Death and Texas: The Unevolved Model of Decency

Patrick Metze, Texas Tech University
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“One murder made a villain, Millions a hero. 
Princes were privileged 
To kill, and numbers sanctified the crime.”*

*Death. Beilby Porteus (1731–1808)

PATRICK S. METZE*

ABSTRACT

Professor Metze takes a critical look at Texas’s substantive capital murder statute, Texas Penal Code § 19.03, the current state of the law, the available constitutional history of each paragraph, the Texas Legislature’s expansive growth of death eligible crimes, and the Court of Criminal Appeals’ complicity in this development, arguing that the statute has become violative of due process as unconstitutionally vague in its application, returning Texas capital jurisprudence to its genesis, exposing virtually all that commit murder in Texas to a system that once again has become arbitrary, capricious, and discriminatory in its application to minorities and in particular to African Americans.

*Associate Professor of Law, Director of the Criminal Defense Clinic and the Capital Punishment Clinic at Texas Tech University School of Law. B.A. Texas Tech University 1970; J.D. The University of Houston 1973. This paper was adapted from a paper prepared for presentation to The State Bar of Texas 36th Annual Advanced Criminal Law Course July 26-29, 2010, San Antonio, Texas.
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**I. Introduction**

For a variety of reasons, the evolution of capital punishment practice in recent years has been away from emphasizing guilt-innocence to dedicating virtually all resources to punishment issues. It is time to take stock in the current state of substantive capital law at its very foundation. This review will be a modest attempt to summarize current advancements of §19.03 of the Texas Penal Code. To give a comprehensive overview of death penalty jurisprudence in Texas would take volumes. An endeavor of such a nature will be far beyond the scope of this paper.\(^1\)

**II. History of Modern Death Penalty Law**

A brief history of modern capital punishment jurisprudence will put this discussion into context. In 1972, the United States Supreme Court struck down the application of the existing capital sentencing schemes finding them unconstitutional in the manner applied as in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.\(^2\) The unfettered discretion to arbitrarily\(^3\) and capriciously\(^4\) impose a death sentence was labeled freakish and wanton.\(^5\)

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\(^1\) Thanks to a man I am honored to call my colleague, Professor Arnold Loewy, Texas Tech University School of Law Judge George R. Killam Jr. Chair of Criminal Law, who has willingly been my mentor and friend during my transition from a lifetime of practicing law to my new life of passing along the lessons I learned along my way. Also, thank you to the rest of my colleagues on the faculty of the Tech Law School who graciously gave me the opportunity to do this work. Special thanks goes to my research assistant, Kama Lawrence, who has shared with me her intellect and amazing legal research talents while being a patient, cheerful, and insightful companion on this journey.


\(^3\) *Id.* at 273 (Brennan, J., concurring).

\(^4\) *Id.* at 295.
The role of racism in the arbitrary administration of the different state statutes was noted as was the disproportionate representation of African Americans as capital defendants. State statutes were struck down that provided for automatic death sentences for all capital murders and first-degree murder as in violation of not only the Eighth but also the Fourteenth Amendment.

Responding to Furman, thirty-five States came forward with new statutes. In 1976 the Supreme Court reviewed five of the new statutes, approving three and rejecting two. In striking down North Carolina’s mandatory death sentence for murder, the Court said such a mandatory statute failed to consider the character and record of the defendant or the circumstances of the offense and violated the “fundamental respect for humanity” which supports the Eighth Amendment. This is the genesis of mitigation in modern death penalty jurisprudence.

Within the new generation of capital sentencing statutes are three fundamental concepts: (1) Guided Discretion, (2) Individualized Sentencing, and (3) Heightened Reliability. The sentencing jury in a

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5 Id. at 309 (Stewart, J., concurring).

6 Id. at 249 (Douglas, J., concurring).

7 “[D]eath stands condemned as fatally offensive to human dignity. The punishment of death is therefore ‘cruel and unusual,’ and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. ‘The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.” Furman, 408 U.S. at 304-05 (Douglas, J., concurring).


10 Id. at 304.

11 Since Furman, it is clear that “vesting of standardless sentencing power in the jury violates the Eighth and Fourteenth Amendments.” Woodson, 428 U.S. at 302. “[T]he Eighth Amendment’s heightened ‘need for reliability in the determination that death is the appropriate punishment in a specific case’” addresses the prevention of arbitrariness in sentencing. Caldwell v. Mississippi, 472 U.S. 320, 323 (1985) (quoting Woodson, 428 U.S. at 305). In capital cases, there must be sufficient process to guarantee that “the sentence was not imposed out of whim . . . or mistake.” Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring).
capital trial must be guided by “objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.” 12 The sentencer must be focused “on the particularized circumstances of the crime and the defendant.” 13 Finally, capital procedures must be more reliable than sentencing procedures in ordinary criminal trials because the death penalty is “unique in its total irrevocability . . . in its rejection of rehabilitation of the convict as a basic purpose of criminal justice . . . in its absolute renunciation of all that is embodied in our concept of humanity.” 14

From these cases emerged four features for identifying a constitutionally sufficient scheme.

(1) A statutory aggravating circumstance that must be proven beyond a reasonable doubt before the death penalty can be imposed to provide an “effective mechanism” for narrowing those who are death-eligible;

(2) A separate bifurcated sentencing proceeding apart from the culpability phase of the trial;

(3) A rationally reviewable, understandable process, with clear and objective standards, that channels the sentencing jury’s discretion to consider mitigating evidence in imposing a life sentence or in giving a punishment of death; and

(4) Adequate, automatic direct appellate review to ensure a sentencing decision is consistent with Constitutional requirements.

These capital sentencing procedures must be sufficiently clear so that ordinary citizens can understand and apply them.15 Not only must these processes be clear but also objective, providing specific and detailed guidance for the jury in such a way that the jury decision can be rationally reviewed.16

12Woodson, 428 U.S. at 303.

13Gregg, 428 U.S. at 199.

14Furman, 408 U.S. at 306 (Stewart, J., concurring).

15Jurek, 428 U.S. at 279 (Burger, CJ, concurring) (“...I agree with Justices Stewart, Powell, and Stevens that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them.”).

16Georgia’s “outrageously or wantonly vile, horrible, and inhuman” aggravator was invalidated as vague and providing no meaningful guidance. Godfrey v. Georgia, 446 U.S. 420, 422-423, 428-429 (1980). Oklahoma’s “especially heinous, atroci ous, or cruel” standard was also struck down on this same basis. “[C]hanneling and limiting of the
The new Texas statute, passed in the wake of Furman, used statutory aggravating circumstances that made a defendant constitutionally eligible for the death penalty as one of its elements and used “special questions” governing the sentencing decision. Initially, the new Texas Penal Code limited capital homicides to intentional and knowing murders committed in five situations and required the jury to answer three questions in a proceeding that took place after a verdict finding a defendant guilty of one of the specified murder categories. Essentially, the Texas scheme remains as it was originally written with a revision of the jury special issues as capital jurisprudence evolved. The following discussion of the elements of capital murder as presently set out in the Texas Penal Code shows an expansion of aggravating circumstances over the past three decades to nine. Effective September 1, 1991, a new sentencing procedure statute left in effect the procedure for pre-September 1, 1991, cases.

III. Texas Penal Code § 19.03. Capital Murder

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

17 Jurek, 428 U.S. at 268. The new Texas Penal Code §19.03 (1974) limited capital homicides to intentional and knowing murders committed in five situations: (1) murder of a peace officer or fireman; (2) intentional murder committed in the course of kidnapping, burglary, robbery, aggravated rape, or arson; (3) murder committed for remuneration; (4) murder committed while escaping or attempting to escape from a penal institution; and (5) murder committed by a prison inmate when the victim is a prison employee. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

18 See infra note 207 and accompanying text. It is argued this expansion has actually reached twenty-seven classifications of capital murder, which does not include the one non-death capital felony that remains in Texas law. See infra Part XVI.

19 The current sentencing procedure statute is Art. 37.071 of the Texas Code of Criminal Procedure (CCP), and the procedure for pre-September 1, 1991, cases is now found in CCP Art. 37.071. CODE CRIM. PRO. ANN. art. 37.071 (Vernon Supp. 2009).

20 Texas Penal Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terrorist threat under Section 22.07(a)(1), (3), (4), (5), or (6);\(^{21}\)

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;\(^{22}\)

(6) the person:

(A) while incarcerated for an offense under this section or Section 19.02,\(^{23}\) murders another; or 

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\(^{21}\)TEX. PENAL CODE ANN. § 22.07 (Vernon 2005). Terroristic Threat. (a) A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to: (1) cause a reaction of any type to his threat by an official or volunteer agency organized to deal with emergencies; (3) prevent or interrupt the occupation or use of a building, room, place of assembly, place to which the public has access, place of employment or occupation, aircraft, automobile, or other form of conveyance, or other public place; (4) cause impairment or interruption of public communications, public transportation, public water, gas, or power supply or other public service; (5) place the public or a substantial group of the public in fear of serious bodily injury; or (6) influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state. (b) An offense under Subsection (a)(1) is a Class B misdemeanor. (d) An offense under Subsection (a)(3) is a Class A misdemeanor, unless the actor causes pecuniary loss of $1,500 or more to the owner of the building, room, place, or conveyance, in which event the offense is a state jail felony. (e) An offense under Subsection (a)(4), (a)(5), or (a)(6) is a felony of the third degree. TEX. PENAL CODE ANN. § 22.07 (Vernon 2005).

\(^{22}\)“Combination’ means three or more persons who collaborate in carrying on criminal activities.” TEX. PENAL CODE ANN. § 71.01(a) (Vernon 1995); see infra Sec. XI. Sec. 19.03(a)(5) PENAL CODE. MURDER WHILE INCARCERATED IN PENAL INSTITUTION.

\(^{23}\)Section 19.02 defines murder in all respects, not just as applicable to the capital murder context. Texas Penal Code §19.02 includes a more complete definition of “murder”. TEX. PENAL CODE ANN. § 19.02 (Vernon 1994). See infra note 20.
(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under six years of age; or

(9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

IV. Mens Rea in the Capital Murder Context

In all nine of the capital murder scenarios just defined, either an intentional or knowing mens rea is required, except for when a person commits a capital murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6), in which case the requisite mens rea is restricted to intentional acts only.27


27TEX. PENAL CODE ANN. § 19.03 (Vernon 2005). In defining capital murder, one must first commit a murder as defined in Texas Penal Code §19.02. In §19.02, murder is defined as (1) intentionally or knowingly causing the death of an individual, (2) intending (not knowingly) to cause serious bodily injury by committing an act clearly dangerous to human life that causes the death of an individual, or (3) committing or attempting to
Overview of §19.03 Texas Penal Code

**Intentional:** A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. 28

**Knowing:** A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. 29

Consequently, Texas Penal Code, section 6.03 defines three “conduct elements” that may be involved in an “intentional” or “knowing” offense: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct. 30 The statutory definition of “intentional” culpability requires the person accused to have the “conscious” objective or desire (1) to engage in the illegal conduct (nature of conduct) or (2) to cause the result of that conduct (result of conduct), while “knowing” culpability requires the person to be “aware” (1) of the criminal nature of his conduct (nature of conduct), (2) the circumstances surrounding his criminal conduct (circumstances surrounding conduct) or (3) that his criminal conduct is reasonably certain to cause the result (result of conduct). 31

Proving a person committed a capital murder “knowingly” is proof by means of a lower mens rea than “intentional,” but none the less still exposes the actor to the full range of punishment for a capital murder, with

commit a felony (presumably with the requisite mens rea for the underlying felony), other than manslaughter, and in the course of and to further the commission of the crime or attempt, or in the immediate flight a person commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. TX. PENAL CODE ANN. § 19.03 (Vernon 2005).

28TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1994).

29TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1994).


31See Lugo-Lugo v. State, 650 S.W.2d 72, 85 (Tex. Crim. App. 1988) (Clinton, J., concurring). This concurring opinion includes a primer in “elements of conduct” and the intent of Chapter 6 of the Code of Criminal Procedure in its definitions of the culpable mental states of intentional, knowing, reckless and criminal negligence. Id. Mental states of reckless and criminal negligence are not discussed herein as to “conduct elements” as capital murder cannot be by reckless or criminal negligence behavior. Id.
one exception. This exception is if the actor knowingly causes the death of another, without a conscious desire to cause the death, while committing or attempting to commit a crime specifically enumerated in §19.03(a)(2) of the Texas Penal Code. In this scenario, the actor cannot be guilty of capital murder, only the lesser included offense of murder as defined in §19.02 of the Texas Penal Code.

Should the language of the Indictment and the Jury Charge contain the “intentional or knowing” language as to the murder committed during the commission of one of the stated crimes in §19.03(a)(2), case law has long approved this “mistake” rationalizing the “intentional or knowing” language as descriptive of the first prong of §19.03(a)(2) that a murder defined by §19.02 Texas Penal Code must first be committed. “Texas courts have consistently held that capital murder indictments and jury charges using the ‘intentionally and knowingly’ language are sufficient, even if the definitions of intentionally and knowingly are not properly limited as to result of conduct, nature of conduct, or nature of circumstances instructions.” In Medina, the trial court used the wrong definition for “knowing” murders, and the Appellate Court reasoned that awareness by the Defendant that his conduct is reasonably certain to cause

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32 TEX. PENAL CODE ANN. § 6.02(d) (Vernon 2005).
33 TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2005). The underlying crimes being: kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6).
34 Kuntschik v. State, 636 S.W.2d 744, 747 (Tex. App.—Corpus Christi 1982); Kinnamon v. State, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990) (holding that when the defendant, while coming a robbery, fired a warning shot into floor that ricocheted into victim causing her death there was no showing of intent to cause the death). Kinnamon was overruled on other grounds by Cook v. State, 884 S.W.2d 485, 488-89, 91 (Tex. Crim. App. 1994), and the overruling was recently recognized in Roberts v. State, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008).
35 Cameron v. State, 988 S.W.2d 835 (Tex. App.—San Antonio 1999, pet. ref’d) (cert. denied, 528 U.S. 1166 (2000)).
the result (result of conduct) requires awareness of the lethal nature his conduct (nature of conduct), so the distinction “blurs.”

However, there is conflicting authority that upon proper objection these mistakes as to the application of the definitions of “intentional” and “knowing” in Indictments and Jury Charges is error.

As a “result of conduct” crime, murder while committing a designated crime must be with the specific intent to cause the death to qualify as a capital murder under §19.03(a)(2) of the Texas Penal Code, with the culpable mental state necessary to satisfy the “conduct elements” of the underlying offense.

A trial court should only include the “proper”

\[37\text{Medina, 7 S.W.3d at 640.}\

\[38\text{See Medina, 7 S.W.3d at 639; Cook v. Texas, 884 S.W.2d 485, 492, fn 6 (Tex. Crim. App. 1994); Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); Arline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986); Miller v. State, 815 S.W.2d 582, 586 n. 5 (Tex. Crim. App. 1991). See Martin v. State, No. 14-95-01135-CR, 1997 WL 269102, *4-5 (Tex. App.—Hous. [14th Dist.] May 22, 1997) (not designated for publication). Wherein the jury was instructed, “Before you would be warranted in finding the defendant guilty of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of robbery... but also that the defendant intentionally caused the death of Joel Congdon by stabbing Joel Congdon with a deadly weapon, namely, a knife, with the intention of thereby causing the death of Joel Congdon... Now, if you find from the evidence beyond a reasonable doubt that on or about the 15th day of May, 1994, in Harris County, Texas, the defendant, Larry Lee Martin, Jr., did then and there unlawfully, intentionally or knowingly while in the course of committing or attempting to commit the robbery of Joel Congdon, cause the death of Joel Congdon by stabbing Joel Congdon with a deadly weapon, namely a knife;... or if you find from the evidence beyond a reasonable doubt that on or about the 15th day of May, 1994, in Harris County, Texas, Johnny Lopez did then and there unlawfully, intentionally or knowingly while in the course of committing or attempting to commit the robbery of Joel Congdon, cause the death of Joel Congdon, by stabbing Joel Congdon with a deadly weapon, namely a knife, [parties language omitted], then you will find the defendant guilty of capital murder as charged in the indictment” (emphasis added). Martin, 1997 WL 269102 at * 4. This instruction was confessed by the State to be error, but there was no objection at trial and hence not preserved, and the Appellate Court found no “egregious error” as per Almanza, at page 171, as the circumstances surrounding the crime clearly demonstrated a specific intent to kill. Martin, 1997 WL 269102 at *4-6. “However, finding error in the jury charge begins, rather than ends, the appellate court's inquiry. The next step is to make an evidentiary review, as well as a review of the record as a whole which may illuminate the actual, not just theoretical harm to appellant.” Cook, 884 S.W.2d at 492 (citing Kelly v. State, 748 S.W.2d 236, 239 (Tex. Crim. App. 1988)); Almanza, 686 S.W.2d at 174; see also, Haggins v. State, 785 S.W.2d 827, 828 (Tex. Crim. App. 1990). Part of this harm analysis may be the degree, if any, to which the application portion of the charge limited the culpable mental states. See Turner v. State, 805 S.W.2d 423, 432 (Tex. Crim. App. 1991) (Miller, J., concurring ) (op. on reh'g).}

culpable mental state definitions specific to the facts of a case, as to the underlying offense.\(^{40}\) It is error for a court to fail to limit its definitions, subject to a properly preserved objection and “egregious harm” analysis under \textit{Almanza}.\(^{41}\) But, if the facts of the case, as applied to the law in the application paragraph of the charge, point the jury to the appropriate portion of the definitions, no harm results from the court’s failure to so limit the definitions of the culpable mental states.\(^{42}\) In assessing harm resulting from the inclusion of improper conduct elements in the definitions of culpable mental states, the courts “may consider the degree, if any, to which the culpable mental states were limited by the application portions of the jury charge.”\(^{43}\) If, however, all three conduct elements are included in the underlying offense, the Court may include all statutory definitions of “intentionally” and “knowingly” without error.\(^{44}\)

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\(^{40}\) For example, if a case contains only two of the three conduct elements and in its jury charge the court has given the statutory definitions for all three conduct elements, the court commits error by not limiting its instructions to only the two relevant conduct elements.

\(^{41}\) Hughes v. State, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994); \textit{Almanza}, 686 S.W.2d at 171.

\(^{42}\) Hughes, 897 S.W.2d at 296.


\(^{44}\) Barnes v. State, 56 S.W.3d 221, 234 (Tex. App.—Ft. Worth 2001, pet. ref’d). Sec 19.03(a)(2) PENAL CODE. MURDER IN THE COURSE OF COMMITTING OR ATTEMPTING TO COMMIT CERTAIN CRIMES discusses of the §19.03(a)(2) Texas Penal Code classification of capital murder, as it relates to the nexus between the underlying crime and the murder committed while attempting or committing the underlying crime. \textit{See infra} Part VIII.
V. Diminished Capacity

A culpable mental state must be proved beyond a reasonable doubt as an element of the offense.\(^{45}\) In *Cowles v. State*, it was recognized that evidence of a defendant's abnormal mental condition, falling short of legal insanity, is admissible whenever that evidence is relevant to the issue of whether he had the mental state that is a necessary element of the crime charged where specific intent is an element of the offense and the “with intent” crimes.\(^{46}\) Several attempts have been made to introduce diminished capacity into the culpability phase of criminal trials in Texas with varying degrees of success.\(^{47}\) After *Cowles*, in *Wagner v. State*, such “diminished capacity” was a recognized doctrine.\(^{48}\) The Appellate Court permitted evidence of a physical injury, which may have impaired Wagner’s mental function and impulse control, on the issue of adequate cause to justify sudden passion.\(^{49}\) Wagner’s use of “diminished capacity” in this way has since been superseded by statute making sudden passion now a punishment issue.\(^{50}\)


\(^{47}\)In fact, a search on Westlaw® for the search term “diminished capacity” yields 604 cases just in Texas alone. In *De la Garza v. State*, the defendant argued for the trial court to submit a requested jury instructions on “specific intent and the mental state of diminished capacity” because at the time of the offense the defendant was struck in the head which he believed diminished his capacity to form the culpable mens rea for attempted capital murder. De la Garza v. State, 650 S.W.2d 870 (Tex. App.–San Antonio 1983, writ ref’d). The Court failed to recognize the defense of diminished capacity finding the evidence sufficient to conclude the defendant was aware of his conduct and the results of his conduct thereby avoiding the specific intent exception set out in *Cowles*. *Id.*

\(^{48}\)Wagner, 687 S.W.2d 311.

\(^{49}\)Wagner predated bifurcated guilt-innocence and punishment hearings.

\(^{50}\)TEX. PENAL CODE ANN. § 19.02(d) (Vernon 1994). There is no provision in Texas Capital Jurisprudence that addresses sudden passion. Under current Texas law it is an affirmative defense only in the punishment phase of a murder trial under Texas Penal Code §19.02(d). Is there not a constitutional challenge available in this circumstance? Unfortunately this is beyond the scope of this paper, but a question begging an answer. See Wesbrook v. State, 29 S.W.3d 103, 112-13 (Tex. Crim. App. 2000) (“The Legislature is vested with the lawmaking power of the people in that it alone ‘may define crimes and prescribe penalties.’ . . . The Legislature, through its broad power to classify crimes and those who stand accused of crimes, chose not to permit the defense of “sudden passion” in the context of capital murder.”).
Wagner, however, was a true “diminished responsibility” case in which the defendant’s claim of mental abnormality showed him less culpable, as if Texas had adopted a lesser form of insanity. The Courts have often struggled understanding and applying correctly the difference between “diminished capacity” and “diminished responsibility” scenarios.

In Judge Maloney’s concurring opinion in Penry v. State, albeit dicta,\(^{51}\) he defines “diminished capacity” as evidence which is offered to negate the requisite culpable mental state (which if successful leads to a not guilty), whereas evidence of “diminished responsibility” means the defendant is not fully responsible for the crime (the elements of the offense being satisfied but the defendant is less culpable and convicted of a lesser crime or punished less severely).\(^{52}\) These concepts are different from “insanity” which also addresses the defendant’s mental state but is an affirmative defense to prosecution if at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.\(^{53}\)

Often, the Code of Criminal Procedure, art. 38.36(a) is used to introduce mental health evidence into the guilt-innocence phase of a murder trial.\(^{54}\) “In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.”\(^{55}\)

In Thomas v. State\(^{56}\) a clinical psychologist was not allowed to testify during guilt-innocence about the relevant facts and circumstances of the condition of Thomas’s mind at the time of a murder as permitted by the version of art. 38.36(a) CCP, in effect in 1994. The testimony was offered


\(^{52}\)Penry, 903 S.W.2d at 767, fn 1; Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75-1 J. CRIM. L. & CRIMINOLOGY 1, 20 (1984). Judge Maloney cites cases from many jurisdictions supporting his contention, including United States v. Pohlot, 827 F.2d 889, 903-06 (3rd Cir. 1987) (distinguishing doctrine of diminished responsibility from negation of mental state).

\(^{53}\)TEX. PENAL CODE ANN. § 8.01(a) (Vernon 1994).

\(^{54}\)Formerly, TEX. PENAL CODE ANN. § 19.06 (Vernon 1974).

\(^{55}\)CODE CRIM. PRO. ANN. art. 38.36(a) (Vernon Supp. 2003).

\(^{56}\)Thomas v. State, 886 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1994).
on the issue of whether Thomas acted intentionally and knowingly in committing murder. The Court of Appeals took the argument to be “some sort of insanity defense.” Absent a plea of insanity or evidence raising insanity, the Court found it was not a proper way to negate intent by showing Thomas did not have the “concurrent mental capability to know that his conduct was wrong.” “The negation of intent is absence of intent” and is entirely different than lacking the capacity to form intent due to severe mental illness. This Court labeled the latter “insanity.” This is just one example of how the Courts have misunderstood and struggled with the concept of “diminished capacity.”

A few years later, in Warner v. State, testimony of defendant’s posttraumatic stress disorder (PTSD) was excluded at the guilt-innocence stage of trial. That Court of Appeals found that short of inability to distinguish right from wrong (insanity), such evidence is not admissible as to specific intent crimes of aggravated kidnapping and arson. A petition for discretionary review (PDR) was granted to determine if the trial court had erred in excluding evidence of Warner’s alleged PTSD at the guilt/innocence stage of the trial. The Court of Criminal Appeals (CCA) concluded that their decision to grant PDR was improvident, because Warner did not preserve his complaint for appellate review by failing to make an offer of proof or evidence after the Trial Court ruled the evidence inadmissible.

Thirty years after Cowles, in Jackson v. State, the Courts were still struggling with these concepts. Jackson killed his brother by hitting him with a hammer while he slept. Jackson suffered from mental illnesses and complained on appeal he was prevented from arguing to the jury that Jackson lacked the requisite mens rea as a consequence of those mental illnesses. The Court of Criminal Appeals granted review “to determine

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57 Id.
58 Warner, 944 S.W.2d 812 (Tex. App.—Austin 1997).
59 Id. at 815.
60 For the purposes of brevity, hereinafter the Texas Court of Criminal Appeals is often referred to as the CCA.
63 Id. at 569.
64 Id. at 570-71.
whether the doctrine of diminished capacity exists in the jurisprudence of Texas."\textsuperscript{66} The CCA agreed with the Court of Appeals that Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity.\textsuperscript{67}

Relevant evidence, however, may be presented to the fact finder to negate the \textit{mens rea} element. This evidence may include the accused’s history of mental illness. In a murder prosecution, the trial judge has the discretion under Texas Code of Criminal Procedure art. 38.36(a) to admit all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, subject to a Rule 403, T.R.E., objection.\textsuperscript{68}

If such evidence is admitted, the Court may determine whether it raises the issue of a lesser-included offense.\textsuperscript{69} The Court found the jury could then either find (1) if the evidence reduces culpability, that the defendant is guilty of the lesser-included offense or (2) the jury could find the defendant guilty of the more serious charge and just assess a lesser punishment.\textsuperscript{70}

The CCA found evidence of mental illness “in this case” does not negate \textit{mens rea}.\textsuperscript{71} They found there is no defense in Texas that due to mental illness the defendant did not have the requisite \textit{mens rea} at the time of the offense because he lacked the \textit{mental capacity}, or was absolutely incapable of \textit{ever} forming that frame of mind.\textsuperscript{72}

\textsuperscript{65}In closing argument, counsel tried to argue the jury should find Jackson lacked the mental capacity to intentionally or knowingly cause bodily injury. The State objected to the improper argument, which was sustained. On appeal Jackson made a due process and due course of law argument that the jury was not allowed to consider evidence of diminished capacity to negate the element of \textit{mens rea}. But Jackson failed to show what evidence the jury was not allowed to consider of diminished capacity to negate the element of \textit{mens rea}. \textit{Id.} at 571-572, 574.

\textsuperscript{66}\textit{Id.} at 572.

\textsuperscript{67}\textit{Id.} at 573.

\textsuperscript{68}\textit{Id.} at 574.

\textsuperscript{69}\textit{Id.}.

\textsuperscript{70}\textit{Id.} at 575. The Court failed to mention the third option, which is if the fact finder did not believe the state met its burden on the \textit{mens rea} element of the crime, then the jury could find the defendant not guilty.

\textsuperscript{71}\textit{Id.} at 572.

\textsuperscript{72}\textit{Id.} at 575. Perhaps Trial Counsel used the wrong words, but would it have been correct had he argued that during the offense, because of mental illness, the defendant
Recently, Jackson was distinguished in Sparks v. State. Sparks attempted to argue his mental conditions negated the necessary mens rea to commit a crime used as the basis for a motion to proceed on adjudication of guilt. The Court of Appeals somehow interpreted Jackson for the proposition that Spark’s mental conditions did not negate the mens rea but provided only an excuse for his aggressive behavior, once again seeming to confuse “diminished capacity” with “diminished responsibility” or, as the fact finder, just not believing that the offered proof of Sparks’ mental illness negated the mens rea of the crime the basis for the motion. An “excuse” is a defense which diminishes capacity, not responsibility.

Following Jackson came Ruffin v. State. Ruffin was charged with aggravated assault for shooting at ten police officers. Ruffin tried to offer testimony from a psychologist that Ruffin was suffering from severe delusions on the night of the event and believed that he was shooting at Muslims, not police officers. The Trial Court excluded the testimony about Ruffin’s mental disease and delusions, ruling that such expert testimony was admissible only in a homicide or when the defendant pleads insanity. The CCA found that testimony of a mental disease or defect that rebuts the mens rea of the charged offense is relevant and admissible simply did not form the requisite mens rea to commit the subject offense? Did the CCA find in essence against Jackson on the legal and factual sufficiency of the evidence without saying so? What if Trial Counsel had not used the words “mental capacity?” Would the Trial Court by preventing argument have erred? In their discussion of Jackson’s “mental capacity” and his “ever” being able to form the requisite mens rea, the CCA confused “diminished capacity” with “diminished responsibility” just as Judge Maloney had complained in Penry. See Penry v. State, 903 S.W.2d at 767, fn 1; supra notes 51-52 and accompanying text.


74Id. at 4.

75Id.

76Black’s law dictionary defines an excuse as: “a reason that justifies an act or omission or that relieves a person of a duty. . . . A defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. The following defenses are the traditional excuses: duress, entrapment, infancy, insanity, and involuntary intoxication. — Also termed legal excuse.” BLACK’S LAW DICTIONARY (8th ed. 2004).


78Id. at 587.

79Id.
unless excluded under a specific evidentiary rule. Speaking to many of the issues raised by this paper, the CCA said:

“Insanity is the only ‘diminished responsibility’ or ‘diminished capacity’ defense to criminal responsibility in Texas. These ‘diminished’ mental-state defenses, if allowed, would permit exoneration or mitigation of an offense because of a person's supposed psychiatric compulsion or an inability to engage in normal reflection or moral judgment. Such defenses refer to a person's lesser or impaired mental ability (compared to the average person) to reason through the consequences of his actions because of a mental disorder. The Texas Legislature has not enacted any affirmative defenses, other than insanity, based on mental disease, defect, or abnormality. Thus, they do not exist in Texas.”

The CCA noted the United States Supreme Court had recently upheld Arizona's wholesale exclusion of expert psychiatric testimony concerning mental illness offered to rebut proof of the defendant's mens rea. Despite the ruling of the Supreme Court, the CCA reaffirmed Jackson in finding that such expert evidence might be relevant, reliable, and admissible to rebut proof of the defendant's mens rea.

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80 Id. at 588; see evidentiary rules such as T.R.E. 403 or 703-705. The evidence is inadmissible “if the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, if the expert is insufficiently qualified, or the testimony is insufficiently relevant or reliable under our state's guidelines for expert testimony.” Ruffin, 270 at 595; see Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998) overruled on other grounds; Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992).


83 Ruffin, 270 S.W.3d at 595. Ruffin was recently twice distinguished by the CCA: (1) Mays v. State, 2010 WL 1687779 (Tex. Crim. App. April 28, 2010) (opinion not released for publication and subject to revision or withdrawal as of June 21, 2010 when last checked) (Mays knew he was shooting at police officers. His mental illness was relevant for mitigation in punishment but did not directly rebut mens rea). (2) Lizcano v. State, 2010 WL 1817772 (Tex. Crim. App. 2010) (unpublished opinion). (“The excluded testimony suggested general limitations in cognitive ability, intoxication at the time of the offense, and general deficits in adaptive functioning. The excluded testimony had relevance only to whether the appellant's mental functioning was below normal to some degree. There was no evidence showing a connection between the appellant's generally low level of mental functioning and his knowledge during the commission of the offense that the victim was a police officer.”). Lizcano, at p. 21.
At the time of preparation of this paper, the most recent case to discuss this problem was Zorn v. State, dated May 28, 2010.\[84\] A friend of Zorn’s attempted to testify that Zorn suffered from paranoid schizophrenia and other related emotional problems. The trial court heard the testimony outside the presence of the jury and ruled it inadmissible at guilt-innocence.\[85\] The Appellate Court found that evidence of the defendant’s mental state was admissible “when relevant to the issue of mens rea.”\[86\] Although Texas still does not recognize a “diminished capacity” defense, psychological evidence is admissible if relevant to the issue of the defendant’s mens rea to commit the crime.\[87\] “[J]ust as a blind person would be permitted to offer evidence that his blindness prevented him from understanding that a person he shot at was a police officer, so too could a person suffering from mental delusions offer evidence about those delusions if they prevented him from apprehending that the person he shot at was a police officer.”\[88\] Nevertheless, the Court found Zorn’s “lowered ability to navigate stressful situations explains why she was drinking and why she was in a hurry, but does not serve to negate the mens rea or to show that she could not appreciate the risk that her conduct created.”\[89\]

It is apparent most courts in Texas will now recognize that evidence of a defendant’s mental state is admissible and relevant to the issue of the mens rea element of a crime. Now if defense lawyers would just learn to recognize it, present it and argue it in the right way and at the right time, with authority.

\[84\]Zorn v. State, No. 12-09-00134-CR, 2010 WL 2145255 (Tex. App.—Tyler May 28, 2010). (opinion not yet released and subject to revision or withdrawal as of the date it was last checked, June 21, 2010).

\[85\]Id. at 4-5.


\[88\]Zorn, 2010 WL 2145255 at *6; Ruffin, 270 S.W.3d at 594.

\[89\]Zorn, 2010 WL 2145255 at *6-7; Literally as this paper was in its final editing, the CCA issued Davis v. State, ---S.W.3d---, 2010 WL 2382567 (Tex. Crim. App. June 16, 2010) (During guilt phase defendant tried to introduce psychiatric testimony about defendant’s substance abuse to negate mens rea of underlying burglary. Because case involved voluntary intoxication, testimony was not admissible at guilt-innocence.).
VI. Party Responsibility

By the use of the law of parties, a person’s criminal responsibility can be enlarged to acts in which he may not be the principal actor. A person is criminally responsible as a party to a crime whether the offense is by his own conduct, by the conduct of another for which that person is criminally responsible or by both. This expanded criminal responsibility for the acts of another falls on a person in one of three ways.

(1) If a person causes or aids an innocent or non-responsible person to engage in the crime with the kind of culpability required for that crime, then he is criminally responsible for the other’s acts.

(2) If a person solicits, encourages, directs, aids, or attempts to aid another to commit a crime acting with intent to promote or assist the commission of the crime, criminal responsibility results.

(3) If a person fails to make a reasonable effort to prevent the commission of a crime he had a legal duty to prevent and if he acted with intent to promote or assist the commission of the crime, that person is criminally responsible for the acts of the other person.

Additionally, if in attempting to carry out a felony conspiracy, another felony is committed by one of the conspirators, all conspirators are guilty of the felony committed even without intent to commit the felony, if the crime was committed in furtherance of the conspiracy and one should have anticipated the crime as a result of carrying out the conspiracy.

90 Goff v. State, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996); see TEX. PENAL CODE ANN. § 7.01(c) (Vernon 1994). “All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.” Consequently, the Courts will use the term “party” or “accomplice” interchangeably.

91 TEX. PENAL CODE ANN. § 7.01(a) (Vernon 1994).

92 TEX. PENAL CODE ANN. § 7.02(a)(1) (Vernon 1994).

93 TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1994).

94 TEX. PENAL CODE ANN. § 7.02(a)(3) (Vernon 1994).

95 See TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1994). The definition of criminal conspiracy addresses situations where a person, with intent that a felony be committed, (1) “agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and (2) he or one or more of them performs an overt act in pursuance of the agreement.” TEX. PENAL CODE ANN. § 15.02(a) (Vernon 1994). Prosecution under the criminal conspiracy statute results in being charged with a crime one level lower than the most serious felony a part of the conspiracy. TEX. PENAL CODE ANN. § 15.02(d) (Vernon 1994). Case law tends to indicate that the §15.02 conspiracy
Overview of §19.03 Texas Penal Code

Case law says for a person to be held criminally responsible in that situation, he must have knowledge of the actor’s unlawful intent at the time he acted to promote or assist the other person’s unlawful conduct.\(^{96}\) This is whether or not the person had such intent themselves. The evidence, in a parties’ case, will be legally sufficient where the person charged is physically present at the commission of the offense and encourages its commission by words or other agreement.\(^{97}\)

“...But mere presence during the commission of a crime is not enough to make one an

reaches back into preparatory conduct constituting inchoate offenses. Woods v. State, 801 S.W. 2d 932, 943 (Tex. App.—Austin 1990, pet. ref’d). Whereas, in a §7.02(b) conspiracy, the defendant’s presence at the time of the offense often is a distinguishing factor. See Johnson v. State, 853 S.W.2d 527, 534-35 (Tex. Crim. App. 1992); Vodochodsky v. State, 158 S.W.3d 502 (Tex. Crim. App. 2005). Not to mention that if one is a party to a capital murder, seldom will a prosecutor desire to reduce the defendant’s culpability by one level if his active participation in the crime aided the commission as is anticipated by §7.02(b). See Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Cf. People v. Kessler, 315 N.E.2d 29 (Ill. 1974) (Defining party liability – not using the often used “natural and probable consequence” of the criminal enterprise test – but using a much stricter statutory standard that one is responsible for acts committed by an accomplice in the course of committing another felony whether the acts were reasonably foreseeable or not. Under the Illinois accountability statute for conduct of another, “where one aids another in planning or commission of offense, he is legally accountable for conduct of person he aids; and that the word ‘conduct’ encompasses any criminal act done in furtherance of planned and intended act.”). Id., at 32. Kessler was convicted of two counts of attempted murder and one count of burglary even though he only told two companions where he had seen a large sum of money in a building, he remained in the car while his companions burglarized the premises and after the companions found a gun inside the building they shot the owner and a police officer while fleeing on foot.

Under § 7.02(b) Texas Penal Code, unless Kessler should have anticipated the shooting of the owner and the police officer as a result of carrying out the burglary conspiracy he would not be a party to the shootings. Although the word “anticipated” is not defined in the Penal Code, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) defines anticipated as “reasonably foreseeable” (ninth definition of “anticipate, v.”) and one thinks a Texas court would say it means actions that are reasonably foreseeable by a person of ordinary prudence in the exercise of ordinary care that the event or some similar event would occur as a “natural and probable consequence.” See Hamilton v. Fant, 422 S.W.2d 495 (Tex. Civ. App. 1967). Anticipation would be intentional, not accidental, and the “natural and probable consequence” of one’s action as the acts of one of sound mind and discretion. Brown v. State, 122 S.W.3d 794, 779 (Tex. Crim. App. 2003). As in Hill, next discussed, Kessler would have only been responsible in Texas for the shootings had at the time he solicited, encouraged, directed, aided, or attempted to aid his accomplices in the burglary he was acting with intent to promote or assist the commission of the attempted murders.


\(^{97}\) Hooper, 214 S.W.3d at 13.
accomplice." And, a person may be charged as a party and convicted even though he was not present at the time of the offense. The trier of fact may look to events and the actions of the accused before, during and after the crime to determine his understanding of the plan to commit the crime and whether at the time of the offense the parties were acting together each contributing some part for their common purpose. Circumstantial evidence alone may be sufficient to show a person is a party to a crime.

Although the workings of the special issues in punishment to determine life or death are beyond the scope of this paper, a person can be convicted of capital murder as a party without having the intent or actual anticipation that a human life would be taken which is required for an answer to the anti-parties special issue in punishment to allow the imposition of the death penalty.


100 Id. Hooper was found guilty of being a party to an aggravated assault of a public servant. Lack of evidence of Hooper’s knowledge of his co-conspirators’ violent nature or of his co-conspirators’ intent to commit an aggravated assault is not an element of the offense under either party liability theory. Hooper, 214 S.W.3d at 14.

101 Powell v. State, 219 S.W.3d 498, 504 (Tex. App.—Ft. Worth 2007, pet. ref’d); Guevara v. State, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (holding direct evidence is not required, as the fact finder may make reasonable inferences from the evidence and circumstantial evidence is just as probative as direct evidence.).

102 Valle v. State, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003); see CODE CRIM. PRO. ANN. art. 37.071, §2(b)(2) (Vernon Supp. 2009); see also, Medrano v. State, No. AP-753202008 WL 5050076, *10 (Tex. Crim. App. Nov. 26, 2008) (not designated for publication) (finding Medrano furnished members of his gang the gun used in a planned robbery which became a murder of more than one person. Medrano did not participate in the offense but was found guilty of capital murder and received a sentence of death. The Court found the jury could find Medrano knew there was going to be a robbery and that by giving his gang the gun he could have anticipated someone might be shot. The mens rea required for the robbery supplies the mens rea for the capital murder committed by a co-conspirator.). However, the jury could have found otherwise.

Texas Code of Criminal Procedure art. 37.071, §2(b)(2), “anti-parties” charge will be given in punishment, to-wit: [“(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, [and the jury did so find the defendant guilty as a party. The jury shall be given the following charge:] 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.”] CODE CRIM. PRO. ANN. art. 37.071, §2(b)(2) (Vernon Supp. 2009).
In a capital murder setting, using Texas Penal Code §7.02(b), if a person agreed with another to commit an initial felony (such as burglary, kidnapping, robbery, sexual assault, delivery of a controlled substance or the like), and while committing that felony his fellow conspirator commits murder, if that initial person should have anticipated a murder would occur, as defined in any of the nine ways set out in Texas Penal Code §19.03 (or should have anticipated a capital crime would be committed as set out in §22.021, Texas Penal Code, as discussed below in the non-death capital setting), then the initial person can be held responsible and prosecuted for capital murder.

Most usually, §7.02(a)(2) is used to expand a person’s criminal responsibility for the acts of others, by showing in some way he solicited, encouraged, directed, aided, or attempted to aid another to commit capital murder while acting with intent to promote or assist the commission of the crime.

An accomplice can be convicted of a lesser included offense if it can only be shown that his intent was to promote or assist in the commission

Both of the U.S. Supreme Court cases of Enmund v. Florida, and Tison v. Arizona discussed the use of the death penalty on defendants who were not proven to have an intent to kill. Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). In Enmund, the Court held that the Eighth Amendment forbids the execution of one who does not himself intend that murder be committed and participates in the crime with others but only in an attenuated capacity. Enmund, 458 U.S. at 790-91. In Tison, the Supreme Court clarified Enmund and held that the federal constitution does not proscribe the execution of a major participant in an offense who possesses “reckless indifference” towards a murder committed by parties acting with him in a crime. Tison, 481 U.S. at 158.

But see Lawton v. State, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995), cert. denied, 519 U.S. 826 (1996), disavowed on other grounds; Mosley v. State, 983 S.W.2d 249, 263 n. 18 (1999) (“[T]hat the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to Enmund and Tison concerns; the jury had already found that appellant intended to at least promote or assist in the commission of an intentional murder.”); Gongora v. State, No. AP-74636, 2006 WL 234987 (Tex. Crim. App. Feb. 1, 2006) (authorizing the jury by the charge to convict appellant as a party does not make Article 37.071, section 2(b)(2) unconstitutional as applied to appellant in this case.). A proposed repeal of the anti-parties charge was introduced in the Texas House during the 80th Legislature during 2007 but did not make the final bill. HB 8 history available at: http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB8.

This is assuming Kennedy v. Louisiana, 128 S.Ct. 2641 (2008) has not in effect rendered this statute ineffectual and unconstitutional. The non-death capital felony concept is discussed in the section entitled CAPITAL PUNISHMENT FOR NON-MURDER CRIMES. See infra Part XVI.


of the lesser offense not the more serious offense.\textsuperscript{106} It is no defense that the primary actor has been acquitted,\textsuperscript{107} has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, has gone to trial before or after the accomplice,\textsuperscript{108} or is immune from prosecution altogether.\textsuperscript{109} It is the criminal \textit{mens rea} of each accomplice that matters as each party to a crime may be convicted of only those crimes for which he had the requisite mental state.\textsuperscript{110}

On occasions, the Courts have found evidence insufficient to support a conviction using the conspiracy language of §7.02(b).\textsuperscript{111} Also, it is not

\textsuperscript{106}Cf. Cordova v. Lynaugh, 838 F.2d 764 (5th Cir. 1988) \textit{overruled in part on other grounds}; see Vanderbilt v. Collins, 994 F.2d 189, 195 (5th Cir. 1993) (quoting Hopper v. Evans, 456 U.S. 605, 610 (1982) (citing Beck v. Alabama, 447 U.S. 625, 638 (1980)). ("\textit{Beck} stands for the proposition that the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense \textquoteleft in every case\textquoteright in which \textquoteleft the evidence would have supported such a verdict.\textquoteright"). The law in Texas as to lesser included offenses is set out in Hall v. State, 225 S.W.3d 524 (Tex. Crim. App. 2007) In Texas, the first step is the pleadings approach as the sole test for determining whether a party may be entitled to a lesser-included-offense instruction and is a question of law. The second step is whether there is some evidence, anything more than a scintilla, adduced at trial to support such an instruction. \textit{Id.}, at 535-36. In the recent case of Tolbert v. State, 306 S.W.3d 776 (Tex. Crim. App. 2010), the Court did not grant the State’s request for an instruction on the lesser included offense of murder in a capital murder-robbery case. The Defendant did not want the charge taking an all or nothing approach. This instruction, like a "defensive issue," is not "applicable to the case" unless the defendant "timely requests the issue or objects to the omission of the issue in the jury charge." (citing Posey v. State, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998)). The Court found the trial court was not required to \textit{sua sponte} provide this jury instruction.


\textsuperscript{108}See Owens v. State, 867 A.2d 334, 340 (Md. 2005) (noting that the "clear answer given by other courts and treatise writers" is that even after a principal has been acquitted of a crime, another person can be convicted for his role in aiding and abetting the commission of that same crime).

\textsuperscript{109}TEX. PENAL CODE ANN. § 7.03(2) (Vernon 1994); \textit{see, e.g.,} Singletary v. State, 509 S.W.2d 572, 578 (Tex. Crim. App. 1974) (noting that "an accomplice is not entitled to a new trial or reversal just because a subsequently tried principal has been acquitted. The fact that another jury acquitted the principal in a subsequent trial does not by itself entitle an accomplice to the same offense to a new trial. In many instances different juries reach opposite results on the same evidence.").

\textsuperscript{110}Ex parte Thompson, 179 S.W.3d 549, 553-54 (Tex. Crim. App. 2005) ("What matters under §7.02(a) is the criminal \textit{mens rea} of each accomplice; each may be convicted only of those crimes for which he had the requisite mental state.").

\textsuperscript{111}Moffett v. State, 207 S.W.2d 384 (Tex. Crim. App. 1948) (holding mere presence at scene of capital murder by itself insufficient to convict as a party or a conspirator); Navarro v. State, 776 S.W.2d 710 (Tex. App.—Corpus Christi 1989) (supplying murder weapon to triggerman); Isham v. Collins, 905 F.2d 67 (5th Cir. 1990) (presence at scene with triggerman and assistance in disposing of the murder weapon); Flores v. State, 551
necessary that an individual be indicted as a party to be convicted as one, as this is not an element of an offense.\textsuperscript{112} And finally, it is always discretionary with the Trial Court to include an instruction to the jury on the law of parties if the evidence supports it.\textsuperscript{113}

\section*{VII.
Sec. 19.03(a)(1) Penal Code
MURDER OF A PEACE OFFICER OR A FIREMAN}

As discussed above, a constitutionally sufficient capital punishment scheme must first include a statutory aggravating circumstance to be proven beyond a reasonable doubt before the death penalty can be imposed to provide an effective mechanism for narrowing those who are death-eligible.\textsuperscript{114}

The first “statutory aggravating circumstance” in Texas is the murder of “a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman.”\textsuperscript{115}

The phrase "lawful discharge of an official duty" is not statutorily defined, but it does have an ordinary meaning that jurors can apply using

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\item S.W.2d 364 (Tex.Crim.App. 1977) (Possession of deceased's car, even with license plates to another car, and storage of deceased's suitcase with items in it); Turner v. McKaskle, 721 F.2d 999 (5th Cir. 1983) (possessing stolen property of the murder victim); Vodochodsky v. State, 158 S.W.3d 502 (Tex. Crim. App. 2005) (discussing in a vague manner about committing crime, bonding triggerman out of jail knowing he might commit a crime without state showing the defendant was aware of a looming specific capital murder). TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1994).
\item Sorto v. State, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005) Sorto brought claim under In re Winship, 397 U.S. 358 (1970) and Apprendi v. New Jersey, 530 U.S. 466 (2000), that party status must be alleged in the indictment and proven by the finder of fact, and failure to do so violated the Sixth Amendment and Sorto’s rights to due process. The Court made no finding on the claim saying it was not properly preserved for review. See Jones v. United States, 526 U.S. 227, 232 (1999) (explaining that only the elements of an offense must be charged in an indictment, submitted to the fact finder, and proven beyond a reasonable doubt.). An “(e)lement of the offense” means: (A) the forbidden conduct; (B) the required culpability; (C) any required result; and (D) the negation of any exception to the offense.” TEX. PENAL CODE ANN. § 1.07(22) (Vernon 2009).
\item Furman v. Georgia, 408 U.S. 238, 239-240 (1972).
\item TEX. PENAL CODE ANN. § 19.03(a)(1) (Vernon 2005).
\end{itemize}
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their own common sense.... The phrase "who is acting in the lawful discharge of an official duty" has been challenged as unconstitutionally vague, but as long as the officer was acting within his capacity as a peace officer, he was acting within the discharge of his official duties. “Whether [the deceased police officer] was making a lawful arrest is not relevant to determining if [he] was acting in the lawful discharge of his official duties. A police officer is still acting within the lawful discharge of his official duties when he makes an unlawful arrest, so long as he is acting within his capacity as a peace officer.”

The second prong of this section is the accused knowing the person is a police officer or fireman. This is fact driven by each case but still requires actual knowledge on the part of the accused that the deceased was a peace officer.

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116 Mays v. State, No. AP-75,924, 2010 WL 1687779, (Tex. Crim. App. April 28, 2010) (opinion not yet released and subject to revision or withdrawal as of the date it was last checked, June 21, 2010); see Daniels v. State, 754 S.W.2d 214, 219 (Tex. Crim. App. 1988) (noting that, when words are not defined, they are ordinarily given their plain meaning unless the statute clearly shows that they were used in some other sense); Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979) (stating that, in the absence of special definitions, statutory language under attack as vague can be measured by common understanding and practices or construed in the sense generally understood).


119 Nethery v. State, 692 S.W.2d 686, 698-99 (Tex. Crim. App. 1985); Venegas v. State, 660 S.W.2d 547 (Tex. App.—San Antonio 1983) (holding that the jury should have been instructed that if defendant did not know plainclothes officers were police when they broke into his house the defendant was not guilty); Moore v. State, 999 S.W.2d 385, 404 (Tex. Crim. App. 1999) (finding the off duty officer was acting in official capacity when he intervened in a burglary. Defendant knew he was an officer so noting 14 times in his confession); Excamilla v. State, 143 S.W.3d 814 (Tex. Crim. App. 2004) (Appellant complained state offered no proof that he knew victim was police officer. CCA found officer that performed CPR testified he unbuttoned “uniform shirt,” another officer testified clothing “clearly identified” him as a police officer, valet parking employee said victim was in uniform, defendant told reporter he knew victim was police officer, and defendant told hospital employee he had shot a cop.).
VIII.
Sec. 19.03(a)(2) Penal Code
MURDER IN THE COURSE OF COMMITTING OR ATTEMPTING TO COMMIT CERTAIN CRIMES

Under this subsection of §19.03, a person who intentionally commits a murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6), commits a capital felony. For a more complete discussion of the culpable mental state peculiar to this subsection, see above in Section IV entitled MENS REA IN THE CAPITAL MURDER CONTEXT. Suffice it here to repeat, the requisite mens rea in this type of capital felony is restricted to intentional murders only.

Nexus between the Murder and the Underlying Crime

There are some additional limitations to this form of capital felony. There must be a nexus between the murder and the crime committed or attempted to be committed. The CCA construed the phrase “in the course of committing or attempting to commit” to mean conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the underlying offense. The victim

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120 TEX. PENAL CODE ANN. § 22.07 (Vernon 2005). Section 22.07 of the Texas Penal Code defines terroristic threat as it applies to a capital felony. See supra note 21 for the complete text of § 22.07. Under subparagraph (a)(1) of that section, the offense is a Class B misdemeanor (threat to an official or volunteer agency organized to deal with emergencies), under subparagraph (a)(3) it is a Class A misdemeanor (to prevent or interrupt occupation or use of various locations and forms of conveyance - unless the actor causes pecuniary loss of $1,500 or more to the owner of the building, room, place, or conveyance, in which event the offense is a state jail felony), and under subparagraphs (a)(4), (a)(5), or (a)(6) it is a felony of the third degree (threats to public services, placing public in fear, and influencing governmental entities). It is interesting to note, that while committing or attempting to commit a Class B or Class A misdemeanor, one may commit a capital felony under the current scheme.

121 In defining capital murder §19.03 first requires one must commit murder as defined in Texas Penal Code §19.02. Under §19.03(a)(2) that murder must be specifically intentional not knowing. TEX. PENAL CODE ANN. § 19.03 (Vernon 2005).

122 Ibanez v. State, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986); Rivera v. State, 808 S.W.2d 80, 93 (Tex. Crim. App. 1991) (holding the nexus requirement for capital murder involving murder in the course of a robbery is the same as the nexus requirement in a robbery between the assault and the theft).

or things done to the victim of the murder may provide the nexus as the history of this language will show.\textsuperscript{124}

The evolution of this concept can best be understood by studying the relation between a robbery\textsuperscript{125} (theft) and a murder (resulting capital murder) through case law developments since the implementation of the modern penal code.

**Robbery**

*Moore v. State (1976)*

In an early pre-Penal Code offense, the Defendant took the position that in effect there was no nexus between a robbery that took place at one location and a murder of the victim of the robbery that took place at another location, some distance away. The Defendant claimed this was not a murder during the course of the robbery making it a capital felony, even though after the Defendant had taken the victim to the second location he later returned to the robbery scene to additionally beat the victim. While beginning the process of defining the nexus requirement of §19.03(a)(2), the CCA rejected the Defendant’s position, and refused to limit murder in the course of committing or attempting to commit robbery to only those circumstances where the killing takes place at the same place and about the same time of the robbery. The Court felt this would permit a defendant who has committed robbery to escape capital murder charges by removing the robbery victim to another place for the purpose of killing the victim to prevent the victim's testimony.\textsuperscript{126} The court refused to adopt a construction of the statute that would make the statute “absurd or

\textsuperscript{124}The following baker’s dozen cases, from pre-Penal Code to modern era CCA interpretations, show a steadfast interpretation of §19.03(a)(2) as requiring a nexus between the underlying crime alleged as an aggravator and the commission of a murder to make the murder a capital felony, saying “in the course of committing or attempting to commit” means conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the underlying offense. *Riles*, 595 S.W.2d at 862.

\textsuperscript{125}“A person commits [robbery] if, in the course of committing theft as defined in Chapter 31 [Texas Penal Code] and with intent to obtain or maintain control of the property, he (1) intentionally, knowingly, or recklessly causes bodily injury to another, or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.” TEX. PENAL CODE ANN. § 29.02 (Vernon 1994).

\textsuperscript{126}As an aside, the victim died of drowning. At the time, what would become 19.03(a)(2) read in part that a person commits capital murder if “the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson....” (Acts 1973, 63rd Leg., p. 1122, ch. 426) One wonders if the murder in the subject case was proved by the proper culpable *mens rea*?
ridiculous,” or that would lead to “absurd conclusions of consequences.”  

**Palafox v. State (1979)**

The nexus requirement can be used to remove a Defendant from capital murder exposure. In *Palafox*, the Defendant admitted he killed the victim and took items from the victim's home. However, he clearly stated that the murder was done for its own sake and upon urging from another they tried to make it appear that the murder was part of a burglary. It was only for this reason that items were taken from the victim. The CCA found this was a murder and a subsequent theft, not a capital murder-robbery.  

There was no nexus between the murder and the alleged underlying crime of robbery which contained an element of theft.

**Fierro v. State (1986)**

The question of how the state shows intent to commit the underlying crime to establish the nexus was addressed in *Fierro*. Here a cab driver was shot and subsequently items were taken from him. The defense argued there was no showing of intent to commit robbery prior to the victim’s death. The Court found a robbery of the victim immediately after the shooting of the victim which resulted in his death is capital murder occurring in the course of committing robbery. “The fact there was no prior discussion of robbery and no indication of intent to commit robbery mentioned in the confession was not controlling.” A verbal demand for money is not the “talisman of an intent to steal. Such intent may be inferred from actions or conduct.”

**DeMouchette v. State (1986)**

Addressing the proof necessary to establish the nexus in a robbery-murder scenario is *DeMouchette*. The Defendant claimed there was no nexus between the murders and an alleged underlying robbery, claiming no proof of murder in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of robbery as the

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128 Palafox v. State, 608 S.W.2d 177 (Tex. Crim. App. 1979), *superseded by statute* (TEX. R. EVID. 607) *abrogation recognized by* Janecka v. State, 937 S.W.2d 456 (Tex. Crim. App. 1996, reh. denied) (Palafox is an old “voucher” rule case, in which the state failed to sufficiently rebut exculpatory evidence the state introduced and the conviction was reversed. Although this is no longer the law, the case is instructive on the facts).

state failed to prove a theft. The CCA noted that proof of a completed theft is not necessary in proving a robbery-capital murder, and certainly in proving an attempted robbery-capital murder. The Court found the evidence sufficient to convict for capital murder with the underlying offense of robbery when it showed three employees of the restaurant were shot, and at least one killed, immediately preceding a ransacking of the business at closing time, which included obtaining keys from one of the victim's person after he was shot.130

_Barnard v. State (1987)_

In _Barnard_ a murder occurred during the commission of an aggravated robbery of a convenience store where one person was killed and another robbed. The nexus between the murder and the underlying crime can be the robbery of one person and the murder of another in the course of committing the underlying robbery. The Defendant argued that since the indictment included all the detailed elements to prove robbery, including theft with its component parts, that the nexus the state made was the murder that occurred while the Defendant was committing theft and that theft was not an authorized underlying crime for capital murder. The Court quickly dispatched this argument by showing the indictment when read as a whole showed robbery as the underlying crime by detailing the elements of robbery including theft.131


The nexus requirement that the aggravating element of murder occurred during the commission or in the immediate flight after the commission of a robbery is sufficiently proven if the State proves the robbery occurred immediately after the commission of the murder.132 Further, an intent to steal may be inferred from the facts.133

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131 Barnard v. State, 730 S.W.2d 703, 708-09 (Tex. Crim. App. 1987). The Defendant on appeal also made an interesting “bootstrapping” argument [or some would say merger argument] that by using the shooting to elevate a theft to a robbery that the state could not use the shooting to then elevate the robbery to a capital murder. The CCA noted robbery can be by assault or by the threat of violence and any shared elements with capital murder are not relevant to the Legislature purpose of using this mechanism to narrowly define offenses as aggravators to elevate certain crimes to a capital felony as mandated by the constitutional death penalty scheme required by _Furman v. Georgia_ and approved by _Jurek v. State_. _Furman v. Georgia_, 408 U.S. 238 (1972); _Jurek v. State_, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262, 96 S.Ct. 2950 (1976).


133 McGee, 744 S.W.2d at 235.
In another case during the same year involving how the trier of fact should decide the timing of the formation of intent to commit the underlying crime, the CCA agreed that the point at which the Defendant formed his intent to take the victim's property is critical to deciding whether his acts are a capital murder in the course of robbery or a first degree murder, followed by theft from a corpse, a third degree felony. The question is whether any rational trier of fact, from the evidence as a whole, would find the Defendant intended to take the victim's property before, or as, he murdered her. It is permissible for the jury to infer that sequence from all the evidence admitted. If a theft (or robbery) was committed "as an afterthought and unrelated to" an assault (or murder), then the evidence is insufficient to show a robbery-capital murder nexus.\(^{134}\)

While once again struggling with intent, the CCA again recognized it is possible to have a murder followed by theft without having a murder in the course of robbery (capital murder). In *Nelson*, what makes a theft into a robbery is the presence of the intent to obtain or maintain control of property at the time of, or prior to, the murder. This intent is the nexus that ties the theft (robbery) and the murder together to create a capital felony. If the State proves that the intent was present, it has proven the murder occurred in the course of robbery, even though appropriation may occur after the murder. Once again the Court confirmed that the trier of fact, if acting rationally, may infer the Defendant’s intent from the facts of the case.\(^{135}\)

The Defendant believed the victims had cheated him on a drug deal. He and two others went to the victim’s house with knives with intent to kill the victims. After they killed the victims, they searched the house for things to steal. CCA found a rational jury could have found beyond a

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\(^{134}\)White v. State, 779 S.W.2d 809, 814-15 (Tex. Crim. App. 1989); *see* Cooper, 67 S.W.3d at 224; Jackson v. Virginia, 443 U.S. 307, 319 (1979) (explaining that the Appellate Court is to determine, based on the evidence presented to the trier of fact and all reasonable inferences therefrom, whether any rational jury could have found the Defendant guilty beyond a reasonable doubt).

\(^{135}\)Nelson v. State, 848 S.W.2d 126, 131-32 (Tex. Crim. App. 1992). Interestingly, the CCA here toyed with the theft language elements in coming to its conclusion which is the exact thing that caused the *Barnard* Court so much difficulty five years before when the indictment there had all the elements of robbery in it including all the elements of theft.
reasonable doubt that at or before the time of the killings the Defendant formed the intent to commit robbery by taking the victims' property and establishing a thereby a nexus. The jury may infer the intent from the conduct of the Defendant, but robbery as an afterthought and unrelated to the murder will not suffice.  

_Holberg v. State (2000)_

The Court continued to use the same language to draw a nexus between the underlying crime and the murder saying "[t]he term `in the course of committing' an offense means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense.” A trial court's charge must accurately track the relevant statutes, giving the jury clear guidance on the distinctions between murder in the course of committing or attempting to commit the underlying crime (a capital felony), and any applicable lesser included offenses, including murder (a non-capital offense), and give the jury the option of finding the Defendant guilty of any, or none, of those offenses. As the charge authorized the jury to convict on alternative theories, and as Holberg only challenged the legal sufficiency of the evidence, if any one theory was sufficient the verdict of guilt would be upheld, which it was. As to the nexus requirement, the jury found the Defendant murdered the victim, an 80 year old man, with 58 stab wounds and numerous blunt force injuries, shoved the base of a lamp five inches down his throat, and took $1,400 in cash from his wallet spending the evening buying and snorting.

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cocaine with a friend. The nexus between the Defendant's murder of the victim while committing robbery and burglary was affirmed.


And finally in this survey of nexus in the §19.03(a)(2) robbery-murder context is the case of Cooper. Although not a capital case, but a robbery case, CCA confirmed Nelson for the proposition that a theft could be committed "as an afterthought and unrelated to" a murder and that would not satisfy the "in the course of" requirement. The CCA has held "numerous times" that murder is sufficiently proven "in the course of" committing robbery if the State proves that the robbery occurred immediately after the murder. The nexus requirement for murder in the course of a robbery, creating a capital felony, is the same as the nexus requirement between an assault and a related theft creating a robbery. The nexus is proven if the State shows the theft occurred immediately after the assault. The intent to commit the underlying offense (i.e. robbery prior to or during the commission of the murder) can be inferred by acts and conduct of the defendant. Even if there is no other evidence of

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138 See Anderson v. Collins, 18 F.3d 1208, 1221-1223 (5th Cir.1994) (The phrase "in the course of committing ... robbery" is, of course, not technically an "aggravating circumstance," but rather an element of the substantive offense. However, this distinction is perhaps not constitutionally significant in light of the Supreme Court's statements that designating aggravating circumstances and restricting the categories of murder for which death may be imposed serve, in the statutes of different states, the equivalent function of narrowing the class of persons eligible for the death penalty); see Lowenfield v. Phelps, 484 U.S. 231, 243-45 (1988) (The Supreme Court relied on this narrowing at the guilt/innocence phase in upholding the Texas capital sentencing scheme. See Jurek, 428 U.S at 269-71. A robbery, as defined in the statute, must have been committed or attempted, and the murder must have had some temporal proximity and factual connection to the robbery. The only real room for uncertainty is how far one can expand the temporal proximity if the logical connection exists. Jurek, 428 U.S at 269-71.


141 Cooper v. State, 67 S.W.3d 221, 225 (Tex. Crim. App. 2002); see also Alvarado, 912 S.W.2d at 207; White, 779 S.W.2d at 815; Ibanez, 749 S.W.2d at 807.


143 Ibanez, 749 S.W.2d at 807.

144 Cooper, 67 S.W.3d at 223.
a nexus, that inference will support a conviction. In addition to these robbery-murder cases, there are two cases involving aggravated sexual assault that provide additional nexus concepts.

**Aggravated Sexual Assault**

*Dorough v. State (1982)*

In *Dorough* the question was settled as to whether the underlying crime, even though completed, must have the same victim as the murder. The nexus between the murder and the underlying crime can be the aggravated sexual assault of one person and the murder of another in the course of committing the underlying aggravated sexual assault even though 45 minutes had elapsed between the last sexual assault and the murder.\(^{147}\)

\(^{145}\)Id. at 224. MEYERS, J., filed a dissenting opinion in *Cooper*, in which PRICE, JOHNSON, and COCHRAN, J.J., joined. The dissent agreed with the lower court that proof of an assault followed by a theft without a showing that the assault was committed with the intent of facilitating the theft is not enough to sustain a robbery conviction. The dissent found no evidence that Cooper developed the requisite intent to commit theft either prior to, or during the assault. The dissent said the majority's interpretation of *McGee* was inaccurate. *McGee* (and *Nelson*) said the proof of a nexus can be shown by a robbery immediately after the murder, with other evidence that tended to prove the actor formed the intent to commit the robbery either during, or immediately after the commission of the murder. The dissent believes the majority's "general rule" set out in *McGee*, i.e. proof of a theft occurring immediately after an assault is enough evidence from which intent can be inferred, (explained in the majority opinion on page 224) fails to examine the other cases cited as authority which makes it clear there was never a "general rule" and it would be unwise to begin to treat it as such. Id. at 225-28 (Meyers, J., dissenting).

\(^{146}\)A person commits aggravated sexual assault if the person intentionally or knowingly penetrates or contacts the anus, sexual organ, mouth of another without consent, or does the same with a child, with consent not being an issue. *TEX. PENAL CODE ANN.* § 22.021 (Vernon 2007). This can involve serious bodily injury or death, or fear of same, kidnapping, and deadly weapons. The statute is not copied here, as it is quite large.

\(^{147}\)*Dorough v. State*, 639 S.W.2d 479, 480 (Tex. Crim. App. 1982). The court here expanded the definition of "in the course of committing aggravated rape." It highlighted the assaultive conduct that remained present after the last sexual assault as "both victims were in the appellant's custody throughout the course of the episode," "...the appellant threatened them with a gun the entire time.... and [t]he appellant never left the scene." *Dorough*, 639 S.W.2d at 481. The subject murder occurred after the murder victim and the sexual assault victim had been turned loose. The murder victim, instead of walking away, turned back and Dorough shot him again, this time fatally. One could argue that the "assaultive conduct" to which the Court used to expand the nexus requirement was aggravated assault, not the underlying aggravated sexual assault charged in the indictment. John Melvin Dorough, Jr., is now 53 years of age and remains in prison serving his life sentence with no scheduled release date even though he was eligible for release over 13 years ago. *See* http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=02396388.
A nexus can be established where the victim is murdered during her flight from being the victim of the underlying crime after the completion of the underlying crime. Just because an aggravated sexual assault was committed prior to the events leading to the death of the victim, who was killed in flight after the sexual assault, did not mean that the death of the victim was not caused in the course of committing the aggravated sexual assault alleged as the underlying crime. “‘[I]n the course of committing' an offense listed in Penal Code, Sec. 19.03(a)(2), means conduct occurring in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of the offense.... [The Court saw] no material difference between this and the armed bank robber who shoots his victim as he flees, in order to eliminate the only witness to his crime.” This was the very conduct proscribed as a capital offense in § 19.03(a)(2).

Kidnapping

Generally, the developed rules as to nexus apply to any of the underlying crimes in §19.03(a)(2). However, specifically as to kidnapping, unlike robbery, the nexus cannot be created unless the kidnapping (attempted or otherwise) occurs prior to the murder. The Courts have determined that kidnapping cannot occur after a victim is dead.

Kidnapping is defined as “intentionally or knowingly abducting another person.” The definition of a “person” is an “individual....” Murder is intentionally or knowingly causing the death of an individual. An individual is defined as a human being who is alive... so once a victim is dead, kidnapping is no longer possible and any moving of a dead

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149 Kidnapping is the intentional or knowing abduction of another person. TEX. PENAL CODE ANN. § 20.03 (Vernon 1994).


151 TEX. PENAL CODE ANN. § 20.03 (Vernon 1994).

152 TEX. PENAL CODE ANN. § 1.07(38). (Vernon 2009).


body could not possibly be kidnapping.\textsuperscript{155} Therefore kidnapping could not be assumed to establish the proper nexus to make the murder rise to a capital felony unless the kidnapping occurred, or was attempted, while the individual was alive.\textsuperscript{156}

There are those that believe including kidnapping in the list of underlying crimes used as an aggravator to increase a murder to a capital felony may be over-broad in violation of the Eighth Amendment.\textsuperscript{157} The definition of “abduct” is to restrain a person with intent to prevent liberation by secreting or holding the victim in a place where he is not likely to be found or by using or threatening to use deadly force.\textsuperscript{158} Restraint can be shown with slight movement or temporary confinement.\textsuperscript{159} Virtually every murder involves some restraint of the victim’s movements. An argument can be made that using kidnapping as an aggravator hardly narrows the class of murderers who are eligible for capital punishment contemplated by \textit{Jurek}.\textsuperscript{160}

\textbf{Burglary}

\textsuperscript{155}Herrin, 125 S.W.3d at 440; see Gribble v. State, 808 S.W.2d 65, 72, n. 16 (Tex. Crim. App. 1990) (plurality opinion) \textit{cert. denied}, 501 U.S. 1232 (1991) (“We accept for purposes of analysis that a dead body cannot be kidnapped.”).

\textsuperscript{156}See White v. State, 779 S.W.2d 809 (Tex. Crim. App. 1989). Theft from a corpse does not raise the theft to robbery thereby creating the nexus between the theft and the previous murder to create a capital felony. \textit{Id}. If murder is sufficiently proven "in the course of" committing robbery, if the State proves that the robbery occurred immediately after the murder, then how does the mere fact of moving a body, immediately following a murder, not give rise to the assumption by inference, as set out in \textit{Cooper}, that the defendant committed the murder while in the act of committing kidnapping? See McGee v. State, 774 S.W.2d 229, 234 (Tex. Crim. App. 1989) (The intent to commit the robbery can be inferred by acts and conduct of the defendant); \textit{Cooper v. State}, 67 S.W.3d 221, 224 (Tex. Crim. App. 2002). Is the claim that the accused was merely moving a dead body not an alternative motive the jury could rationally disregard drawing the inference that if it was not the defendant’s intent to abduct the victim, he would have let the victim lie? See \textit{Cooper}, 67 S.W.3d at 224.

\textsuperscript{157}See Brimage v. State, 918 S.W.2d 466, 489 (Miller, J., concurring and dissenting).

\textsuperscript{158}TEX. PENAL CODE ANN. § 20.01(2) (Vernon 2003).

\textsuperscript{159}Hines v. State, 75 S.W.3d 444 (Tex. Crim. App. 2002).

\textsuperscript{160}See \textit{Brimage}, 918 S.W.2d at 484 (Miller, J., concurring and dissenting, opinion joined by Baird, J.).
Burglary as the underlying crime to aggravate murder to capital murder presents an interesting scenario. If one shoots the owner of a house as the owner answers the door and the actor enters the house and commits theft, does the theft provide such a bright line rule for the assumption of intent and the establishment of a nexus as is set out in the robbery-murder situation of *Cooper*? The CCA finds otherwise, using a different approach, allowing the murder itself to be used to show the nexus between the murder and the burglary. “This Court has upheld capital murder convictions, concluding that the evidence sufficiently established the underlying felony of burglary by murder of the victim following the unlawful entry into the habitation.”

In a burglary with the intent to commit a felony, the felony requirement is satisfied by the actual murder of the victim. The rule in *Cooper*, as to robbery-murder, is that a theft following the murder shows intent to commit robbery. *Homan* requires nothing after the murder to show intent other than the murder itself, letting the murder serve double duty creating a nexus with the underlying crime. Judge Johnson in her

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161 Burglary occurs when, “without the effective consent of the owner, a person (1) enters a habitation, or building not open to the public, with intent to commit a felony, theft, or an assault, or (2) remains concealed, with the same intent, in a building or habitation, or (3) enters a building or habitation and commits or attempts to commit a felony, theft or an assault.” TEX. PENAL CODE ANN. §30.02. (Vernon 1999).

162 The CCA might well extend the *Cooper* rule to burglary-murder because of its property crime nature. But, could not the actor have the intent to just commit murder with no present intent to burglarize the victim’s home and once the victim is dead sees the unprotected belongings and takes advantage? Is this a capital murder?

The theft statute does not speak of unlawfully appropriating property with intent to deprive the property from an “individual” but from an “owner.” TEX. PENAL CODE ANN. § 31.03(a) (Vernon 2009). The assets of a person upon his death are vested in his heirs, either his devisees, legatees or donees if the person dies testate or if intestate to his heirs at law. Tex. Prob. Code Ann. § 37 (Vernon 1981) (section repealed by Acts 2009, 81st Leg., ch. 680, § 10(a), effective January 1, 2014). Therefore, one can no more steal from the dead than one can sexually assault the dead or kidnap the dead. So committing an act of theft from a dead person is stealing from that person’s heirs and provides no nexus between the murder and the alleged underlying crime and shows nothing about the intent of the actor as to robbery prior to committing, while committing or in immediate flight from committing (or attempting to commit) robbery. What inference can be drawn from a killing at a person’s front door, or in their bedroom, toward the actor’s intent to burglarize the victim’s home? The CCA appears to have created a special rule for burglary. The more special rules are created the less likely an ordinary person is put on notice as to what activity is proscribed.


dissent in *Homan* opined, “As the majority acknowledges, this appears to be a case of ‘bootstrapping’ to get a charge of capital murder.”\(^{165}\) She chastised the majority for relying “upon case law which ha[d] no basis in logic” and for misinterpreting earlier precedent.\(^{166}\)

**Arson**\(^{167}\)

As to arson, the *mens rea* is satisfied when both the intent to murder and the intent to commit arson are shown under the facts of the case.\(^{168}\) The intent may "be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."\(^{169}\) In an arson case, intent cannot be inferred from the mere act of burning,\(^{170}\) unlike in the robbery-murder case where intent can be inferred by the mere act of a theft

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\(^{165}\) *Homan*, 19 S.W.3d at 850 (Johnson, J., dissenting).

\(^{166}\) *Id.*, at 851. It is almost as if *Homan* adopts a rule that to meet the underlying felony requirement of burglary-capital murder, all that needs to be shown is the inference the victim (the owner or another) was intentionally murdered in a habitation or a building not open to the public. Or said another way, the underlying burglary with the intent to commit a felony (murder) is elevated to burglary-capital murder by the one single act of intentionally causing the death of an individual within a habitation or building (of course there have to be some facts to sustain the additional inference that the entry was without the owner’s consent, but the courts seldom fail to affirm the apparent inferences of the fact finder).

\(^{167}\) Texas Penal Code §28.02 states: "(a) A person commits an [arson] if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage: (1) any vegetation, fence, or structure on open-space land; or (2) any building, habitation, or vehicle: (A) knowing that it is within the limits of an incorporated city or town; (B) knowing that it is insured against damage or destruction; (C) knowing that it is subject to a mortgage or other security interest; (D) knowing that it is located on property belonging to another; (E) knowing that it has located within it property belonging to another; or (F) when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another. (a-1) A person commits an [arson] if the person recklessly starts a fire or causes an explosion while manufacturing or attempting to manufacture a controlled substance and the fire or explosion damages any building, habitation, or vehicle. (a-2) A person commits an [arson] if the person intentionally starts a fire or causes an explosion and in so doing: (1) recklessly damages or destroys a building belonging to another; or (2) recklessly causes another person to suffer bodily injury or death...." TEX. PENAL CODE ANN. § 28.02 (Vernon 2009). Offenses range from state jail to first degree felony.


following the murder or in a burglary-murder case where the intent to commit burglary is inferred by the murder itself.\textsuperscript{171}

**Obstruction or Retaliation\textsuperscript{172}**

The underlying crime of obstruction or retaliation can occur with no violence being committed. In these circumstances, where no injury results, only “harm,”\textsuperscript{173} or even just a mere threat of harm, a murder committed in the course of committing or attempting to commit such an obstruction or retaliation becomes a capital felony.\textsuperscript{174} Even in those cases where the “harm” is more than a mere “loss or disadvantage,” but an actual injury including harm to another in “whose welfare the person affected is interested,” the statute does not speak of bodily injury, serious or otherwise, only “injury” implying a violation of a legal right, a wrong or injustice or an actionable invasion of a legally protected interest.\textsuperscript{175} There

\textsuperscript{171}Perhaps it is because a capital felony involving arson is more rare, the cases tend to follow what this writer believes is a more logical interpretation of the intent of the statute. In an arson-murder case, as there is no assumption of intent on the underlying crime, there is no necessity on the part of the courts to use the murder as the nexus to the underlying crime. This could be because usually the victim remains in the burned structure and the facts and circumstances leading up to the arson often show an independent intent to commit the arson (i.e. the presence of accelerants or their containers, financial hardships, or recent insurance acquisitions for example). The Courts would do better by using the arson line of cases to require proof beyond a reasonable doubt both as to the defendant’s intent on the murder and proof beyond a reasonable doubt as to the proper mens rea on the underlying aggravating crime and to stop bootstrapping the facts of cases to justify a capital conviction, especially in the robbery-murder and burglary-murder scenarios.

\textsuperscript{172}TEX. PENAL CODE ANN. § 36.06 (Vernon 2003). Obstruction or Retaliation: “(a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act: (1) in retaliation for or on account of the service or status of another as a: (A) public servant, witness, prospective witness, or informant; or (B) person who has reported or who the actor knows intends to report the occurrence of a crime; or (2) to prevent or delay the service of another as a: (A) public servant, witness, prospective witness, or informant; or (B) person who has reported or who the actor knows intends to report the occurrence of a crime....”

\textsuperscript{173}“Harm” is defined in the Texas Penal Code, section 1.07(25), as: “anything, reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.” TEX. PENAL CODE ANN. § 1.07(25) (Vernon 2009).

\textsuperscript{174}“And if you don’t get away from me, Mr. Police Officer, I’m going to kill you too because I’m mad at the world.” If this statement is made to the police just following an actor committing murder, or in the commission of a murder, is this what the statute contemplates? This statement is obviously made to the policeman on account of his service or status as a public servant (retaliation) and to delay or prevent him performing his duty as a public servant (obstruction) and threatens harm by committing an unlawful act.

\textsuperscript{175}“Injury” is defined as “1. The violation of another’s legal right, for which the law provides a remedy; a wrong or injustice. 2. Scots law. Anything said or done in breach of
are but just a few cases involving the “obstruction and retaliation” portion of the capital murder statute and no clear overriding problem with the statute has developed.176

In an obstruction case, the State must prove the defendant intentionally or knowingly harmed or threatened to harm another by an unlawful act (i.e. murder in this context) and obstructed, prevented or delayed (1) a public servant, witness, prospective witness, or informant from their service or (2) a person who has or the defendant knows intends to report a crime.177 Nothing requires an intent to prevent the reporting of a specific crime and although the defendant’s reasons for obstructing are

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176 See Russell v. State, 155 S.W.3d 176 (Tex. Crim. App. 2005) Russell was convicted of capital murder and sentenced to death for causing the death of Tanjala Brewer while committing or attempting to commit the offense of retaliation. Brewer and Russell had previously been involved romantically and Brewer, as a police informant introduced Russell to an undercover narcotics officer which led to Russell’s arrest. In Russell’s taped statement he said he had broken off his relationship with Brewer because she had set him up. Russell admitted killing Brewer. All of the points of error raised on appeal were evidentiary and procedural complaints having nothing to do with the construction of that portion of the capital murder statute under which he was prosecuted. Id.

177 See Ward v. State, No. AP-75750, 2010 WL 454980, *2 (Tex. Crim. App. 2010) (not designated for publication). Ward was convicted of intentionally murdering Michael Walker, a City of Commerce Code Enforcement Officer, who was at Ward’s home in a city truck wearing a city uniform, following up on a code violation. Ward’s complaints on appeal again had to do with matters unrelated to the effect or application of the statute. The Trial Court did not err in excluding expert’s testimony that Ward was psychotic and had paranoid delusions which led him to believe that there was a conspiracy by city officials to harm him and caused him to murder city employee. Ward, 2010 WL 454980.

See Gardner v. State, 306 S.W.3d 274 (Tex. Crim. App. 2009). Gardner was convicted of capital murder and sentenced to death for shooting his wife in the course of committing or attempting to commit burglary or retaliation. The Court only addressed the issue of sufficiency of the burglary underlying and mentioned the retaliation in passing. The victim had filed for divorce from Gardner and he had apparently confronted her on the issue of whether she was going to go through with the divorce. The Court cited Russeau for the proposition that the evidence is sufficient if it proves only one of the two underlying charged felonies, not both. See infra note 182.

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See text.
relevant to show his motive, they are not an element of the offense.\textsuperscript{178} Motive though may be a circumstance indicative of the defendant’s guilt,\textsuperscript{179} and such circumstantial evidence can be legally sufficient to affirm a capital murder conviction.\textsuperscript{180}

In a retaliation case, the State must prove the defendant intentionally or knowingly harmed or threatened to harm another by an unlawful act (i.e. murder in this context) in retaliation for a person being or serving as (1) a public servant, witness, prospective witness or informant or (2) a person who has or the defendant knows intends to report a crime.\textsuperscript{181} Should one be charged with committing or attempting to commit another named offense and retaliation in the alternative, the evidence is sufficient if it proves only one of the two charged felonies, not both.\textsuperscript{182}

\textsuperscript{178}Hall v. State, No. AP-75121, 2007 WL 1847314 (Tex. Crim. App. 2007) (unreported) (finding the defendant guilty of capital murder and sentenced to death for committing murder to prevent the victim from telling the police of a drug house).


\textsuperscript{180}King v. State, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000); See Evans v. State, No. 05-08-01289-CR, 2010 WL 779327 (Tex. App.—Dallas 2010) (unreported) (Defendant convicted of capital murder while in the course of committing and attempting to commit obstruction and retaliation as the victim was a potential witness against the Defendant in a drug case in another state.).

\textsuperscript{181}TEX. PENAL CODE ANN. § 36.06(a)(1) (Vernon 2003); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2005). As to these underlying crimes, are the courts and fact finders to also assume the requisite intent to commit obstruction or retaliation by the subsequent “harm or threat” which raises a committed murder to the level of a capital felony, even without any injury? Does the inferential assumption of intent doctrine establish a nexus between the murder and any after-the-fact behavior by the Defendant reasonably tied to the murder as showing the murder occurred in the course of committing or attempting to commit the underlying crimes of obstruction or retaliation? How does the subsequent commission of those crimes after a murder is completed ever establish a nexus sufficient to prove beyond a reasonable doubt a capital murder? Is a husband that takes a telephone away from his wife as she calls 911 and subsequently murders her commit a capital murder? What if after the murder he “obstructs” the investigation by some act? Is “harm” no matter how insignificant now the underlying crime to increase a murder to capital murder? Who in the community knows this is the law? Under the tests of Grayned v. Rockford, 408 U.S. 104, 108 (1972), it can be argued the application of the obstruction and retaliation statute as an aggravator is so vague as to violate due process as it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly and that it provides no explicit standards for those who would apply the statute to prevent arbitrary and discriminatory enforcement even for the most minor of underlying crimes. Grayned v. Rockford, 408 U.S. 104, 108 (1972).

Terroristic Threat\textsuperscript{183}

A person who intentionally commits a murder in the course of committing or attempting to commit a terroristic threat defined in the Texas Penal Code under Section 22.07(a)(1), (3), (4), (5), or (6), commits a capital felony.\textsuperscript{184} If a person threatens violence (1) to a person or property to cause a reaction “of any type” by one who deals with emergencies, (2) to prevent or interrupt the use of a building, aircraft, automobile, or public place, (3) to affect public communications, transportation, or utilities, (4) to place the public or a “substantial” group in fear of serious bodily injury, or (5) to affect the government at any level, one commits a terroristic threat. Based on the details of the statute this terroristic threat can be a Class B or Class A misdemeanor or a felony of the third degree. There are no cases interpreting “terroristic threat” as the underlying crime to this portion of §19.03(a)(2) that could be found.\textsuperscript{185}

Jury charge presented two alternate grounds, under either of which jury could find defendant guilty of capital murder. First ground was capital murder as alleged in indictment and described in capital murder statute [remuneration]. Second ground was legally defective as it did not constitute capital murder under the statute [conspiracy felony murder]. As it is impossible to tell which ground for conviction the jury selected, under Almanza Robinson was egregiously harmed by the error in the jury charge. Judgment was reversed, and case remanded for a new trial. See Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984).

\textsuperscript{183}This portion of §19.03(a)(2) became law effective Sept. 1, 2003, from the 78\textsuperscript{th} Legislature, ch. 388, § 1 creating another new classification (or many new classifications) of crime eligible for capital punishment. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2005)

\textsuperscript{184}See supra note 21. TEX. PENAL CODE ANN. § 22.07 (Vernon 2005). Texas Penal Code § 22.07 defines terroristic threat as it applies to a capital felony. The reader is reminded that under subparagraph (a)(1) of that section, the offense is a Class B misdemeanor, under subparagraph (a)(3) it is a Class A misdemeanor (unless the actor causes pecuniary loss of $1,500 or more to the owner of the building, room, place, or conveyance, in which event the offense is a state jail felony), and under subparagraphs (a)(4), (a)(5), or (a)(6) it is a felony of the third degree. Interesting to note while committing or attempting to commit a Class B or Class A misdemeanor one may commit a capital felony under the current scheme. Is this something people of ordinary intelligence would know?

\textsuperscript{185}The constitutionality of a capital murder based upon such a vague underlying crime as terroristic threat which includes misdemeanors, makes prosecution unlikely. A constitutional capital murder scheme must provide “an effective mechanism for categorically narrowing the class of offenses for which the death penalty could be imposed...” Pulley v. Harris, 465 U.S. 37, 55 (1984)(Stevens, J., concurring) (citing the rulings in Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976)).
IX.

Sec. 19.03(a)(3) Penal Code
MURDER FOR REMUNERATION

A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration. One should note that there is no specific mens rea for the underlying aggravators of (1) remuneration, (2) the promise of remuneration, (3) employing another for remuneration, or (4) employing another for the promise of remuneration all used to raise a related murder to a capital felony.

The murder for hire scenario was early on defined in terms of pecuniary gain. It mattered not whether the gain was for the person performing the murder or one benefitting from the murder, but there were limits.

There are no definitions in the penal code for "remuneration" or "the promise of remuneration." Those terms encompass "a broad range of situations, including compensation for loss or suffering and the idea of a

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186Texas Penal Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).


188See e.g. Beets, 767 S.W.2d at 733-37; O’Bryan v. State, 591 S.W.2d 464 (Tex. Crim. App. 1979) (recovering insurance money); McManus v. State, 591 S.W.2d 505, 510-13 (Tex. Crim. App. 1987) (receiving an inheritance); Duff-Smith v. State, 685 S.W.2d 26 (Tex. Crim. App. 1985) (Murdering was for the proceeds of the Defendant’s mother's estate; defendant convicted and sentenced to death under the theory of remuneration, or murder for financial gain.).

189See Rice v. State, 805 S.W.2d 432, 434 (Tex. Crim. App. 1991) rehearing denied. Defendant was convicted of capital murder for remuneration. The CCA reversed holding the killing of a person to insure continuation of one’s share of money from a gang’s illegal activities and to enhance one’s status in the gang was insufficient to satisfy the remuneration element of the capital murder statute. Id.
reward given or received because of some act." \textsuperscript{190} The CCA in defining remuneration does not use a narrow construction which requires a payment by a principal to an agent. \textsuperscript{191} 

To show the murder was performed for the reason of pecuniary gain, the state must prove the “defendant's intent or state of mind as related to an expectation of [tangible] remuneration.” \textsuperscript{192} Intent or state of mind is often shown by circumstantial evidence looking at the defendant’s actions as reliable proof of his intent. \textsuperscript{193} Remuneration is not limited to pecuniary gain, but is the receipt of some benefit or compensation to be received because of a murder. \textsuperscript{194} “Did the actor kill in the expectation of receiving some benefit or compensation...?" \textsuperscript{195}

Often, murder for remuneration is thought of as “murder for hire” that involves three persons, “a principal, agent and victim.” \textsuperscript{196} However, this type of capital murder does not have to have a “minimum” of three persons and is not limited to a “murder for hire” scenario where an agent is paid by a principal to murder a victim. Murder for remuneration also embraces the killer’s expectation that she will benefit from the death of the

\textsuperscript{190}Beets, 767 S.W.2d at 734 (showing the actor's intent or state of mind: “Did the actor kill in the expectation of receiving some benefit or compensation, e.g., life insurance proceeds, pension benefits?”). \textit{Id.} at 735.

\textsuperscript{191}Rice, 805 S.W.2d 434.

\textsuperscript{192} \textit{Id.} at 434-35.

\textsuperscript{193}Parrish v. State, 950 S.W.2d 720, 722 (Tex. App.—Fort Worth 1997, no pet.).

\textsuperscript{194}Underwood v. State, 853 S.W.2d 858, 860 (Tex. App.—Ft. Worth 1993) Underwood offered to kill four people to be named by his former cellmate in exchange for the former cellmate's killing of two investigators working on the murder case against Underwood. \textit{Id.} Court held this was sufficient evidence of remuneration, rejecting Underwood's contention that "remuneration" is limited to pecuniary gain. \textit{Id. But cf., Urbano v. State, 837 S.W.2d 114 (Tex. Crim. App. 1997) overruled on other grounds} (Finding the Defendant killed a fellow inmate in prison on behalf of prison gang. The Defendant’s rank within the gang was increased because of the murder. However, there was no direct evidence that at the time of the killing the Defendant was aware of the benefit he might receive for the killing or that he acted with that benefit in mind. Defendant not guilty of capital murder.)

\textsuperscript{195}Beets, 767 S.W.2d at 735.

\textsuperscript{196}Beets, 767 S.W.2d at 736 (Beets overruled the Court’s prior decision in \textit{Doty} requiring there to be a "minimum" of three actors to constitute the capital offense of murder for remuneration). \textit{See Doty v. State, 585 S.W.2d 726 (Tex. Crim. App. 1979).}
Overview of §19.03 Texas Penal Code

victim when she herself is the actor. Sometimes, the actor’s efforts can fall short of commission and be an offense less than capital.

X.

Sec. 19.03(a)(4) Penal Code
MURDER WHILE ESCAPING OR ATTEMPTING TO ESCAPE FROM A PENAL INSTITUTION

When a person commits murder, as defined under Section 19.02(b)(1), while escaping or attempting to escape from a penal institution, that murder is a capital felony. Once again there is no specific mens rea for the underlying aggravator of escape or attempted escape. Case law interpreting this portion of the capital murder statute is scarce.

The only reported case is that of Ignacio Cuevas who was convicted of intentionally and knowingly causing the death of a woman while Cuevas and others were attempting to escape from a penal institution. The CCA affirmed his conviction after his third retrial, and third sentence of death, not writing on issues that might be germane to a discussion of mens rea or other topics relevant to this section.

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197 Beets, 767 S.W.2d at 733-34. (finding the indictment, which alleged Beets murdered her husband by shooting him with a firearm and the said murder was committed for remuneration, namely: money from retirement benefits, insurance, and the victim’s estate, alleged the aggravating element that elevated the offense of murder to capital murder.).

198 TEX. PENAL CODE ANN. § 15.03 (Vernon 1994). Criminal Solicitation. Criminal solicitation is defined as “a person, with intent that a capital felony be committed, requests, commands, or attempts to induce another to engage in capital murder or make the other person a party to its commission.” This crime is a first degree felony if the crime solicited is a capital murder. There is also a definition within the statute for solicitation of any first degree felony.

199 Texas Penal Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).

200 TEX. PENAL CODE ANN. §19.03(a)(4) (Vernon 2005).

XI.
Sec. 19.03(a)(5) Penal Code
MURDER WHILE INCARCERATED
IN PENAL INSTITUTION

A person commits capital murder if, while the person is incarcerated in a penal institution, the person commits murder, as defined under Section 19.02(b)(1), of another person (A) who is employed in the operation of the penal institution; or (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

Penal Institution Employee

The murder of a prison employee was one of the first five aggravators approved in Jurek as properly narrowing the definition of capital murder. To prove a §19.03(a)(5) capital murder, the State has to first

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202 TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994). Texas Penal Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual.

203 “Penal Institution” means a place designated by law for confinement of persons arrested for, charged with, or convicted of an offense. TEX. PENAL CODE ANN. § 1.07(37) (Vernon 2009). As part of the creation of intelligence database as to criminal combinations and street gangs, Art. 61.02(e)(2) of the Code of Criminal Procedure defines a “penal institution” as a “confinement facility operated by or under a contract with any division of the Texas Department of Criminal Justice, a confinement facility operated by or under contract with the Texas Youth commission, or a juvenile secure pre-adjudication or post-adjudication facility operated by or under a local juvenile probation department, or a county jail.” CODE CRIM. PROC. ANN. art. 38.36(a) (Vernon Supp. 2009). Trial Court may take judicial notice that TDCJ or a county jail is a penal institution. Moreno v. State, No. 01-91-00858-CR, 1992 WL 187375 (Tex. App.—Hous. [1 Dist] 1992) (not designated for publication); Legg v. State, 594 S.W.2d 429, 432 (Tex. Crim. App. 1980).

204 Subparagraph (B) of §19.03(a)(5) first became effective out of the 73rd Legislature in 1993, creating another new classification of crimes eligible for capital punishment. “‘Combination’ means three or more persons who collaborate in carrying on criminal activities, although (1) participants may not know each other's identity; (2) membership in the combination may change from time to time; and (3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.” TEX. PENAL CODE ANN. § 19.03(a)(5) (Vernon 2005); TEX. PENAL CODE ANN. § 71.01(a) (Vernon 1995).

205 Jurek v. Texas, 428 U.S. 262 (1976). (“The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; [sic] murder committed in the course of kidnaping, burglary, robbery, forcible rape [sic], or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee.”). Id., at 268. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).
prove the defendant intentionally or knowingly committed murder. Additionally, the State must prove the defendant was incarcerated in a penal institution at the time of the murder, and that the victim was employed by a penal institution, both factual determinations without *mens rea*. There are no cases discussing the construction of this statute.\(^{207}\)

### Combination

Incarcerated individuals who commit murder with the intent to participate in a combination make up a clear and definite subclass category of incarcerated murderers. The Courts have held this category is

\(^{206}\)TEX. PENAL CODE ANN. § 19.03(a)(5)(A) (Vernon 2005).


Although the murder of a penal institution employee by an inmate was one of the original five aggravating factors approved in *Jurek* the constitutionality of this specific scheme has not been tested since that time in light of the continued expansion of circumstances used to qualify a murder as a capital felony. Actually when the component parts of the entire statute are examined the original five capital murders were at least ten different ways to commit capital murder, to-wit: (1) murder of a peace officer or (2) fireman; (3) murder committed in the course of kidnapping, (4) burglary, (5) robbery, (6) forcible rape, or (7) arson; (with attempt could be 5 additional ways) (8) murder committed for remuneration (could be 4 ways); (9) murder committed while escaping or attempting to escape from a penal institution (could be 2 ways); and (10) murder committed by a prison inmate when the victim is a prison employee. (Arguably this is 19 different ways to commit capital murder not counting manner and means within the statutes.)

Under the current statute there are now at least 27 aggravators or classifications expanding by 270% the original 10 component part aggravators, to-wit: murder (1) of a peace officer or (2) fireman (3) in the course of committing kidnapping, (4) burglary, (5) robbery, (6) aggravated sexual assault, (7) arson, (8) obstruction or (9) retaliation, or (10) terroristic threat under § 22.07(a)(1), (11) under §22.07(a)(3), (12) under §22.07(a)(4), (13) under §22.07(a)(5), or (14) under §22.07(a)(6), (15) for remuneration, (16) while escaping from a penal institution, (17) while incarcerated of an employee of a penal institution, (18) to establish, maintain, or participate in a combination or its profits, (19) while incarcerated for murder, (20) while incarcerated for capital murder, (21) while serving sentence of life or 99 years for Aggravated Kidnapping, (22) Aggravated Sexual Assault, or (23) Aggravated Robbery, (24) of more than one person (mass murder), (25) of more than one person (serial murder), (26) of a child under six years of age, or (27) of a judge of the many courts. This does not account for attempted crimes or the many component parts such as in the terroristic threat statute.
not arbitrary, justified by the State's interest in preventing prison gang violence as it provides a “reasoned, principled basis for distinguishing offenders eligible for capital punishment” and does not violate the Eighth Amendment. Further, Penal Code §19.03(a)(5)(B) is not unconstitutionally vague as it both reasonably informs citizens of the proscribed conduct and provides adequate guidelines for enforcement. The underlying aggravating element of this section (“with the intent to establish, maintain, or participate in a combination or in the profits of a combination”) is a matter of specific intent, so the State must prove, not the actual commission of a series of criminal offenses, but that the defendant committed the murder “with the present intent to commit a

208 “‘Criminal street gang’ means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.” TEX. PENAL CODE ANN. § 71.01(d) (Vernon 1995). The Code of Criminal Procedure art. 61.02 requires criminal justice agencies and law enforcement agencies to “compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs.” See CODE CRIM. PRO. ANN. art. 61.02 (VERNON SUPP. 2009).


A Security Threat Group (STG), also known as a prison gang, is any group of inmates in the prison (Texas Department of Criminal Justice (TDCJ)) who prison officials reasonably believe poses a threat to the physical safety of other inmates and staff. TDCJ recognizes 12 Security Threat Groups: Aryan Brotherhood of Texas, Aryan Circle, Barrio Azteca, Bloods, Crips, Hermanos De Pistoleros Latinos, Mexican Mafia, Partido RevolucionarioMexicanos, Raza Unida, Texas Chicano Brotherhood, Texas Mafia, and the Texas Syndicate. Security Threat Groups on the Inside, Texas Department of Criminal Justice (August, 2007); available at: http://www.tdcj.state.tx.us/cid/Pamphlet-Narr%20Form-09-07.pdf.


211 “‘Combination’” means three or more persons who collaborate in carrying on criminal activities, although (1) participants may not know each other’s identity; (2) membership in the combination may change from time to time; and (3) participants may stand in a wholesaler-retailer or other arm’s-length relationship in illicit distribution operations. TEX. PENAL CODE ANN. § 71.01(a) (Vernon 1995).
continuing series of criminal acts.” As a specific intent element of the offense, the intent to “establish, maintain, or participate in a combination or in the profits of a combination” cannot be supplied through “inadvertent conduct.”

In this context, the question always arises as to how proof of the defendant being a member of a prison gang is admissible? All relevant evidence is admissible unless otherwise excepted by Constitution, statute, or other rules. "Relevant evidence" is evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Gang membership evidence may be admissible to show bias, motive, intent, or to refute a defensive theory. Although generally gang

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212 Campbell, 18 S.W.3d at 921.


214 TEX. R. EVID. 402.

215 TEX. R. EVID. 401. Although admissible as relevant, any evidence can nevertheless be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” TEX. R. EVID. 403. In this context proof of the gang membership is required to prove the crime, therefore it is difficult to imagine a court finding such evidence to be unfairly prejudicial, as confusing the issues or misleading the jury. One cannot imagine how such evidence would present delay problems for the court but it could present needless cumulative evidence if such evidence was already provided by other sources. See Mozen v. State, 991 S.W.2d 841, 845 (Tex. Crim. App. 1999) (authorizing in Rule 403 exclusion of admissible relevant evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." See e.g., Joiner v. State, 825 S.W.2d 701, 708 (Tex. Crim. App. 1992); McFarland v. State, 845 S.W.2d 824, 837 (Tex. Crim. App. 1992), cert. denied; Green v. State, 840 S.W.2d 394, 410 (Tex. Crim. App. 1992) (Evidence is "unfairly prejudicial" when it unduly suggests to the fact finder to make a decision on an improper basis, commonly an emotional one).

216 Texas Rules of Evidence, Rule 404(b) says nothing specifically about “bias” but does say evidence of other crimes, wrongs or acts may be admissible for “other purposes” (not limiting the purposes for which they may be admissible) such as motive and intent, preparation, plan, knowledge, identity or absence of mistake or accident and opportunity. TEX. R. EVID. 404(b). The circumstances surrounding a witness’ bias or interest could always be offered as to their credibility and reasons for testifying generally under Rule 613, in a sexual assault case under Rule 412, or if appropriate, as to prior compromise efforts as per Rule 408. TEX. R. EVID. 408, 412, 613. In a prison gang capital murder case, one could imagine a fact pattern for each of these situations.

217 See, e.g., United States v. Sargent, 98 F.3d 325, 328 (7th Cir. 1996) (finding evidence of gang membership undermined the coercion defense and explained the
membership evidence is relevant, and therefore admissible, if it shows a non-character purpose that tends to show commission of the crime.\footnote{TEX. R. EVID. 404(b); Vasquez v. State, 67 S.W.3d 229, 239-40 (Tex. Crim. App. 2002) (finding potential character conformity inference by admission of the Defendant’s membership in a prison gang did not substantially outweigh the relevant purpose of showing motive for the robbery and murder surviving the Defendant’s Rule 403 challenge.).} In a prosecution under \S 19.03(a)(5)(B), the “same transaction contextual evidence” rule, makes proof of prison gang affiliation admissible character evidence under the crimes, wrongs, or other acts exception but only when the proof of the charged offense makes little or no sense without it.\footnote{Pondexter v. State, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996) (citing England v. State, 887 S.W.2d 902, 915 (Tex. Crim. App. 1994)).} If there is no other reason for the defendant to have acted as he did in committing the murder, the defendant’s gang-affiliation evidence is admissible during the guilt-innocence stage of a trial.\footnote{Tibbs v. State, 125 S.W.3d 84, 94 (Tex. App.—Houston [14 Dist.] 2003 pdr ref’d) (Anderson, J., concurring) (citing Brumfield v. State, 18 S.W.3d 921, 925-26 (Tex. App.—Beaumont 2000). Where evidence that defendant was member of a prison gang (a security threat group) was admissible to prove his intent to work in a continuing criminal activity, or combination. \textit{Id}.}

**XII.**

**Sec. 19.03(a)(6) Penal Code**

**MURDER WHILE SERVING SENTENCE FOR CERTAIN CRIMES**

A person commits capital murder if the person commits murder,\footnote{Texas Penal Code \S 19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual. TEX. R. EVID. 402.} (A) while the person is incarcerated for a previous conviction of murder or a capital murder,\footnote{\footnote{Under \S 19.03(a)(6)(A) it is a capital murder to commit a murder while one is incarcerated for capital murder or murder. \textsc{Tex. Penal Code Ann.} \S 19.03(a)(6)(A) (Vernon 2005).}} or (B) while serving a sentence of life imprisonment or a...
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A term of 99 years for an offense of Aggravated Kidnapping,\(^{223}\) Aggravated Sexual Assault,\(^{224}\) or Aggravated Robbery.\(^{225}\) This version of §19.03(a)(6) became effective September 1, 1994.\(^{226}\)


\(^{224}\) TEX. PENAL CODE ANN. § 22.021 (Vernon 2007). Aggravated Sexual Assault.


\(^{226}\) The 73rd Legislature, regular session, Ch 715, approved June 19, 1993, effective September 1, 1993, the version of §19.03(a)(6) which read, “(6) the person, while serving a sentence of life imprisonment or a term of 99 years for the commission of any offense listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, murders another...” (emphasis added). TEX. PENAL CODE ANN. § 19.03(a)(6) (Vernon 1993). Many of the cases reflect reference to this version of §19.03(a)(6). The current version reads, “(6) the person (A) while incarcerated for an offense under this section [capital murder] or Section 19.02 [murder], murders another; or (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04 [Aggravated Kidnapping], 22.021 [Aggravated Sexual Assault], or 29.03 [Aggravated Robbery], murders another...” TEX. PENAL CODE ANN. § 19.03(a)(6) (Vernon 1994). Interestingly, this change also was out of the 73rd Legislature, regular session, Ch 900, §1.01, also approved June 19, 1993, but to be effective September 1, 1994, one year after the Ch 715 version went into effect.

A search of the advisory committee notes and reports showed no reason for the two versions approved the same day but effective a year apart. Art.42.12§3g(a) of the Texas Code of Criminal Procedure in effect during the summer of 1993 was the same version as the changes made in the 72nd Legislature during the summer of 1991. During the 73rd Legislature the decision was apparently made to add “murder” and “indecency with a child” to the list of offenses in §3g(a) [being the list of offenses limiting a court’s ability to grant probation without a jury determination].

In the first draft, effective for only one year, from Sept. 1, 1993 to Sept. 1, 1994, §19.03(a)(6) added four new ways to commit capital murder. For that year, a person committed a capital murder who committed murder while serving a sentence of life or 99 years for the following crimes: capital murder, aggravated kidnapping, aggravated sexual assault, and aggravated robbery. Prior to that time, there was no reference in §19.03(a) to murdering another while incarcerated other than the murder of a penal institution employee which is today labeled as (a)(5)(A) and then was (a)(5).

By changing the language of §19.03(a)(6), effective Sept. 1, 1994, and removing the reference to §3g(a)(1), the Legislature set up another new classification of capital murder under §19.03(a)(6), now expanding the categories of those eligible for the death penalty by adding murder to Section (A) of §19.03(a)(6). Prior to the second version of §19.03(a)(6) a person who committed murder, while serving a sentence for murder, was not capital punishment eligible because murder was not a designated crime under §3g(a)(1). Effective Sept. 1, 1994, if an actor is serving a sentence of any length for an offense of murder, not just a life sentence or a 99 year term, and that person commits another murder it is a capital felony. The Legislature effectively created a “two-strike and your out” rule. But this time, the “out” can be a permanent removal from the game not just being benched. [See §12.42(d) of the Texas Penal Code setting the punishment for a third, non-state jail, felony at life or a term of imprisonment with a minimum of 25 years and a maximum of 99 years for the “three strike rule.”]
In *Cannady*, Sec. 19.03(a)(6) of the Texas Penal Code was challenged for constitutionality.\(^{227}\) Contained therein is a discussion of constitutional challenges applicable to any aggravating circumstances which qualify a murder as a capital felony. There are two requirements under the Eighth Amendment for any aggravating circumstance, as an element of a capital offense, to pass constitutional muster.

First, the circumstance must apply to a subclass of those convicted of murder, not to everyone convicted of murder.\(^{228}\) If everyone that is convicted of murder qualifies under a statute for capital punishment, this violates the mandate of *Jurek* that a constitutional capital scheme must narrow “the categories of murders for which a death sentence may ever be imposed….\(^{229}\)

Second, “the aggravating circumstance must not be unconstitutionally vague.”\(^{230}\) The test to determine if a statute is so vague as to violate due process is whether it (1) gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly as vague laws do not give fair warning. and (2) provides

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\(^{227}\) Cannady v. State, 11 S.W.3d 205 (Tex. Crim. App. 2000 rehearing denied) (While serving two life sentences for two previous murders, Cannady killed a fellow inmate and was convicted under §19.03(a)(6). CCA held that the use of a prior offense where accused is serving a life sentence that occurred before the effective date of the amendments creating (a)(6) did not violate *ex post facto*).


explicit standards for those who apply it to prevent arbitrary and discriminatory enforcement.\textsuperscript{231}

Also, to survive an equal protection challenge, a statutory classification created by an aggravating circumstance must not interfere with a fundamental right or discriminate against a suspect class and must be rationally related to a legitimate governmental purpose.\textsuperscript{232}

Capital murder defendants do not constitute a “suspect class.”\textsuperscript{233} The life of one convicted of capital murder is “no longer held sacrosanct” and his “life” may no longer have the status of a fundamental right. Therefore, the courts use the rational basis test and the challenged statute need only be “rationally related to a legitimate governmental purpose.”\textsuperscript{234}

Maintaining a safe, orderly, and effective functioning prison is a legitimate and compelling state interest.\textsuperscript{235} So creating a subclass of murderers within the category of those convicted of enumerated aggravated crimes serving a life sentence or a term of 99 years and thereby exposing that subclass to capital punishment is a rational action toward maintaining safe and orderly prisons.\textsuperscript{236}

Using the maximum sentences used throughout the Penal Code to draw a line at 99 years or life to create a sub-class of murderers from those convicted of enumerated aggravated crimes provides consistency and

\textsuperscript{231}Grayned v. Rockford, 408 U.S. 104 (1972) (\textit{Grayned} dealt with a city’s anti-noise ordinance which had First Amendment questions. In addition to these two requirements as to vagueness, the Court discussed the impact of a vague statute that might operate to inhibit the exercise of First Amendment freedoms).

\textsuperscript{232}\textit{Cannady}, 11 S.W.3d at 215.

\textsuperscript{233}\textit{Henderson}, 962 S.W.2d at 560.

\textsuperscript{234}\textit{Id.} at 561.


\textsuperscript{236}\textit{Cannady}, 11 S.W.3d at 215. Although \textit{Cannady} dealt with a defendant convicted of a capital murder defined as a murder committed by a person serving a sentence of life imprisonment or a term of 99 years for an offense of Aggravated Kidnapping, Aggravated Sexual Assault, or Aggravated Robbery, the same legitimate and compelling state interest rationale would apparently apply to those that commit a murder while incarcerated for a previous conviction of murder or capital murder under Paragraph (A) of §19.03(a)(6).
The Legislature may draw whatever line it chooses between punishments and “using the maximum sentences allowed seems to be as good a place as any to draw that line” when it comes to creating the aggravator set out in §19.03(a)(6).\textsuperscript{238}

The status of the Defendant as an inmate serving a particular sentence (life or 99 years)\textsuperscript{239} is an element of the crime of capital murder.\textsuperscript{240} In fact, the Defendant’s status is the aggravating element that increases a “simple” murder (a first-degree felony) to a capital offense.\textsuperscript{241} This does not violate due process or due course of law protections.\textsuperscript{242}

In Cannady, the Court found inmates who murder another in prison while serving a sentence of life imprisonment or a term of 99 years for the commission of a named aggravated offense (1) make up a subclass of murderers in general (2) and create a clear and definite category of those that are serving sentences for such aggravated offenses, (3) implicitly finding §19.03(a)(6) of the Texas Penal Code was not constitutionally vague, (4) that this statute did not interfere with a fundamental right or (5) discriminate against a suspect class and (6) the statute did rationally relate to a legitimate governmental purpose.\textsuperscript{243}

\textsuperscript{237} Henderson, 962 S.W.2d at 562-563. Once again, this same rationale would presumably apply to the seemingly arbitrary creation of a subclass of murderers from a category of those incarcerated from a previous conviction of murder or capital murder under Paragraph (A) of §19.03(a)(6). It should be noted, under this paragraph, when one is incarcerated for a previous conviction of murder or capital murder and one commits another murder, the length of the term of incarceration being served for the previous conviction is not an element of the crime, or a consideration for the appropriate aggravator. (For example, a person serving a 5 year sentence for murder commits a capital felony if he commits another murder while incarcerated on his 5 year sentence the same as if he had originally been sentenced to life on the first murder. The circumstances of the sentence being served are apparently not an issue.)

\textsuperscript{238} Cannady, 11 S.W.3d at 215-16.

\textsuperscript{239} The same would apply to one serving any sentence for a previous conviction for murder or capital murder.

\textsuperscript{240} Cannady, 11 S.W.3d at 228; see State v. Mason, 980 S.W.2d 635, 640 (Tex. Crim. App. 1998).

\textsuperscript{241} Cannady, 11 S.W.3d at 216.

\textsuperscript{242} Id. (citing Jurek v. Texas, 428 U.S. 262 1976).

\textsuperscript{243} Cannady, 11 S.W.3d at 205.
XIII.

Sec. 19.03(a)(7) Penal Code
MURDER OF MORE THAN ONE PERSON

A person commits capital murder if the person commits murder, and murders more than one person (A) during the same criminal transaction; or (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct. Murder of a second victim, whether in the same criminal transaction or during different criminal transactions, pursuant to the same scheme or course of conduct, is the aggravating circumstance that renders the first murder a capital felony.

The multiple murders contemplated by this section require those murders to be committed either intentionally or knowingly. Capital murder is a result-of-conduct offense and a jury charge should only define "intentionally" and "knowingly" as they relate to the result of the Defendant’s conduct.

Section 19.03(a)(7) defines the murder of more than one person as a capital felony in two completely different ways. First, if one murders

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244 Texas Penal Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).


247 Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992) cert. den’d. Narvaiz was a “same criminal transaction” case, but its logic can be applied to multiple murders in different criminal transactions, pursuant to the same scheme or course of conduct, that the second murder is the aggravating circumstance that makes the first murder a capital felony. Id.


250 See Medina, 7 S.W.3d at 639-40. Medina complained it was not his intent to kill, only to shoot at the house as he drove by. The CCA affirmed Medina “was guilty of murder because he was aware that firing an automatic weapon into a crowd of people was, by the nature of the conduct, reasonably certain to result in death,” explaining Medina’s intent to kill “can be inferred from the manner in which a deadly weapon is employed.” Id. (citing Vuong v. State, 830 S.W.2d 929, 933 (Tex. Crim. App. 1992)); see also Cook v. Texas, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994); Godsey v. State, 719 S.W.2d 578, 580-81 (Tex. Crim. App. 1986) (“The specific intent to kill may be inferred from the use of a deadly weapon” if from the manner of its use it was “reasonably apparent that death or serious bodily injury” could result.).
more than one person during the “same criminal transaction” one commits capital murder. The term “same criminal transaction” describes multiple acts, “closely connected in time, place, and circumstances” that arise out of a “single guilty design.” A “criminal transaction” is an “act, process, or instance of carrying on or carrying out” the multiple murder. The term “criminal transaction,” in this context, should be interpreted expansively considering the legislature's intent to insure public safety by exposing those that commit multiple murder to the most severe punishment possible, and the CCA’s broadly construing other portions of the capital murder statute. Put in other terms a “criminal transaction” embraces facts showing “a continuous and uninterrupted chain of conduct occurring over a very short period of time ... in a rapid sequence of unbroken events.” When the transaction ends depends on when the criminal conduct ceases. If the evidence supports the “rational


254 Id.

255 Vuong v. State, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992) (Defendant with a semi-automatic rifle walked through pool hall firing short bursts killing one person, wounding three, then entered the café and fired point blank at a sixteen year old, shooting a total of eleven times, hitting someone with seven shots and killing two. The Court found Vuong killed two victims in a continuous and uninterrupted chain of conduct occurring over a very short period of time); Chapman v. State, 838 S.W.2d 574 (Tex. App.—Amarillo 1992 pet ref’d) (Two murders committed during same criminal transaction, where acts occurred within 15 minutes and 150 feet of each another, and it was Chapman’s single design to kill both victims); Jackson v. State, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000) (Two victims were found dead in the same apartment and were killed in the same manner. Jackson’s DNA matched DNA from blood stains on two towels in the victim’s bathroom and he could not be excluded as a contributor of the blood mixture covering a metal bar. The Court found the jury could “rationally conclude appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person”); Coble v. State, 871 S.W.2d 192 (Tex. Crim. App. 1993) cert. den’d, (same criminal transaction where three murders occurred in close proximity to each other, on same road, within a few hours in a continuous, uninterrupted series of events); Williams v. State, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009) (Williams offered self-defense on murder of second victim claiming a completely different transaction as he changed motive between the two killings. Whether two murders occurred during same criminal transaction does not depend on Williams’ motive. The evidence was legally and factually sufficient to show both murders happened in “same criminal transaction” as there was “a continuous and uninterrupted chain of conduct occurring over a very short period of time ... in a rapid sequence of unbroken events.” (citing Jackson v. State, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000)).

256 Kalish v. State, 662 S.W.2d 595, 600 (Tex. Crim. App. 1983) (“When one voluntarily engages in criminal conduct consisting of a bodily movement, generally it produces a ‘victim’ and thus becomes a transaction. That kind of criminal transaction terminates with cessation of conduct - ordinarily in a relatively brief period of time.”).
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inference” the victims were killed in the “same criminal transaction,” the Appellate Courts will not disturb a jury's verdict.\(^{257}\)

Second, under §19.03(a)(7), one commits a capital felony if one murders more than one person during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.\(^{258}\) Unlike the “same criminal transaction” scenario, these murders are not required to occur in a certain time frame, location or geographically limited area.\(^{259}\) These murders have an “over-arching objective or motive” and show “a regular mode or pattern of ... behavior.”\(^{260}\) Only one of the murders must occur in this State for Texas to have jurisdiction.\(^{261}\)

The two paragraphs of §19.03(a)(7) define two mutually exclusive crimes. By definition, one cannot be convicted of killing more than one person in the same "scheme or course of conduct" unless there is proof of different criminal transactions. The term "same criminal transaction" amounts to something less than "same scheme or course of conduct." What separates the two is the continuity of the killing.\(^{262}\) The legislative


\(^{258}\)TEX. PENAL CODE ANN. § 19.03(a)(7)(B) (Vernon 2005).

\(^{259}\)Corwin v. State, 870 S.W.2d 23, 26 (Tex. Crim. App. 1993) (finding that when Corwin, over the course of nine months and in three different counties, abducted, sexually assaulted, and killed two women, and then attempted to abduct and killed a third, the activities were “during the same scheme or course of conduct.”).

\(^{260}\)Id. at 28-29; Feldman v. State, 71 S.W.3d 738 (Tex. Crim. App. 2002) superseded by statute on other grounds, (finding that Feldman’s acts of killing a truck driver during road rage and killing another truck driver approximately forty-five minutes later, occurred pursuant to the same over-arching objective or motive and pursuant to the same scheme or course of conduct.); Burkett v. State, 172 S.W.3d 250 (Tex. App.—Beaumont 2005) cert. den’d (In the murder of one woman and two youths, the common scheme was car thefts, the common course of conduct was the use of the same weapon to kill all three, and separate locales and lapse of several hours between killings was the break in continuity of killings, so the evidence conformed to the Indictment alleging capital murder under Texas Penal Code §19.03(a)(7)(B)). TEX. PENAL CODE ANN. § 19.03(a)(7)(B) (Vernon 2005).

\(^{261}\)Bayless v. State, No. 05-99-01978-CR, 2003 WL 21006915, *2 (Tex. App.—Dallas 2003) (unpublished) (finding that section 1.04 Texas Penal Code read together with §19.03(a)(7)(B) gave Bayless fair notice that she could be convicted of a capital felony for murdering more than one person if one murder occurred in Texas and both murders were pursuant to the same scheme or course of conduct. Texas has jurisdiction if “a result that is an element of the offense occurs inside this state.”). See TEX. PENAL CODE ANN. § 1.01(a)(1) (Vernon 1994); TEX. PENAL CODE ANN. § 19.03(a)(7)(B) (Vernon 2005).

history of §19.03(a)(7) reveals “same criminal transaction” was intended for mass murders and “same scheme or course of conduct” was intended for serial murders.\textsuperscript{263} However, the Legislature did not intend that “every different-transaction multiple killing” should be a capital felony.\textsuperscript{264}

Under §19.03(a)(7), when it comes to the charging instrument, the offense may be indicted under both theories in the alternative,\textsuperscript{265} and if the jury gives a general verdict of guilty, the Appellate Court will most likely affirm the conviction if the evidence was sufficient to support either theory. But, the Appellate Court will not affirm the conviction if the fact-finder finds the accused committed capital murder in both ways alleged.\textsuperscript{266} If the Indictment fails to allege whether the murders were during the “same criminal transaction” or during the “same scheme or course of conduct,” neither is the Indictment insufficient nor are the trial, judgment or other proceedings affected because of a defect of form as long as the substantial rights of the accused are not prejudiced.\textsuperscript{267} If a motion to quash the Indictment is overruled, unless the accused received no notice of the State’s theory, the accused suffers no harm. If the Indictment omits one element of the charged offense, this does not render an otherwise valid Indictment fatally defective.\textsuperscript{268} The State is not required to allege the constituent elements of the aggravating murder even in the face of a motion to quash.\textsuperscript{269}

\textsuperscript{263}Coble, 871 S.W.2d at 199, fn 10 (Illustrative of the Legislature’s intent, and not a definitive list of examples, a mass murderer would be one that “bombs a car killing several people or kills six people in a row at a bar” and a serial murderer “kills all senators over the course of a year for snubbing his legislation”).


\textsuperscript{265}The alternative theories would be (1) that the accused committed capital murder if he first committed murder and murdered more than one person during the same criminal transaction or (2) that the accused committed capital murder if he first committed murder and murdered more than one person during different criminal transactions but the murders were committed pursuant to the same scheme or course of conduct.

\textsuperscript{266}Rios, 846 S.W.2d at 314.

\textsuperscript{267}CODE CRIM. PRO. ANN. art. 21.19 (Vernon Supp. 1966); Kellar v. State, 108 S.W.3d 311, 313 (Tex. Crim. App. 2003) (The Indictment notified Kellar of the nature of the charge against him although it was defective for failing to state whether the deaths were during the same criminal transaction, or same scheme or course of conduct. Kellar’s substantial rights were not harmed.).


In *Burkett*, the Indictment was found to not be fatally defective when it alleged the murders were committed “during the same scheme and course of conduct” but failed to allege the murders were committed “during different criminal transactions but pursuant to the same scheme and course of conduct.”\textsuperscript{270} In *Smith*, the Indictment wholly failed to set out either subsection and was defective. However, as the accused had actual notice upon which the State was basing its allegations, upon amendment of the Indictment prior to trial to include “in the same criminal transaction,” Smith was not impermissibly charged with an additional or different offense.\textsuperscript{271}

A recent capital case of interest is *Paredes v. Quarterman*, in which Paredes filed a Federal Habeas Petition, made a substantial showing of the denial of a constitutional right, and was granted a certificate of appealability on the issue of whether Paredes was deprived of his constitutional right to a unanimous verdict as to which two of the three murder victims Paredes was responsible for killing.\textsuperscript{272} “Reasonable jurists could debate whether the jury instructions necessarily required a unanimous verdict as to each murder victim.”\textsuperscript{273}

Section 19.03(a)(7) has been challenged for constitutionality. As is discussed above, there are two requirements for a constitutional challenge applicable to any aggravating circumstance which qualifies a murder as a capital felony.\textsuperscript{274} First, the aggravator must apply to a sub-class of those convicted of murder, not to everyone convicted of murder.\textsuperscript{275} Section §19.03(a)(7) affects only that very small and specifically identifiable sub-

\textsuperscript{270}Burkett v. State, 172 S.W.3d 250, 253 (Tex. App.—Beaumont 2005) cert. den’d, (“[A] written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective ... The only homicide offense that includes “same scheme or course of conduct” as an element is section 19.03(a)(7)(B).”).

\textsuperscript{271}Smith v. State, 297 S.W.3d 260, 267 (Tex. Crim. App. 2009) (The original indictment on its face listed the charge as capital murder, and Smith’s attorney had worked for months prior to trial preparing his defense to a capital murder charge. The record clearly showed that Smith had actual notice of the capital charge upon which the State was basing its allegations).

\textsuperscript{272}Paredes v. Quarterman, 574 F.3d 281 (5th Cir. 2009).

\textsuperscript{273}Id. at Headnote 19.


class of persons guilty of murder. Second, the aggravator must not be unconstitutionally vague.

Interestingly, a person to whom a statute clearly applies may not challenge it for vagueness. With this in mind, understanding same "criminal transaction" in its narrowest sense to show "a continuous and uninterrupted chain of conduct occurring over a very short period of time ... in a rapid sequence of unbroken events," §19.03(a)(7)(A) was held to not be unconstitutionally vague as applied. Similarly, despite the indefiniteness of the phrase "same scheme or course of conduct," §19.03(a)(7)(B) was held to not be unconstitutionally vague as applied. Finally, §19.03(a)(7) was challenged, and held not to be unconstitutionally vague for failing to specify a culpable mens rea for the second homicide.

Section 1.07(a)(38) of the Texas Penal Code defines a “person” as an “individual” and subparagraph (26) defines an “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” Also, remember Texas Penal

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276. Vuong v. State, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992). Although Vuong dealt strictly with subparagraph (A) dealing with “same criminal transactions” the same narrowing of those eligible for the death penalty would apply to subparagraph (B). Few of those convicted of murder also commit other murders either as a mass murderer or as a serial killer.

277. Cannady, 11 S.W.3d at 214.

278. Briggs v. State, 740 S.W.2d 803, 806 (Tex. Crim. App. 1987); Parker v. Levy, 417 U.S. 733, 746 (1974); see also, Village of Hoffman Estates, et al. v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (One "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.") This would indicate that only those that are found not guilty, or on appeal successfully claim they are wrongfully convicted because they did not engage in the proscribed conduct (i.e. capital murder under §19.03(a)) may challenge a statute for vagueness.


282. Subparagraph (38) which defines “person” as an “individual” was added in 1979. See Acts 1979, 66th Leg., ch. 530, without reference to Acts 1979, 66th Leg., ch. 655, in subsec. (a), added subds. (37) and (38).

283. Subparagraph (26) defining “individual” in its current form was changed in 2003 to include unborn children. See Acts 2003, 78th Leg., ch. 822, in subd. (26), where the Legislature substituted “is alive, including an unborn child at every stage of gestation from fertilization until birth” for the previous language “has been born and is alive”; and
Code §19.02(b)(1) defines murder as intentionally or knowingly causing the death of an “individual.” Under §19.03(a)(7), if a person commits murder, meaning he intentionally or knowingly causes the death of an “individual” and murders more than one person, defined as an “individual” during the same criminal transaction or during different criminal transactions but pursuant to the same scheme or course of conduct, the person commits a capital felony. Therefore, a person who intentionally or knowingly causes the death of a woman and her unborn child, at any stage of gestation, commits capital murder.284

In Lawrence, the Appellant argued it was a violation of substantive due process to prosecute him for intentionally or knowingly killing an embryo because the embryo was not viable, that is, it could not survive outside the womb.285 The CCA declined to second guess the Legislature who is free to protect the lives of whomever it defines as being a human being.286 If a mother was noticeably pregnant and other facts of the case existed which could be taken as additional proof of the mother’s pregnancy, such as a crib or other baby-related items visible where the mother lived, evidence could be sufficient to show the actor intentionally or knowingly murdered the mother and her unborn child qualifying these multiple murders as a capital felony.287

If there is proof of an actor’s intent to kill the same number of individuals who are actually killed, transferred intent may be used to support a §19.03(a)(7) charge of capital murder under either subparagraph.288 However, if the accused did not know that the mother

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284Lawrence v. State, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007). A discussion of these definitions as they relate to Sec. 19.03(a)(8) of the Texas Penal Code and the murder of a child under six years of age can be found in later under SEC. 19.03(a)(8) PENAL CODE. MURDER OF A CHILD UNDER 6 YEARS OF AGE. See infra Part XIV.

285Lawrence, 240 S.W.3d at 917. The Court notes the Appellant focused on viability because prohibitions on abortion before viability have no "compelling state interest" and are unconstitutional. See Gonzales v. Carhart, 550 U.S. 124 (2007) (states may protect human life not just from viability but "from the outset of the pregnancy."). Carhart, 550 U.S. at p. 1626.

286Lawrence, 240 S.W.3d at 917-18; Carhart, 550 U.S at 157; see Poelker v. Doe, 432 U.S. 519 (1977).


288Roberts v. State, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008) ("e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if,
was pregnant, such as during the early stages of pregnancy, the actor’s lack of knowledge of the embryo’s existence will not support a claim of a separate specific intent to kill the embryo. 289

XIV.
Sec. 19.03(a)(8) Penal Code
MURDER OF A CHILD
UNDER 6 YEARS OF AGE

A person commits capital murder if the person intentionally or knowingly causes the death of an individual under six years of age.290 This statute has survived an Equal Protection and Eighth Amendment challenge.291

Constitutionality

When a statute is attacked for equal protection violations, the statute must be strictly scrutinized if it interferes with a “fundamental right” or discriminates against a “suspect class.”293 Otherwise, the statute will survive the challenge if the “challenged classification [here using under six years of age as the dividing line between murder and capital murder] is rationally related to a legitimate governmental purpose.”294

First, capital murder defendants are not a “suspect class.”295 Next, life, as the most basic of fundamental rights, loses that status for those convicted of capital murder.296 Consequently, to survive a constitutional

intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane.”).

289Roberts, 273 S.W.3d at 331. (“It is undisputed that appellant did not know that Ms. Ramirez was pregnant. Lacking knowledge of the embryo’s existence, appellant could not form a separate specific intent to kill the embryo, as is required by statute.”).

290TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).


294Id. Called the “rational basis” test.

295Henderson, 962 S.W.2d at 560; see Janecka v. State, 739 S.W.2d 813, 834 (Tex. Crim. App. 1987).

296Henderson, 962 S.W.2d at 561.
equal protection challenge, §19.03(a)(8) only has to show that the challenged classification of children under six years of age, as the statutory aggravator to raise a murder to a capital murder, has a rationally related legitimate governmental purpose.  

A state has a legitimate, compelling interest in protecting children’s well-being even when another’s constitutionally protected rights are involved. Within the category of “children,” this “legitimate, compelling” interest allows the creation of a sub-class of “young children.” The Legislature may draw a line between younger and older children to protect the younger children because of their “inexperience, lack of social and intellectual development, moral innocence, and vulnerability” and to express society's moral outrage against the murder of young children.

In Black, it was argued that the statute violated equal protection because §19.03(a)(8) does not require proof of the child’s age as an aggravating element, or require proof of the actor’s knowledge of that element. The Court found that this statute does require proof of the child’s age as under six, but does not require proof of the actor’s specific intent as to the nature of the circumstances of the crime. There is no requirement in §19.03(a)(8) that the actor know or intend that his victim is a child under six.

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297 Kadrmas, 487 U.S. at 458; see City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

298 Henderson, 962 S.W.2d at 560.

299 Henderson, 962 S.W.2d at 562.

300 Id.

301 Black v. State, 26 S.W.3d 895, 897 (Tex. Crim. App. 2000) (“Again we need no reason other than the compelling need to protect young children from violence to find a rational basis for the legislature's dispensing with a culpable mental state towards the victim being a young child. The safety of children provides a sufficient rationale to permit the legislature to hold offenders liable when they intentionally or knowingly kill and the victim is a young child.”) Id. at 898.

302 Black, 26 S.W.3d at 897; see Ramos v. State, 961 S.W.2d 637, 638 (Tex. App.—San Antonio 1998) (In In the Matter of M.A., 935 S.W.2d 891, 894 (Tex. App.—San Antonio 1996) the Court “held that the plain language of 19.03(a)(8) suggests that no knowledge requirement exists, beyond the requirement that the defendant knowingly killed the victim, to find a person guilty under this provision.”); McCollister v. State, 933 S.W.2d 170, 172 (Tex. App.—Eastland 1996) (“We hold that appellant's knowledge of the victim's age is not an element of the offense under Section 19.03(a)(8).”).
As discussed above, under the Eighth Amendment, for an aggravating circumstance [such as using six years of age for the victim to delineate between murder and capital murder] to meet a constitutional challenge, the aggravator must apply to a sub-class of those convicted of murder, not to everyone convicted of murder, and “the aggravating circumstance must not be unconstitutionally vague.” In Henderson, the Court of Criminal Appeals found that §19.03(a)(8) met both tests as murderers of children under six are a subclass of murderers in general, and “children under six” are a clear and definite category.

Murder of a Fetus

After the 2003 changes in the Penal Code, the Legislature chose to define an “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” This statutory definition has been held to be unambiguous as to the proscribed conduct. By prohibiting the intentional or knowing killing

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305 Henderson, 962 S.W.2d at 563.

306 See also supra Part XIII. (discussing Lawrence v. State, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007), Eguia v. State, 288 S.W.3d 1 (Tex. App.—Houston [1 Dist.] 2008), and Roberts v. State, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008) as the 2003 changes in the Penal Code definitions of “individual” and “person” relate to the intent to kill an embryo while murdering the mother, in Sec. 19.03(a)(7) PENAL CODE, MURDER OF MORE THAN ONE PERSON.

307 See supra note 283 (citing specific changes made by the 78th Texas Legislature in 2003). This change expanded greatly the pool of victims the murder of which would qualify the offender for capital punishment and thereby expanded the classifications of capital eligible crimes and those eligible for prosecution.

308 Lawrence v. State, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) cert. den’d. Lawrence charged with capital murder and prosecuted under §19.03(a)(7), wherein Lawrence was found guilty of capital murder by committing a multiple murder, i.e., the shooting death of pregnant woman and her four-to-six week old embryo. The Court heard Lawrence’s complaint that the definition of “individual” in §1.07(a)(26) of the Texas Penal Code was void for vagueness under State v. Holcombe, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006), and that the statute failed to define the criminal offense [capital murder by committing a multiple murder in which one of those killed was unborn] “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement.” Lawrence brought his complaint about the vagueness of the statute by a motion to quash the Indictment. The Court ruled that this was not the proper vehicle with which to attack an element of a crime as unconstitutional. The CCA refused to review the Court of Appeals holding that the evidence was sufficient, finding the statute setting out the definition of an “individual” was not impermissibly vague. See supra note 284.
of any “unborn human, regardless of age,” from fertilization onward, an ordinary person can understand what conduct is prohibited -- that murder includes “victims at all stages of gestation.”\(^\text{309}\)

States may protect human life "from the outset of the pregnancy."\(^\text{310}\) The Legislature may protect the lives of human beings as it defines them and a court should not “second-guess” the democratic process.\(^\text{311}\) A woman’s liberty interest in the decision to have an abortion is protected by substantive due process as the state has no “compelling state interest” in an unviable embryo.\(^\text{312}\) But, such substantive due process protection and a state’s compelling interest in protecting the unborn, even before viability, have little to do with the occasion when a third party murders the unborn against the mother’s “will.”\(^\text{313}\) Judge Johnson voiced her concern that the statute in the future may be unconstitutional “as applied” in a circumstance where the accused had no notice of the mother’s pregnancy and as a result could not have intended the death of mother’s unborn child.\(^\text{314}\)

\(^{309}\) *Lawrence*, 240 S.W.3d at 915-16.

\(^{310}\) Gonzales v. Carhart, 550 U.S. 124, 145 (2007) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

\(^{311}\) *Lawrence*, 240 S.W.3d at 917-18.

\(^{312}\) *Roe v. Wade*, 410 U.S. 113 (1973); see *Carhart*, 550 U.S. at 145. ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

\(^{313}\) *Lawrence*, 240 S.W.3d at 917.

\(^{314}\) *Lawrence*, 240 S.W.3d at 918-19 (Johnson, J., concurring opinion in which Holcomb, J., joined). Concurring with the court’s result rejecting the “void for vagueness” and “due process” claims, Judge Cochran, in her concurring opinion, found the evidence was sufficient to prove Lawrence knew the victim-mother was pregnant and intended to kill her unborn child. The CCA refused to review the court of appeal’s holding that the evidence was sufficient and one can only surmise Judge Cochran disagreed with that decision.

Since the date of *Lawrence*, November 21, 2007, [a little over 30 months at the preparation of this paper] a search of the history of *Lawrence* and the citing references shows *Lawrence* has been cited five times as authority on these issues, twice by the CCA itself, and once distinguished. Three of these cases are cited in this footnote as they did not advance the development of the issues raised in *Lawrence*.

Holmes v. State, No. 01-06-00975-CR, 2008 WL 963021, *4 (Tex. App.—Hous. [1st Dist.] April 10, 2008) (unreported) In a non-death capital trial Holmes was convicted of killing his pregnant wife. There was evidence he knew she was pregnant. Holmes attacked the definition of “individual” on Establishment Clause grounds, addressed and overruled in Flores v. State, 245 S.W.3d 432, 436 (Tex. Crim. App. 2008). On Eighth
Less than three months after the ruling in *Lawrence*, in *Flores v. State*, the Court of Criminal Appeals once again addressed the constitutionality of §1.07(a)(26) of the Texas Penal Code and its definition of an Amendment grounds Holmes claimed the definition expanded cases eligible for prosecution as a capital murder in an “arbitrary” and “capricious” manner. The Court cited Lawrence for the proposition that in a constitutional challenge the Court starts with the “presumption that the legislature has not acted unconstitutionally,” and overruled this challenge as previously rejected in *Vuong*. See *Vuong v. State*, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992); *Lawrence*, 240 S.W.3d at 915.

*Sanders v. State*, No. 01-07-00775-CR, 2009 WL 884741, *6* (Tex. App.—Hous. [1st Dist.] Apr 02, 2009) (unreported) (In another non-death capital trial Sanders was convicted also of killing a pregnant woman, who was carrying his baby. The evidence also showed he knew she was pregnant but did not want his other girlfriend to know of the relationship. The Court found, following *Lawrence*, that Sanders, by shooting the woman in the head at close range, would have awareness (knowing) that their unborn child's death would be reasonably certain to result. The Court rejected Sanders’ argument that the definition of “individual” violates the Establishment Clause because as “some religions and denominations ... believe that human life begins at fertilization, ...[t]here is no basis, other than religious belief, for defining an unborn child at every stage of gestation from fertilization until birth as an individual who is alive," following *Lemon* and *Flores*, see infra text with fn 315 et seq. Sanders also made an unsuccessful Eighth Amendment argument similar to *Eguía v. State*, see infra text with footnotes 325 et seq which was overruled following *Lawrence* (although probably more closely following the same Court’s reasoning in *Eguía* from six months earlier);

*Estrada v. State*, No. AP-75634, 2010 WL 2382555, *24-26* (Tex. Crim. App. Jun 16, 2010) (opinion not released for publication, subject to revision or withdrawal) (While in the final stages of preparing this paper *Estrada* was issued. Although subject to revision or withdrawal, it is the latest case involving the death of the unborn and the mother. Estrada was convicted of capital murder for murdering a pregnant woman and their thirteen-week-old unborn child and was sentenced to death. (A new punishment hearing was granted on evidentiary concerns unrelated to the Constitutionality of the statutes defining the unborn as “human beings” and “individuals” and thereby making their murder a capital felony.) Estrada filed a "motion to declare application of the death penalty to the non-consensual termination of a pregnancy unconstitutional." The Court said it was “questionable whether this motion preserved many of the claims presented” in the seven points of error addressing these issues (virtually all the same issues raised by the line of cases following *Lawrence*). The only point of error preserved for appeal was a violation of *Roe v. Wade* (citation omitted). All the other points of error were overruled because neither a facial nor an “as applied” constitutional challenge may be raised for the first time on appeal. Karenev v. State, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009); Curry v. State, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). Once again following *Lawrence*, the Court held *Roe* “has no application to a case that does not involve [a] pregnant woman's liberty interest in choosing to have an abortion” and that *Roe* has no application "to a statute that prohibits a third party from causing the death of [a] woman's unborn child against her will..." (citing *Flores v. State*, 245 S.W.3d 432, fn 40 (Tex. Crim. App. 2008)).
“individual.”\(^{315}\) Flores made two constitutional arguments not previously made in this regard.\(^{316}\)

Convicted of capital murder in causing the death of two fetuses by stepping on the mother’s abdomen in an effort to cause a miscarriage, Flores argued a violation of equal protection as women terminating their own pregnancies are exempted from prosecution under the Penal Code.\(^{317}\)


\(^{316}\)Flores also makes a due process argument under Roe v. Wade, 410 U.S. 113 (1973), rejected in Lawrence v. State, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007), and an “overbroad” argument which was not raised in his petition for discretionary review, which the Court summarily overruled.

\(^{317}\)Flores, 245 S.W.3d at 435 (Flores claimed the mother participated by cooperating in his attempts to terminate the pregnancy).

Texas Penal Code §19.06 reads: “This chapter (Chapter 19: Criminal Homicide) does not apply to the death of an unborn child if the conduct charged is (1) conduct committed by the mother of the unborn child....” This conduct would include all the Chapter 19 crimes: §19.02 Murder, §19.03 Capital Murder, §19.04 Manslaughter, §19.05 Criminally Negligent Homicide, and presumably Murder-Sudden Passion (§19.02(d)).


Texas Penal Code §22.12 reads, “This chapter (Chapter 22: Assaultive Offenses) does not apply to conduct charged as having been committed against an individual who is an unborn child if the conduct is: (1) committed by the mother of the unborn child....”

TEX. PENAL CODE ANN. § 22.12 (Vernon 2003). This conduct would include all the Chapter 22 assaultive offenses that could possibly apply to the unborn, to-wit: §22.01 Assault, §22.02 Aggravated Assault, §22.04 Injury to a Child, and §22.05 Deadly Conduct. It is clear §22.12 would also exempt a mother prosecuted for any other crime where her child is the victim if she is found guilty of one of these assaultive offenses as a lesser included offense of the original charge. Quite frankly, an example escapes this writer, but the creativity of law enforcement and prosecutors never fails to amaze.


Finally, Texas Penal Code §49.12 reads, “§49.07 (Intoxication Assault) and §49.08 (Intoxication Manslaughter) do not apply to injury to or the death of an unborn child if the conduct charged is conduct committed by the mother of the unborn child.”


In Ex parte Vela, No. AP-75562, 2006 WL 3518116 (Tex. Crim. App. 2006) (unpublished). Vela pled guilty to endangering her unborn child by ingesting controlled substances while pregnant, was convicted under §22.041 Texas Penal Code and was sentenced to eighteen months state jail imprisonment. CCA overturned conviction because of the mother’s exemption provided by §22.12.

Certainly the argument can be made that with the definition in §1.07(a)(26) of a child, including a fetus from fertilization through birth, and the unqualified language of §§19.06, 22.12 and 49.12, that whatever the behavior of a mother toward her unborn
Flores’ vehicle for making this claim was through a pre-trial motion to quash the indictment and the Court criticized Flores for attempting to address this “issue” through a pre-trial motion. The Court expressed no opinion on the underlying merits of Flores’ equal protection claim so the issue remains unresolved.\textsuperscript{318}

Flores also made an Establishment Clause\textsuperscript{319} argument that by defining an “individual” to include the unborn the statute adopts “a religious point of view over a secular one.”\textsuperscript{320} In overruling this claim, the Court used the three prong test in Lemon for determining if a statute violates the Establishment Clause. (1) Does the statute have a secular legislative purpose? (2) Is the principal or primary effect of the statute to neither advance nor inhibit religion? And (3), does the statute not promote an “excessive” government entanglement with religion?\textsuperscript{321} If a statute happens to agree with a belief in some or all religions, this does not render it unconstitutional as violative of the Establishment Clause.\textsuperscript{322}

However, from a careful reading of Flores, the constitutional challenges to these issues were not settled.\textsuperscript{323} As an example, the Houston child may be, intentional, knowing, reckless, criminal negligence (defined in §6.03 Texas Penal Code) or merely an accident with no criminal intent whatsoever, even while intoxicated, her only responsibility to her unborn child is civil in nature, if that. Counsel should carefully study this statute should the occasion arise. See TEX. PENAL CODE ANN. § 1.07(a) (Vernon 2009); TEX. PENAL CODE ANN. § 6.03 (Vernon 1994).

\textsuperscript{318}In a footnote, the Court said, “In light of these considerations, we should not overturn the well-established requirement that appellant must preserve an "as applied" constitutional challenge by raising it at trial. TEX. R. APP. P. 33.1; see, e.g., Curry v. State, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (citing Garcia v. State, 887 S.W.2d 846, 861 (1994)) (holding that an "as applied" due process challenge is not preserved for appeal if appellant did not raise a "specific, timely objection" at trial). Flores, 245 S.W.3d at 437, fn 14.

\textsuperscript{319}\textit{U.S. Constitution, Amendment I: Religion, Speech, Press, Assembly, Petition. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I}

\textsuperscript{320}Flores, 245 S.W.3d at 438.


\textsuperscript{322}Harris v. McRae, 448 U.S. 297, 319 (1980). ("Otherwise, no law against theft or murder could pass constitutional muster, because those laws are consistent with religious strictures such as the Ten Commandments."). Flores, 245 S.W.3d at 438 (citing McRae, 448 U.S. at 319).

\textsuperscript{323}The Court failed to address Flores’ overbroad and equal protection arguments. Judge Cochran, joined by Judge Johnson, made the point in her concurring opinion, “the plain language of the statute might well be read to make anyone who assisted the woman or the physician in [a] ...lawful act (i.e. an abortion procedure) subject to prosecution for
Court of Appeals, 1st District, in *Eguia v. State* held the statutory definitions of “individual” and “death” valid under both the Establishment Clause and the Texas Constitution, following both *Lemon* and *Flores*, despite the argument that the statute was unconstitutional as “endorsing religion as it is based solely upon a religious belief that life begins at conception.” These statutes are valid under the Eighth Amendment to the U.S. Constitution as the Legislature has the sole power to define crimes and punishments. The Legislature may expand the list of aggravating factors, and in fact, narrowed those who qualify for capital murder with these changes by passing §19.06 that exempts mothers and certain medical personnel from criminal liability.

Judge Johnson in *Lawrence* saw potential constitutional challenges should the facts of a case fail to show the actor knew the woman murdered was pregnant and as a result the actor could not have intended the death of the mother’s unborn child. In *Roberts v. State*, Judge Johnson’s factual requirements were presented but as a transferred intent issue, not as a constitutional challenge, distinguishing itself on the facts from *Lawrence*.

capital murder under the law of parties: the woman's mother, father, or friend who drives the woman to the doctor's office or provides the money for a lawful abortion with the intent that the woman obtain such an abortion; the unlicensed medical assistant who helps the licensed doctor in performing the abortion; or, as appellant claims in this case, the father of an unborn child who assists in an unorthodox procedure that intentionally leads to a miscarriage.” *Flores*, 245 S.W.3d at 442 (Cochran, J., concurring).

324 *Texas Constitution*, art. I, § 6. Freedom of worship. “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.” (emphasis added). U.S. CONST. art. I, § 6.


326 *Eguia*, 288 S.W.3d at 12.

327 *Id.* at 13.

328 See supra note 314.


330 Roberts’ point of error in this regard read, "Whether proof that Appellant killed a pregnant woman and her embryo in the same transaction established capital murder when Appellant was unaware of the pregnancy."
Roberts was convicted of causing the death of two individuals, a pregnant woman and her embryo (during the same criminal transaction).\footnote{Roberts, 273 S.W.3d at 324.} As a result-of-conduct offense, capital murder is defined in terms of the actor's objective to produce a specified result, i.e. the death of the named decedent.\footnote{Kinnamon v. State, 791 S.W.2d 84, 88 (Tex. Crim. App. 1990), overruled on other grounds; Cook v. State, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).} Put in other words, the culpable mental state must relate to the result of the conduct.\footnote{Schroeder v. State, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (citing Cook v. State, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).} The State attempted to use the doctrine of transferred intent to assign intent to Roberts for the death of the embryo.\footnote{Texas Penal Code §6.04(b)(2) reads, “A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: a different person or property was injured, harmed, or otherwise affected.” TEX. PENAL CODE ANN. § 6.04(b)(2) (Vernon 1994).} In this multiple murder situation, transferred intent as to the second murder is permissible but only if the actor’s intent to kill is proven as to “the same number of persons who actually died.”\footnote{Roberts, 273 S.W.3d at 331.} The record reflected that neither Roberts nor anyone else knew the woman was pregnant.\footnote{Id. at 327.} With no knowledge of the embryo's existence, Roberts “could not form a separate specific intent to kill the embryo, as is required by statute.”\footnote{Id. at 331.}

**XV. Sec. 19.03(a)(9) Penal Code MURDER OF A JUDGE**

A person commits capital murder if the person commits murder as defined under §19.02(b)(1)\footnote{A person commits murder if he “intentionally or knowingly causes the death of an individual. . . .” TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).} and “the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a
court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court or a municipal court.” There are no reported State cases citing this subparagraph of §19.03.

XVI. CAPITAL PUNISHMENT FOR NON-MURDER CRIMES

Still a part of Texas capital statutes is §12.42 (c)(3) of the Penal Code making it a capital offense to commit aggravated sexual assault of a child as a repeat offender, and Art. 37.072 of the Code of Criminal Procedure setting out the procedures to be followed in such repeat sex offender capital cases.

339 T EX. P ENAL C ODE A NN. § 19.03(a)(9) (Vernon 2005). Subparagraph (9) of §19.03(a) became effective Sept. 1, 2005, out of the 79th Legislature, ch. 428, § 1, and created another new classification of capital crime.

340 Specifically, “a defendant shall be punished for a capital felony if it is shown on the trial of an offense under Section 22.021 (Aggravated Sexual Assault) otherwise punishable under Subsection (f) [minimum term of imprisonment is 25 years] of that section that the defendant has previously been finally convicted of:

“(A) an offense under Section 22.021 (Aggravated Sexual Assault) that was committed against a victim described by Section 22.021(f)(1) [victim younger than 6 years old] or was committed against a victim described by Section 22.021(f)(2) [victim younger than 14] and in a manner described by Section 22.021(a)(2)(A) [(i)serious bodily injury (SBI) or attempts death, (ii) puts victim in fear of death, SBI, kidnapping, (iii) threatens death, SBI or kidnapping to any person (iv) uses or exhibits deadly weapon, (v) acts with another, or (vi) uses roofies or drugs]; or

“(B) an offense that was committed under the laws of another state that: (i) contains elements that are substantially similar to the elements of an offense under Section 22.021; and (ii) was committed against a victim described by Section 22.021(f)(1) or was committed against a victim described by Section 22.021(f)(2) and in a manner substantially similar to a manner described by Section 22.021(a)(2)(A).” T EX. P ENAL C ODE A NN. § 12.42(c)(3) (Vernon 2009). (Section (c) of Texas Penal Code §12.42 was added by the Texas 80th Legislative Session in 2007 to become effective September 1, 2007.).

341 Selected portions of Texas Code of Criminal Procedure, Art. 37.072: “...Sec. 2. (a)(1) If a defendant is tried for an offense punishable under Section 12.42(c)(3), Penal Code, in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole... (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually engaged in the conduct prohibited by Section 22.021, Penal Code,
Interestingly, in 2008, the United States Supreme Court in *Kennedy v. Louisiana*[^342] declared unconstitutional a Louisiana statute, similar to Texas Penal Code §12.42 (c)(3), used to convict and sentence to death Patrick Kennedy for raping his 8 year old stepdaughter.[^343]

The Louisiana Supreme Court applied a balancing test set out in *Atkins*[^344] and *Roper*[^345] examining whether there was a national consensus on capital punishment for crimes less than death and whether such punishment was excessive.[^346] The Louisiana Court affirmed Kennedy’s conviction and death sentence finding “the death penalty for the rape of a child under twelve is not disproportionate.”[^347] The Louisiana High Court believed adoption of similar laws in five other states justified the death


[^343]: See La. Stat. Ann. § 14:42 (West 1997 and Supp.1998). “A. Aggravated rape is a rape committed ... where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances: .....(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense. ..... D. Whoever commits the crime of aggravated rape shall be punished by life imprisonment without parole rather than a death sentence be imposed...” See CODE CRIM. PRO. ANN. art 37.072 (Vernon Supp. 2007); CODE CRIM. PRO. ANN. art. 37.071 (Vernon Supp. 2005) (procedure in a capital murder case); CODE CRIM. PRO. ANN. art. 38.36(a) (Vernon Supp. 2001) (for the procedure for offenses committed before September 1, 1991).


[^345]: Roper v. Simmons, 543 U.S. 551 (2005) (executing a person who was under 18 when capital crime was committed is cruel and unusual).

[^346]: State v. Kennedy, 957 So.2d 757 (La. 2007).

[^347]: Id. at 759.
penalty in this situation and showed a trend toward adoption of such statutes.348

Kennedy argued five states did not constitute a "national consensus" for the purposes of Eighth Amendment analysis of the death penalty for the rape of a child, that Coker v. Georgia349 should apply to all rapes regardless of the age, and that the Louisiana statute violated the Eighth Amendment for failing to narrow the class of offenders eligible for the death penalty.350

In a 5-4 decision,351 the U.S. Supreme Court held the Eighth Amendment bars states from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the child's death.352 Applying the death penalty in such a case would be an exercise of "cruel and unusual punishment" in violation of a national consensus on this issue and the country's evolving standards of decency.353

This decency “presumes respect for the individual and thus moderation or restraint in the application of capital punishment.”354 The Court felt there were “special risks of wrongful execution” as the primary

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348Id. at 788. The five states adopting similar statutes to Louisiana were Georgia: Ga. Code Ann. §16-6-1; Montana: MCA 45-5-503; Oklahoma: 10 Okl. St. Ann. § 7115(K); South Carolina: S.C. Code 1976, §16-3-655(C)(1); and Texas: V.T.C.A., Penal Code § 12.42(c)(3). Justice Kennedy, writing for the majority of the Court, noted that all but Louisiana had “narrowed” their statute in that only those that have been previously convicted of a sexual assault crime would be eligible for the death penalty. Kennedy, 128 S.Ct. at 2651. This language should not be taken lightly and could be a sign the court (more particularly Justice Kennedy) is open to more “narrow” statutes in capital felonies, where death of the victim does not occur and is not intended, that satisfy Furman, Gregg, Profitt, and Jurek (citations omitted).

349Coker v. Georgia, 433 U.S. 584 (1977) (applying the death penalty for rape of an adult was cruel and unusual).

350Brief for Petitioner on Writ of Certiorari to the Louisiana Supreme Court in the Supreme Court of the United States, No 07-343, at Questions Presented p. i, Kennedy v. Louisiana, 128 S.Ct. 2641 (2008).

351Justice Kennedy delivered the opinion of the majority in which Stevens, Souter, Ginsburg, and Breyer, JJ, joined.

352Kennedy, 128 S.Ct. at 2646.

353Id. at 2649.

354Id. at 2658; see Trop v. Dulles, 356 U.S. 86, 100 (1958) (“[T]he words of the [Eighth] Amendment are not precise and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). Trop, 356 U.S. at 100-01.
witness can be unreliable because of her special vulnerability to being induced into providing false testimony or the opportunity she may provide imagined testimony.\textsuperscript{355} Further, the Court felt asking a child to participate in a legal process that takes years forces the child to make a moral choice before she is of “mature age to make that choice.\textsuperscript{356}

The minority of the Court wrote there is no national consensus on prohibiting the death penalty of child rapists but the trend is toward its use.\textsuperscript{357} They vehemently oppose the majority’s application of a "blanket condemnation"\textsuperscript{358} barring the death penalty in child rape cases regardless of the facts of the case, including the age of the child, the child’s physical or psychological trauma, the prior record of the rapist, the sadistic nature of the crime, and the number of times the child was raped.\textsuperscript{359}

Whether or not in response to the views of the minority, when the Texas Legislature met for its 81\textsuperscript{st} Legislative Session during 2009 it failed to repeal or remove Texas Penal Code §12.42 (c)(3) or Art. 37.072 of the Code of Criminal Procedure from Texas statutory provisions.

The Texas Legislature and Court of Criminal Appeals must share the responsibility for this lengthy analysis. Had § 19.03 remained as originally approved by the Supreme Court, genuine criticism might be difficult. At that time it was limited and met the requirements of the Court for a substantive Constitutional death penalty scheme. But politicians invariably refuse to leave things alone, and now they have created a monster.

### XVII.
The Legislature’s Expansion of § 19.03

The Texas Legislature never seems to find an end to its assault on the artifice of Texas’ death penalty jurisprudence, §19.03 of the Texas Penal Code. As if not aware that the judicial branch has set the prescripts for

\textsuperscript{355} Kennedy, 128 S.Ct. at 2663.

\textsuperscript{356} Id. at 2662-63.

\textsuperscript{357} Id. at 2673.

\textsuperscript{358} Id. at 2674.

\textsuperscript{359} Id. at 2665. The four dissenting Justices were Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. With the Supreme Court presently undergoing changes in two of those in the majority (and perhaps more in President Obama’s term or soon thereafter), this issue may not be as settled as some believe.
constitutionality, what were five original offenses approved in *Jurek* have ballooned into ten categories encompassing a surprisingly large number of capital crimes.\textsuperscript{360} As shown in Appendix A, there are now at least 142 ways to commit capital murder in Texas.\textsuperscript{361} A creative prosecutor or police officer can almost always figure out a way to charge a murder as capital. Can we now say with certainty that the ordinary person fully realizes or understands what behavior is proscribed?\textsuperscript{362}

Admittedly not scientific, but to illustrate the problem in an anecdotal fashion, I examined the last two dozen cases that included the word “murder” and the penal code murder section “19.02.” Of these 24 cases, 10 were prosecuted as capital murders\textsuperscript{363} but 19 could have been filed as capital murder under the current scheme, 2 more could arguably have been filed as capital, and only 3 could not be fit into §19.03, or I lacked the creativity or failed to have the facts necessary to qualify them.\textsuperscript{364}

\textsuperscript{360}The 9 categories of §19.03 capital murder, and §12.42(c)(3) for the capital felony of repeat aggravated sexual assault of a child. See TEX. PENAL CODE ANN. § 19.03 (Vernon 2005); TEX. PENAL CODE ANN. § 12.42(c)(3) (Vernon 2009).

\textsuperscript{361}See Appendix A.

\textsuperscript{362}A statute must not fail to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. The statute must provide explicit standards for those who would apply the statute to prevent arbitrary and discriminatory enforcement even for the most minor of underlying crimes. Grayned v. Rockford, 408 U.S. 104, 108 (1972).


\textsuperscript{364}Of those 19, 10 were actually filed as capital, and the nine that were filed as “plain” murder are referenced above. The three cases that could not easily fit into an existing capital category were (1) an abused girlfriend shot in the head (which could qualify under retaliation if she had attempted to report a crime or had previously reported a crime) Anderson v. State, No. 01-09-00108-CR, 2010 WL 1839945 (Tex. App.—Hous. [1st Dist.] May 6, 2010, unreported); (2) a woman shot through the front of her house (again, this could have been retaliation but I could not tell from the facts provided the motive for this killing) Franks v. State, No. 03-08-00129-CR, 2010 WL 1730032 (Tex. App.—Austin April 28, 2010, unreported); and (3) a struggle over a loaded weapon that was reversed and should never have been filed as a murder. Chaney v. State, — S.W.3d —, No. 07-08-0476-CR, 2010 WL 2136534 (Tex. App.—Amarillo May 27, 2010).
The nine murders that could have been filed as a capital murder that were filed as simple murder instead included: (1) a victim beat to death in his home and money stolen (robbery-murder or burglary-murder);\(^{365}\) (2) the death of a 12 month old victim (victim under 6);\(^{366}\) (3) the murder of a rival drug dealer where drugs were taken immediately after the murder inferring an intent to commit robbery at the time of the murder (robbery-murder);\(^{367}\) (4) the murder of an estranged wife by her husband during a divorce (retaliation or obstruction);\(^{368}\) (5) the murder of a victim to steal a large amount of marijuana (robbery-murder);\(^{369}\) (6) murder of a wife who had tried to serve stalking husband with protective order (retaliation);\(^{370}\)

The two cases that qualify as “maybe’s” are (1) a drug deal on the street that could have been a murder in the course of committing or attempting to commit a terroristic threat of violence to the victim to control the public areas where drugs were sold (see §22.07(3) Terroristic Threat). M’Bowe v. State, No. 03-09-00160-CR, 2010 WL 2133909 (Tex. App.—Austin May 27, 2010 unreported); and (2) a gang fight where the victim was shot after an altercation in a public area behind the apartments where the fight took place, once again, a threat of violence (“bumping shoulders” and insults) to control a public area shared by competing gangs, or perhaps as a party to a “combination” murder having to do with the profits of the combination originating out of a prison gang relationship. Morales v. State, No. 05-09-00182-CR, 2010 WL 1965889 (Tex. App.—Dallas April 14, 2010 unreported).


\(^{366}\) King v. State, No. 05-08-01716-CR, 2010 WL 2293418 (Tex. App.—Dallas June 9, 2010, unreported) (Murder of a child under 6 can be intentional or knowing.).

\(^{367}\) Ramsour v. State, No. 05-09-00094-CR, 2010 WL 1909595 (Tex. App.—Dallas May 12, 2010, unreported) (Defendant claiming self defense intentionally shot victim who was in a wheelchair and then took others into nearby apartment and took drugs.).

\(^{368}\) Langley v. State, No. 03-08-00722-CR, 2010 WL 1632700 (Tex. App.—Austin April 23, 2010, unreported) (Murder in retaliation or for obstruction must be intentional. Langley told his son he was going to kill his wife before leaving his home, upon returning home Langley told his son he shot “her,” and then Langley called 911 and told them he had shot and killed his estranged wife. When police found the victim she had sustained multiple gunshot wounds and was dead. It would be difficult not to see this as an intentional act.).

\(^{369}\) Wells v. State, — S.W.3d —, No. 04-08-00668-CR, 2010 WL 1486642 (Tex. App.—San Antonio April 14, 2010) (Defendant and another man tied victim with zip ties and duct tape, shot victim in head to steal 50 pounds of marijuana. No argument that the shooting was by anything less than intentional. Defendant claimed he did not do the shooting but the court found he was responsible as a party.).

\(^{370}\) Dozier v. State, No. 01-08-00901-CR, 2010 WL 1241558 (Tex. App.—Hous. [1st Dist.] April 1, 2010, unreported) (Murder in retaliation must be intentional. Dozier bought a gun and two boxes of ammunition. The next day Dozier rented a car and went to his wife’s employment. After a confrontation in the parking lot, the victim threatened to call the police, turned to go back into her workplace and began dialing her cell phone.}
murder of man who was subject to repossession of property by an employee of his creditor (remuneration);\textsuperscript{371} (8) a felony murder DWI for killing two pedestrians (killing more than one person during same transaction);\textsuperscript{372} and (9) the murder of a 17 month old son by his father (victim under 6).\textsuperscript{373}

That is 19 of 24 cases (and perhaps 21 of 24 cases) chosen at random. Almost 80\% of the sample reported cases involving the intentional or knowing death of another could have been filed as capital. Some would argue so many capital murders were reported was because many “plain” murders are pled guilty, foreclosing an appeal. Perhaps it is an anomaly, but by examining the facts of just the reported cases filed as murders, which cases could have been filed as capital, one sees a pattern.

I believe the prosecutors of Texas are exercising more discretion, in Dallas and Houston in particular.\textsuperscript{374} It would not have been surprising if all nine of these murders, a few years past, would have been filed as capital murders. But because prosecutors - for whatever reason - are choosing not to file cases as capital, points to exactly the problem in the early 1970’s addressed in Furman – the arbitrary and capricious exercise of the power to place one person in jeopardy for a capital sentence and allow another to face less harsh sentencing, and the continued over-representation of minorities among those on death row. We have returned once again to those pre-Furman days. The current Texas scheme has again become large and unwieldy, and lends itself to prosecution for a capital crime at the whim of the State. Even Chief Justice Burger who wrote a dissent in Furman agreed the states must “restrict the use of capital punishment to a small category of the most heinous crimes.”\textsuperscript{375}

Pandering to a political climate it perceived as requiring more and more crimes to become death eligible, the Texas Legislature, over the past

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\textsuperscript{371} Hernandez v. State, 309 S.W.3d 661 (Tex. App.—Hous. [14th Dist.] 2010) (Murder for remuneration can be intentional or knowing.).

\textsuperscript{372} Sandoval v. State, —S.W.3d—, No. 08-08-00189-CR, 2010 WL 672162 (Tex. App.—El Paso Feb. 26, 2010) (A mass murder may be knowing or intentional.).

\textsuperscript{373} Hampton v. State, No. 2-09-021-CR, 2010 WL 670033 (Tex. App.—Fort Worth Feb. 25, 2010, unreported) (Murder of a child under 6 can be intentional or knowing.).

\textsuperscript{374} But with the shifting sands of politics, the election of prosecutors with less understanding and perverse political ambitions could quickly return us to the wholesale calamitous prosecution of capital murder.

\textsuperscript{375} Furman v. Georgia, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting).
34 years, has greatly expanded capital murder - including crimes that seldom occur. Texas no longer has that rational, “effective mechanism” for narrowing those who are death-eligible as was approved in Jurek. 376 A critical examination of some of the rulings of the Court of Criminal Appeals, outlined above, will underscore the Court’s participation in this development.

XVIII.
The Court of Criminal Appeals’ Complicity

As if oblivious to this growth in death eligible offenses, the Texas Court of Criminal Appeals - on the whole - takes a result oriented, outcome approach to shaping and interpreting the law. The same political pressures felt by the Legislature, in a state that is dominated by one political ideology, seem to direct the Court’s interpretations and decisions. Although there are voices of reason on the Court, the majority continues its journey toward the day those with supervisory authority over their actions will once again declare an end to this process as they did in Furman, finding that “the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature.” 377

Within the footnotes accompanying the above compilation, are numerous occasions where I wonder about the machinations of the Court, to-wit: (1) the trial court’s keying on defense counsel’s use of the words “mental capacity,” refusing to allow argument on reduced mens rea, and the high court side-stepping the issue using the old “incomplete record” dodge; 378 (2) “no evidence” showing a connection between a defendant’s low intellectual functioning and his perception that he was shooting at the police; 379 (3) mens rea of a party to a robbery – who participated only in the preparation, albeit he provided the guns - “supplies” the mens rea for a capital murder committed by a co-conspirator ignoring Enmund’s requirement of proof of the attenuated party’s intent to commit the murder and mentioning - but not addressing - Tison’s “reckless indifference” test required to allow the attenuated party’s execution, using instead the “should have anticipated” language of Penal Code § 7.02(b) to allow


377 Furman, 408 U.S. at 241 (Douglas, J., concurring).


Overview of §19.03 Texas Penal Code

conviction and the anti-parties charge of Art. 37.071 C.C.P. to allow a sentence of death;\(^{380}\)(4) placing the blame on trial counsel for failing to make requests for a charge or objections to the charge and refusing to rule on the merits of the defendant’s complaints;\(^{381}\)(5) refusing to decide if a defendant’s rights to due process were violated because his status as a party was not alleged in the indictment or passed on by the fact finder in violation of Supreme Court precedent because the issue was not preserved for appeal;\(^{382}\)(6) criticizing the prosecution for allowing a Defendant’s statements to go unchallenged; \(^{383}\)(7) proof of a theft occurring immediately after an assault is enough evidence from which intent to commit a robbery can be inferred, justifying a capital murder charge; \(^{384}\)(8)


\(^{381}\)There are too many cites to list them all, but see Tolbert v. State, 306 S.W.3d 776 (Tex. Crim. App. 2010) (finding the trial court was not required to \textit{sua sponte} provide [a] jury instruction). Why not? That’s one of the few trial court’s responsibilities during a trial. If the court fails to provide a charge, the blame should be placed where it belongs. Why have we developed a jurisprudence that places the burden on the defense counsel to be the only lawyer in the room that knows the law?


\(^{383}\)Palafox v. State, 608 S.W.2d 177 (Tex. Crim. App. 1979), \textit{superceded by statute} (TEX. R. EVID. 607) \textit{abrogation recognized by} Janecka v. State, 937 S.W.2d 456 (Tex. Crim. App. 1996, reh. denied) (In Palafox, the state introduced the Defendant’s written statement denying his intent to commit a burglary with the intent to commit theft, as he said the murder was done in its own right and he tried to make the house look like there was a burglary. The issue of the Defendant’s intent was much more black and white because of the statement, admitted by the state. The state was criticized by the Court for allowing the Defendant’s statements on his intent to go unchallenged, as if the Court was disappointed that the prosecution did a poor job and thereby the Court was forced to find in the Defendant’s favor. Why else would the Court criticize the state? Perhaps there was no evidence available to challenge the Defendant’s statements of his own intent. It’s not beyond the realms of possibility the Defendant was telling the truth of his intent.).

\(^{384}\)Cooper v. State, 67 S.W.3d 221, 225 (Tex. Crim. App. 2002). After many agonizing efforts with the intent issue, including allowing intent to be inferred by the facts and eventually allowing the simple commission of the underlying crime following a murder to prove intent, the Dissent in Cooper makes it plain the jurisprudence may be reaching its outer limits. Now the rule removes the fact finder from the decision of whether the intent to commit the underlying crime existed prior to or during the commission of the murder and allows intent to be assumed by the prompt commission of an element of the underlying crime, thereby effectively removing from the definition of a §19.03(a)(2) capital felony the element of intent to commit the underlying crime prior to or during the commission of the murder. The Dissent in Cooper would place the responsibility squarely in the fact finder’s lap for the determination of whether the facts, and inferences drawn from those facts, prove the requisite intent was formed at the appropriate time to turn the related murder into a capital felony. The CCA should not allow the assumption of an element of a capital crime that should be proven beyond a
the shooting of a sexual assault victim’s companion after both were set free was in the course of committing aggravated sexual assault;\textsuperscript{385} (9) the failure to acknowledge other Judges’ concerns that the use of kidnapping as an aggravator for a capital prosecution may be overbroad;\textsuperscript{386} (10) allowing a murder to be used to show the nexus between the murder and a burglary to commit a felony with no other showing of intent to commit a burglary thereby allowing a capital prosecution;\textsuperscript{387} (11) allowing “theft” occurring after a person is dead to infer the actor’s intent prior to the murder even though one can no more steal from the dead than kidnap or sexually assault the dead;\textsuperscript{388} (12) the use of general verdicts to remove the necessity for specific proof of each crime alleged in the indictment, even if they are just alternate ways of proving a capital murder occurred;\textsuperscript{389} (13) the use of obstruction or retaliation as an aggravator when only mere “harm” of “attempted harm” is alleged and no injury is sustained by the victim;\textsuperscript{390} (14) excusing an indictment which was defective for failing to set out the elements of the crime because the defendant’s substantial rights were not affected;\textsuperscript{391} (15) refusing to rule on a defendant’s claim that a statute is unconstitutional because the issue was raised using a pre-trial motion to quash;\textsuperscript{392} (16) refusing to rule on constitutional challenges reasonable doubt. See Texas Code of Criminal Procedure, art. 38.03, Presumption of Innocence. “All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. . . .”

\textsuperscript{385}Dorough v. State, 639 S.W.2d 479, 480 (Tex. Crim. App. 1982).

\textsuperscript{386}See Brimage v. State, 918 S.W.3d 466, 490 (Miller, J., concurring and dissenting, opinion joined by Baird, J.).


\textsuperscript{388}See supra, note 162.

\textsuperscript{389}Gardner v. State, 306 S.W.3d 274 (Tex. Crim. App. 2009) (The facts of Gardner led the CCA to the ridiculous conclusion that the defendant took his own keys to his estranged wife’s home, let himself in against the victim’s wishes (totally made up facts), killed his wife, then took her keys from her purse, locking the house up and leaving her keys outside in a toolbox before leaving, then stopping down the road to throw his keys away (again totally made up). The CCA ignored discussing the retaliation aspects, which made much more sense, but focused on finding the evidence led to these conclusions. This case is obviously a murder, not a capital murder, but because of the use of retaliation it fits under §19.03. No rational jury could possibly have found a burglary in this case. There was no forced entry and the defendant was obviously contacting the victim to try to reconcile their marriage. Perhaps the CCA did not address the retaliation aggravator, as they too believe it is constitutionally vague or over broad); see also Russeau v. State, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005).

\textsuperscript{390}See supra, note 181.


because of the form of the motion; constitutional challenge overruled because it was not in the petition for discretionary review; not taking up an “as applied” constitutional challenge because it was not addressed at trial; and failing to address overbroad and equal protection arguments even though other Judges warned of problems with the statute.

In particular, the concept of assumption of intent by inference in the robbery-murder scenario is particularly troubling. One wonders if this rationale extends to any underlying crime of §19.03(a)(2)? Most likely the answer is “no.” But how does the CCA distinguish the robbery-murder scenario from other situations in §19.03(a)(2)? Is robbery-murder subject to its own unique rule?

For example, if a defendant commits murder and the allegation is he did it either prior to or in the commission of committing or attempting to commit aggravated sexual assault, will the nexus exist if the evidence shows nothing more than the actor completed the sexual intercourse after the murder? Murder is intentionally or knowingly causing the death of an individual. An individual is defined as a human being who is alive. Therefore, sexual intercourse after a murder could not be assumed to establish the proper nexus to make the murder rise to a capital felony. But why not?

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395 Flores, 245 S.W.3d at 437, fn 14.
396 Flores, 245 S.W.3d at 442 (Cochran, J., concurring).
397 TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994).
398 TEX. PENAL CODE ANN. § 1.07(26) (Vernon 1994).
399 Santellan v. State, 939 S.W.2d 155 (Tex. Crim. App. 1997) (Defendant was indicted and convicted for the offense of capital murder (murder committed in the course of attempting to commit kidnapping). Evidence showed for two days after the victim’s death the Defendant had various sexual relations with the corpse of the victim. The abuse of the corpse was a legally separate offense to the indicted offense under TEX. PENAL CODE ANN. § 42.10 (Vernon 1994). Abuse of Corpse.); see White v. State, 779 S.W.2d 809 (Tex. Crim. App. 1989) (Theft from a corpse does not provide the nexus to raise the theft to robbery thereby creating the nexus between the theft and the previous murder to create a capital felony.).
Are the courts making an assumption that an actor will not follow through with his intent to have sexual intercourse with the victim merely because she dies? Where does this jump in logic originate? Using the reasoning and language of Cooper, the inference that the requisite intent to commit the underlying crime of sexual assault was made at the appropriate time to make the murder a capital felony “will not be negated by evidence of an alternative motive that the jury could rationally disregard [that the actor is a necrophiliac and did not intend a sexual act until the victim was dead].”

Isn’t this the same logic applied in the robbery-murder scenario?

The concepts of assumption of intent by inference, and bootstrapping murder to the underlying aggravating crime to create a nexus - as in the burglary-murder situation - are not well thought out. These rationales are the result of the use of assumptions in other areas of the criminal law to bypass long standing legal traditions of burden of proof and presumption of innocence. The Court’s tendency, all too often, is to bend precedent

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401 The use of assumptions (presumptions) removes elements that may make a prosecution more difficult. This list is not exhaustive but shows the degree to which Texas has embraced this concept. (1) There is the assumption (presumption) that one is intoxicated if one has an alcohol concentration of 0.08 or more, creating a presumption of intoxication that the defendant must disprove. TEX. PENAL CODE ANN. § 49.01(2)(B). (Vernon 2001); (2) Sexual assault being one of the enumerated sexual acts with a child (a person younger than 17 years of age) without regard to consent (with some exceptions) TEX. PENAL CODE ANN. § 22.011(a)(2) (Vernon 2009); (3) Aggravated sexual assault being the same basic behavior with a person younger than 14 years of age (with exceptions). TEX. PENAL CODE ANN. § 22.021(a)(B) (Vernon 2009); (4) See Johnson v. State, 967 S.W.2d 848 (Tex. Crim. App. 1998) (Mistake of fact regarding complaint’s age was no defense as to aggravated sexual assault or sexual assault of a child); (5) Aguirre v. State, 22 S.W.3d 463, Fn 48 (Tex. Crim. App. 1999) (discussing Zubia v. State, 998 S.W.2d 226 (Tex. Crim. App. 1999) (Indecency with a child statute did not require state to prove defendant knew the victim was under 17 years of age, the mens rea does not apply to the age of the child, implying rule is the same for capital murder of child under six)); (6) A person is presumed to possess any obscene material, device or image if he possesses six or more of them. TEX. PENAL CODE ANN. § 43.23 & §43.26 (Vernon 2003); (7) Even to some extent the defendant’s burden in a 4th Amendment challenge to rebut the presumption of proper police conduct, see Amador v. State, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007); (8) Presumption that business owner knows property is stolen if he acts knowingly or recklessly in loaning $25 or more (with restrictions). TEX. PENAL CODE ANN. § 31.03 (Vernon 2009); (9) Presumption that deadly force is reasonable in certain circumstances TEX. PENAL CODE ANN. § 9.32(b) (Vernon 2007); (10) Presumption that one knew the person was public servant. TEX. PENAL CODE ANN. § 22.01(d), § 22.02(c), § 22.11(e) & § 38.14(c) (Vernon 2009); (11) and the following offenses all in TEX. PENAL CODE ANN., to-wit: § 22.041(c)(1) Endangering a Child, §22.05 Deadly Conduct, §28.03 Criminal Mischief, §31.04 Theft of Service, §31.06 Theft by Check, §32.21 Forgery, §32.31 Credit Card Abuse, §32.33 Hindering Secured Creditor, §32.34 Fraudulent Transfer of a Motor Vehicle, §32.35 Credit Card Transaction Record Laundering, §32.41 Issuance of Bad Check, §32.49 Refusal to Execute Release of Fraudulent Lien or Claim, §32.51 Fraudulent Use of Possession of Identifying
and legal tenets to make the conviction of an accused easier and more certain.

**XIX. Evolving Standards of Decency**

Because executions are down in the United States, there are those that would argue that this is much ado about nothing. As Figure 1 shows, during the 33 years following *Gregg*, *Profit*, and *Jurek* and the reinstatement of executions, after the first 20-year increase, in the last 10 years there has been a dramatic decrease in executions nationwide. During this same period, even in Texas, executions have shown a flattening (if not a subtle decline) as shown in Figure 2. Figure 3 confirms this trend continues as the executions of Whites in Texas have taken a marked downturn.

Those opposing the death penalty should take these statistics as encouraging that the “evolving standards of decency,” which some

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Information, §34.02 Money Laundering, §37.10 Tampering with Governmental Record, §38.12 Barratry and Solicitation, §42.01 Disorderly Conduct.

402 “For there was never yet philosopher that could endure the toothache patiently.” William Shakespeare (1564–1616), *Much Ado About Nothing*, Act v, sc. 1.

403 All execution statistics in Figures 1-5 are from the Texas Department of Criminal Justice, available at [http://www.tdcj.state.tx.us/stat/annual.htm](http://www.tdcj.state.tx.us/stat/annual.htm).

404 *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“[T]he words of the [Eighth] Amendment are not precise and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). *Trop*, 356 U.S. at 100-01. (Warren, C.J.)

Justice Scalia remarked, “[I]f you think that [the Constitution] is meant to reflect ... the evolving standards of decency that mark the progress of a maturing society – if that is what you think it is, then why in the world would you have it interpreted by nine lawyers? What do I know about the evolving standards of decency of American society? I’m afraid to ask.” (Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C., March 14, 2005, available at [http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm).)

Here is the reason:  “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .” USCA CONST Art. III, Sec. 2. When deciding matters involving the 8th Amendment to
the U.S. Constitution it is the job of the judiciary to interpret the law. The use of nine lawyers (or thousands of lawyers in the lower courts) is the way it was “originally” intended. These lawyers are members of this society and bring with them those experiences. There is no requirement - and indeed it would be a mistake - for the judiciary to remain sequestered from society. “Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.” Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (“It is emphatically the province and the duty of the judicial department to say what the law is.”).

Arguing recently about the role of the Second and Fourteenth Amendments, Justice Scalia held fast to his “public be damned” attitude in knowing which rights should be protected while channeling the framers of the Constitution, “[I]t would be “judicial abdication” for a judge to “tur[n] his back” on his task of determining what the Fourteenth Amendment covers by “outsourc[ing]” the job to “historical sentiment,” . . . that is, by being guided by what the American people throughout our history have thought. It is only we judges, exercising our “own reasoned judgment,” . . . who can be entrusted with deciding the Due Process Clause’s scope-which rights serve the Amendment’s “central values,” . . . which basically means picking the rights we want to protect and discarding those we do not.” McDonald v. City of Chicago, Ill., --- S.Ct. ----, 2010 WL 2555188 *29 (June 28, 2010) (Scalia, J., concurring).

As if by a parting “shot,” so to speak, Justice Stevens waxes philosophically about the role of history, changing public opinions and those that interpret the language of the Constitution by their own historical interpretations of the late 18th Century. “Not only can historical views be less than completely clear or informative, but they can also be wrong. Some notions that many Americans deeply believed to be true, at one time, turned out not to be true. Some practices that many Americans believed to be consistent with the Constitution’s guarantees of liberty and equality, at one time, turned out to be inconsistent with them. The fact that we have a written Constitution does not consign this Nation to a static legal existence. Although we should always “pa[y] a decent regard to the opinions of former times,” it “is not the glory of the people of America” to have “suffered a blind veneration for antiquity.” The Federalist No. 14, p. 99, 104 (C. Rossiter ed. 1961) (J. Madison). It is not the role of federal judges to be amateur historians. And it is not fidelity to the Constitution to ignore its use of deliberately capacious language, in an effort to transform foundational legal commitments into narrow rules of decision.” McDonald v. City of Chicago, Ill., --- S.Ct. ----, 2010 WL 2555188 at *89 (Stevens, J., dissenting).

In continuing to decide “the rights we want to protect and discarding those we do not,” [emphasis added] “we” should recognize the tide of opinion worldwide condemning the continued use of capital punishment. The Supreme Court should read its own opinion, “Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, [footnote omitted] that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.” McDonald v. City of Chicago, Ill., --- S.Ct. ----, 2010 WL 2555188 at *24. Should not the protections of the Eighth Amendment be just as important as the protections of the Second? Is stare decisis only applicable should it limit or interpret Second Amendment rights? But unlike in McDonald, in protecting Eighth Amendment rights, stare decisis does provide us counsel. The current court is duty bound by stare decisis to always be alert to those “evolving standards of decency that that mark the progress of a maturing society” in interpreting Eighth Amendment jurisprudence and to give those standards effect. Trop, 356 U.S. at 100-01. Paraphrasing Justice Scalia, if you think Trop was a
ridicule, are indeed leading us toward a more mature society. There will be those that will argue that the reduction in executions shows that the system is working, that proper discretion is being applied by the prosecution, and that the courts are thereby appropriately punishing the guilty, removing violent people to the safe confines of prison and deterring others from committing similar crimes. Whether or not this is true is for others to debate as the reasons for the downturn in executions nationwide are probably varied and as individual as the states themselves.

The basis of my complaint is that the Texas substantive capital murder statute (Texas Penal Code §19.03) has become unwieldy and impossible for the ordinary person to understand, and those that are prosecuted for capital murder, are convicted, placed on death row, and ultimately executed are once again subject to the capricious whims of prosecution and appellate review.

Complaining of the death penalty systems in effect in 1976, Justice Douglass commented, “we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.” So the question remains, after decades of capital litigation, are those accused of capital crimes still the recipients of such prejudices?

If the trends on executions of minorities reflected in Figures 4 & 5 are any indication, perhaps those old prejudices, examined in Furman, require the courts to take another look at the Texas death penalty scheme. As executions are generally on the decline, even in Texas, do these charts really need comment? African Americans, who are 12.8% of the U.S.

bad idea and it should no longer be the law, persuade your fellow members of the Court to overrule it. Ridicule tastes most bitter off the lips of a Supreme Court Justice.

population and 11.9% of the Texas population, still represent 41.53% of those on death row nationwide and 38.7% in Texas. Shockingly, in 2008 African Americans were 50% of those executed in Texas, 54% in 2009, and 58% in 2006.

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409 Texas Department of Criminal Justice, Executions by Year, June 16, 2010, available at http://www.tdcj.state.tx.us/stat/annual.htm. For those that wonder if African Americans commit 50% to 58% of the homicides in Texas, statistics for 2008 show of the 1003 arrests for murder and manslaughter, African Americans accounted for 30% of the total. Although 33% of the murder arrests were African American only 10% of the manslaughter arrests were Black. This begs the question, if 90% of the arrests for manslaughter were White, does this not indicate some prosecutorial or law enforcement bias in favor of Whites being charged with the lesser offense of manslaughter? Further study should be done. However, the crime statistics provided by the Department of Justice do lump murder and manslaughter arrests together in one category so the same convention is used here. Interestingly, African Americans nationwide are indeed 50% of the 9859 arrests for murder and manslaughter showing perhaps a predilection for Texas African Americans to actually be less violent in the homicide category raising the question of why so many Blacks are sent to death row and executed disproportionate to their population overall? In fact, of the total arrests in Texas during 2008, African Americans were 25% of the total in all categories (the reasons for this are probably more to do with socio-economic causes than proclivity for violence and law breaking). State crime statistics are available at The Texas Crime Report for 2008 http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm; The Department of Justice statistics can be found at http://www.fbi.gov/ucr/cius2008/data/table_05.html.

Studies have indicated there may be other reasons African Americans are disproportionately represented on death row which are directly tied to the complaints brought by this paper. Because of the difficulty in understanding the language of Art. 37.071 C.C.P. “the deliberation process [of a death jury] not only fail[s] to eliminate or reduce the race-based effects that have been identified in many experimental studies of individual juror-level sentencing behavior, but to the contrary, seen[s] to activate and amplify racialized decision-making.” Further, mitigation is not weighed as heavily for Blacks as Whites and White jurors tend to sentence Blacks to death more frequently than if the Defendant is White. Mona Lynch & Craig Haney, Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination, 33 LAW & HUM. BEHAV. 481-496 (2009); See also T.L. Mitchell, R.M. Haw, J.E. Pfeifer, & C.A. Meissner, Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 LAW & HUM. BEHAV. No. 6 (2005) (finding that a small, yet significant, effect of racial bias in decision-making is present across studies, comparing contemporary studies in light of much earlier conflicting studies). It would be only natural that the racial bias endemic in the jury process must also find its way into other aspects of the capital punishment system, such as to the number of minorities executed disproportionate to their population on death row, which is already significantly
disproportionate to African American’s population in general by over 300%. Even to the most ardent supporter of the death penalty, unless they believe African Americans are inherently more violent that others, these statistics must be troubling.

The Baldus study, discussed in the early case of McCleskey v. Kemp, highlights another strong argument that racial bias has existed all along - even from the early years - in the decision making process in capital cases. The study, based on over 2,000 murder cases in Georgia in the 1970’s, indicated defendants of all races with white victims received the death penalty in 11% of the cases, but defendants of all races with black victims received the death penalty in only 1% of the cases. Among other findings were (1) black defendants with white victims were given the death penalty in 22% of the cases and white defendants with white victims got the death penalty in 8% of the cases; (2) the death penalty was given in only 1% of the cases with black defendants and black victims and 3% of the cases with white defendants and black victims; (3) prosecutors sought death in 70% of the cases with black defendants and white victims, 32% of the cases with white defendants and white victims, 15% of the cases with black defendants and black victims, and 19% of the cases with white defendants and black victims; and (4) that those with white victims were 4.3 times more likely to be given death than those with black victims. Baldus, Pulaski, & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661, (1983); see McCleskey v. Kemp, 481 U.S. 279 (1987).

In 2009, North Carolina passed its “Racial Justice Act” allowing defendants to use statistical evidence to prove racial bias in how the death penalty is applied. N.C.G.S.A. Ch. 15A, Subch. XV, Art. 101 (“No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.” N.C.G.S.A. § 15A-2010).

With this in mind, comes contemporary research in the new study forthcoming in the North Carolina Law Review by Michael L. Radelet and Glenn L. Pierce entitled Race and Death Sentencing in North Carolina1980-2007 (2010). Therein the researchers examined 15,281 homicides in North Carolina occurring during the years 1980 through 2007 - which included 368 death sentences. The study finds those suspected of “killing Whites are over three times more likely to be sentenced to death than those who are suspected of killing Blacks. Overall, 1.2 percent of those suspected of killing Blacks are sentenced to death, compared to 3.9 percent of those suspected of killing Whites....” (Id. at *16). In North Carolina, the victim’s race is a “strong predictor” of who receives a death sentence in a homicide case and is a “significant factor in the decision to seek...the death penalty.” (Id. at *21-22). The data presented by Radelet and Pierce “reveal strong racial disparities in death sentencing in North Carolina.” (Id. at *23).

Some would argue it is neither cruel nor unusual for a society to execute those who have taken another’s life and it is in fact a tradition of our Judeo-Christian society to do so. But Justice Douglas reminds us it is cruel and unusual to apply any penalty “selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.” Is this evidence that “the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns . . . [and t]he death sentence is disproportionately imposed and

Perhaps Dr. Radelet was taken somewhat out of context when he is quoted as saying that “the race of the defendant doesn’t matter at all” but certainly his findings add to the mountain of data that supports the argument that as long as a system of capital punishment cannot be devised that is race neutral – and there are those that believe it cannot be so created (see infra note 429 and accompanying text as to The American Law Institute) - that the continued use of the current system is on the those that persist to ignore the science.

410 From the Hebrew Bible: Leviticus Chapter 24: 20: “breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him.” From the King James Version of the Christian Bible: Leviticus, Chapter 24: 20: “Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again.” Those that make this argument forget the teachings in the Christian New Testament that it is not ours to reap vengeance. Romans 12: 19: “Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord...” And Hebrews 10:30: “For we know him that hath said, Vengeance belongeth unto me, I will recompense, saith the Lord. And again, The Lord shall judge his people.” To the victim’s families and their loved ones see Matthew 5: 38-39: “Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.” To the accused, Matthew 5:44 “But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you . . . .”

carried out on the poor, the Negro, and the members of unpopular groups,"\(^{412}\) once again?

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\text{"The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."}^{413}
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So which way are our standards of decency evolving? Or, are they changing at all? Surely, we have reached - once again - the outer limits of capital expansion. Or, perhaps not. As Louisiana, Georgia, South Carolina, Montana, Oklahoma, and Texas adopted statutes in recent years approving non-death aggravators, \(^{414}\) the four dissenters in \textit{Kennedy v. Louisiana}, I submit, argue the trend is toward the use of capital punishment in non-death cases, and that but for the majority’s decision, these new statutes could have formed a “strong new evolutionary line.”\(^{415}\)

The story of the failed execution of Romell Broom in Ohio last year should offend even the most ardent death penalty supporters. For almost 2½ hours Broom’s arm was stuck over, and over, and over - 18 times - in an eventual unsuccessful attempt to open a vein in his arm to execute him,

\(^{412}\)\textit{Furman}, 408 U.S. at 249-50 (quoting from The President's Commission on Law Enforcement and Administration of Justice recently concluded (The Challenge of Crime in a Free Society 143 (1967))).


\(^{414}\)\textit{Id.} at 2652.

\(^{415}\)\textit{Id.} at 2665-2673 (Alito, J., dissenting). Seems somehow ironic, on more than one level, that these four would use the word “evolutionary” to describe what could have been, and may yet be, a line of cases of which \textit{Kennedy v. Louisiana} may only be a mutation. “If you go back and read the commentaries on the Constitution by Joseph Story, he didn’t think the Constitution evolved or changed. He said it means and will always mean what it meant when it was adopted.” Justice Antonin Scalia, remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C., March 14, 2005, available at \texttt{http://www.cifif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm}. 


Is this the evolution of decency?\footnote{417}{See the stories of 32 botched executions compiled by Michael L. Radelet, University of Colorado, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#_edn63.}

What about the innocent? The Innocence Project has helped exonerate 241 inmates through post-conviction DNA testing, of which 17 were former residents of death row.\footnote{418}{Lithwick, Dahlia, NEWSWEEK, September 3, 2009, Innocent Until Executed, available at http://www.newsweek.com/2009/09/02/innocent-until-executed.html.}


Given the number of exonerations in recent years, and many off of death row, it seems highly improbable that there has not been at least one innocent person executed despite the hopeful wishes of some.\footnote{421}{It should be noted at the outset that the dissent does not discuss a single case—not one-in which it is clear that a person was executed for a crime he did not commit. If such

\textit{an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt.” Kansas v. Marsh, 126 S.Ct. 2516, 2533 (2006) (Scalia, J., concurring).}
of a capital trial and appeal was $2.3 million, 3 times the cost to house that
inmate for 40 years in a single cell at the highest security level.\footnote{Christy Hoppe, \textit{Executions cost Texas millions – Study finds it’s cheaper to jail killers for life}, \textit{Austin Bureau of the Dallas Morning News}, March 8, 1992 at 1A. See Marc A. Levin, 2009-2010 \textit{Legislators’ Guide to the Issues}, CENTER FOR EFFECTIVE JUSTICE, TEXAS PUBLIC POLICY FOUNDATION, November 2008, at 104, available at \url{http://www.texaspolicy.com/pdf/2009-2010-LegeGuide.pdf} (showing the current prison cost in Texas is $49.40 per inmate per day, which is $18,031 per year, lower than the national average of $24,656).}

According to the TDCJ, the current per day costs on Death Row are computed by the Texas Legislative Budget Board (LBB) since FY 2002. A search of the LBB website (\url{http://www.lbb.state.tx.us/}) did not reveal any current data on death row per-day costs. The LBB showed during FY 2008 a system wide cost per bed at $47.50 an increase of only 8% over the previous 6 years (TDCJ showed costs per-day system wide for FY 2002
was $44.01). It is my opinion LBB’s statistics appear to be politically skewed and inaccurate. In fact, in an email from a public information officer for the LBB, it was confirmed the LBB “does not have a cost-per-day/per-bed metric for Death Row inmates.” One wonders why this statistic is no longer kept? By looking at the costs-per-day/per-bed last computed by the Criminal Justice Policy Council in their report entitled *Mangos to Mangos: Comparing the Operational Costs of Juvenile and Adult Correctional Programs in Texas* prepared for the 78th Texas Legislature, 2003, a political motivation becomes apparent. (The report is available at http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/2003cpd.pdf.) The per-bed cost for Death Row calculated for Fiscal Year 2001 was $60.30 and for Fiscal Year 2002 was $61.63. This is an increase of only 2.2% per year between FY 2001 and FY 2002. If the costs continued to only rise at 2.2% per year, the 2010 cost for Death Row would be $73.35 per-day-per bed. This is almost a 22% increase in costs for the past 9 years at this modest rate of growth. At this rate, in 9 more years the cost of Death Row will be $89.19 per-day or $10.5 million per year assuming the population does not change. At today’s cost, for each year the 323 inmates are kept on Death Row the total cost is a little over $8.6 million compared to the system-wide cost (as per the 2008 $46.51 per-day cost) of almost $5.5 million - an increased cost per year of $3.1 million to house 323 inmates on Death Row until they are executed. It appears politicians do not want people comparing “mangos to mangos” any longer.

The costs of prosecutions and prisons will eventually factor into the debate on the viability of Texas continuing to support capital punishment. Since the time of Ms. Hoppe’s article first mentioned in this note - on a related issue - the criminal justice budget in Texas has increased in 1990 from $793 million to $2.94 billion in 2008 [See Mark A. Levin, 2009-2010 Legislators’ Guide to the Issues, CENTER FOR EFFECTIVE JUSTICE, TEXAS PUBLIC POLICY FOUNDATION, November 2008, at 104, available at http://www.texaspolicy.com/pdf/2009-2010-LegeGuide.pdf]. In this writer’s opinion, the reasons for this alarming growth in spending are twofold. First, even though crime has not risen during this period [See Joe Keohane, *Imaginary fiends*, THE BOSTON GLOBE, Feb. 14, 2010, available at http://www.boston.com/bostonglobe/ideas/articles/2010/02/14/imaginary_fiends/] (showing that across the country, FBI data shows that crime last year fell to lows unseen since the 1960s - part of a long trend that has seen crime fall steeply in the United States since the mid-1990s), the people of Texas – through their Legislature - have fallen in love with using criminal justice agencies, including law enforcement and correctional facilities - instead of social service agencies - to punish the outcomes rather than treat the causes of crime and poverty. Second, the people of Texas fail - or refuse - to distinguish crime from sin or the criminal from the mentally ill. Although there are efforts being made, on the whole, our state shamefully ignores the causes of why one would abuse drugs or alcohol as a method of coping with life and refuses to fully accept responsibility to those with medical problems who cannot seek a remedy by themselves. A more productive use of available resources away from killing our own - to helping our own - seems more appropriate.

As North Carolina has 173 people on Death Row, and Philip Cook calculates the savings to North Carolina at $11 million per year by abolishing their Death Row, Texas could easily save an equivalent of $20 million per year when all contributing factors are considered. Further study should be done in these areas. It appears that Texas will abolish the death penalty when it can no longer financially afford it.
XX. Conclusion

As I prepared this compilation of over 30 years of vitiating §19.03 jurisprudence, our political institutions, the Texas Legislature (Legislative), the prosecutors (Executive), and the Court of Criminal Appeals (Judicial), confirm and reinforce what we have been told for many years about the capital punishment scheme in Texas, that this whole process has little to do with “Justice” and everything to do with the maintenance of political power.426

What does it say about a society that ties a man to a chair, puts a sack over his head, puts a Velcro target on his chest, and has five other human beings put four 30-30 cal. bullets through his heart? What began with the firing squad execution of Gary Gilmore in 1977 in Utah, has come full circle with the firing squad execution of Ronnie Lee Garner in June, 2010, again in Utah. This is not an evolution, but a disintegration of decency - an all out attack on the soul of our people. Garner’s execution has opened up the debate once again.427

In Texas, as a society, we find ourselves right back where we began – putting people to death through a system that arbitrarily selects minorities for prosecution and execution by over three times their population. In Texas, where there are 142 different ways to commit a capital crime – well beyond the ordinary person’s ability to understand what behavior is proscribed. In Texas, the state that steadfastly clings to a statute making

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426 Thank you to Millard Farmer of Atlanta, Georgia, whose words are never forgotten and who continues to inspire and illuminate.

427 Smart, Christopher, THE SEATTLE TIMES, June 16, 2010, Utah Execution Reopens Death Penalty Debate, available at http://seattletimes.nwsource.com/html/nationworld/2012136377_utahdeath17.html?syndication=rss; see FOX 13 News, KSTU-TV, Salt Lake City, Utah, report by Shauna Khorrami who described the execution. The website said, “[a] hood was placed over Gardner's head and a physician attached a Velcro target to his chest in front of his heart. . . . a five-person firing squad, four using live rounds and one using a blank, took aim at the target on Gardner's chest. . . . counting down from five. . . shots were fired as the number two was pronounced. . . . Gardner's body tensed at the moment the four rounds of 30-30 caliber bullets hit their target. After the shots were fired, Gardner's fingers still moved. His left arm starting moving up and back. He clenched his fists. . . some thought he was still alive. . . . The four shots left holes in the back of the chair which Gardner sat in. The medical examiner checked for a pulse. He checked Gardner's eyes. His mouth was open. He was described as ashen. A small pool of blood was believed to have gathered at his waist, although it is difficult to say as he was wearing a navy blue jumpsuit. Gardner was pronounced dead at 12:17 a.m.” It was described by the reporter as “a violent death.” Available at http://www.fox13now.com/news/firingsquad/kstu-utah-man-facing-firing-squad-execution-ronnie-lee-gardner.0.7337567.story. Charming.
capital the sexual assault of a child where death was not intended. In Texas, where only one White person has ever been executed for the killing of a Black person.\(^{428}\)

In October 2009, The American Law Institute, the premier intellectual source for pro-death penalty scholarship, abandoned their efforts in this arena “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”\(^{429}\) Reasons given were the impossibility of designing a death penalty system that would be fair, without racial disparities, that would not be enormously expensive, that would not risk executing innocent people, and was not affected by the political underpinnings involving elected officials.

Professor Samuel R. Gross, the Thomas and Mabel Long Professor of Law at the University of Michigan Law School, is quoted saying law students will learn the “same group of smart lawyers and judges — the ones whose work they read every day [who drafted the model penal codes and the initial basic death penalty structure for the Supreme Court’s decisions in *Gregg*, *Profitt*, *Jurek* and their progeny] — ha[ve] said that the death penalty in the United States is a moral and practical failure.”\(^{430}\)

\(^{428}\) The only White person executed in Texas for killing an African American was Larry Allen Hayes from Conroe, Montgomery County, Texas. On July 15, 1999, Mr. Hayes killed his wife, Mary Evelyn Hayes, a White woman, and 18 year old Rosalyn Ann Robinson, a Black woman, who was working at a nearby convenience store. After shooting Ms. Robinson, Mr. Hayes took her car. Mr. Hayes volunteered for his execution on September 10, 2003 after spending less than three years on death row. As the average length of time on death row is 10.26 years, and Mr. Hayes was received on death row in May, 2000, had he pursued his appeals Mr. Hayes would probably still be alive and Texas would still be waiting its first execution of a White person for the murder of a Black person. Hayes v. State, 85 S.W.3d 809 (Tex. Crim. App. 2002); see http://www.tdcj.state.tx.us/stat/drowfacts.htm.

Additionally on death row are the only other White men that run a reasonably good chance of actually being executed for murdering an African American in Texas since *Jurek*. Lawrence Russell Brewer and John William King were sentenced to death for the horrific killing of an African American man, James Byrd, Jr., on June 7, 1998, in Jasper, Jasper County, Texas. Their co-defendant, Shawn Allen Berry, was the last to be tried of the three and was given a life sentence by a jury. Should one or both of these men be executed, their deaths will be the first in Texas where the victim or victims did not include another White person.


As states such as New Mexico\textsuperscript{431} and New Jersey\textsuperscript{432} abolish their death penalty, and states such as California have no executions,\textsuperscript{433} the Court of Criminal Appeals in Texas finds every way to justify these prosecutions by bending definitions of intent, avoiding making constitutional rulings, and creatively applying the facts of a case to the law to allow our unconstitutional system to flourish.

As the Legislature expands the number of crimes eligible as aggravators to 142, and reversals on direct appeal become an aberrance, when are the appellate courts going to acknowledge that we have returned to the capricious and arbitrary exercise of power of which Justice Douglas in \textit{Furman} wrote? Our system once again panders to “the discretion of judges and juries in imposing the death penalty” to enable the penalty “to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . .”\textsuperscript{434}

Ultimately, “[t]he degree of civilization in a society can be judged by entering its prisons,”\textsuperscript{435} and today when you enter the prisons of Texas you find the largest governmental killing machine in the nation,\textsuperscript{436} and seventh most active in the world.\textsuperscript{437}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{431}]Gaynor, Tim, \textit{REUTERS}, March 18, 2009, \textit{New Mexico Gov. Bill Richardson bans death penalty}, available at \url{http://www.reuters.com/article/idUSTRE52I0I820090319}.
\item[\textsuperscript{433}]Elias, \textit{supra} note 422.
\item[\textsuperscript{434}]\textit{Furman}, 408 U.S. at 2735.
\item[\textsuperscript{435}]Quote is generally attributed to Fyodor Dostoevsky (1821 - 1881), \textit{The House of the Dead} (1862).
\item[\textsuperscript{436}]Number of executions by state since 1976:
\begin{tabular}{llll}

<table>
<thead>
<tr>
<th>State</th>
<th>Total</th>
<th>2010</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>460</td>
<td>13</td>
<td>24</td>
</tr>
<tr>
<td>Virginia</td>
<td>107</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>92</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Florida</td>
<td>69</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Missouri</td>
<td>67</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
\end{tabular}
\begin{small}
This chart shows the five states that have executed the most since 1976. Overall, Texas has executed more than 4 times its nearest rival, and the last two years, while other states’ numbers have been modest, as always Texas is out front setting the pace. Source: Death Penalty Information Center, Washington, D.C., available at \url{http://www.deathpenaltyinfo.org/FactSheet.pdf}.
\end{small}
\end{itemize}
\end{footnotesize}
Considering their long, storied history of apartheid and oppression of their Black population, courageously – and against public opinion - in 1995 South Africa’s Constitutional Court unanimously agreed that the death penalty was substantively inconsistent with protection of a human being’s “right to life” and the post-apartheid constitutional prohibition of “cruel, inhuman, and degrading treatment or punishment.” In response to this decision, Archbishop Desmond Tutu commented, “The abolition of the death penalty is making us a civilized society. It shows we actually do mean business when we say we have reverence for life.”

Texas could shock the world by demonstrating our reverence for all human life by understanding and implementing the proper function of the power of the state. “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Leave the convicted in prison unless they serve their full sentence or earn the right to be released on parole, and few will. In 2009 the five countries with the highest rates of execution were China (unknown, but 1718+ in 2008), Iran (388+), Iraq (120), Saudi Arabia (69), United States (52 – of which 24 were just in Texas). After Yemen (30+), Texas would rank 7th in the world in executions. Amnesty International USA, *Death Penalty Statistics 2009*, available at [http://www.amnestyusa.org/death-penalty/international-death-penalty/death-penalty-statistics-2009/page.do?id=1691051].

In the Matter of The State v. T. Makwanyane and M. Mchunu, Case No. CCT/3/94 (Constitutional Court of the Republic of South Africa 6 June 1995), available at [http://law.gsu.edu/ccunningham/fall03/DeathPenalty-SouthAfrica-Makwanyane.htm], for a PDF image of the case see: [http://docs.google.com/viewer?a=v&q=cache:menaSNlnhVkJ:www.constitutionalcourt.org.za/uhtbin/cgisirsi/20080415073642/SIRSI/0/520/J-CCT3-94+%22state+v.+Makwanyane%22+South+Africa&hl=en&gl=us&pid=bl&srcid=ADGEESjO3r4sveiRPvYe_6Wc2A5dQWJuScjN11bBOV5U004lUhDIQjoWYELfsL9EZ3i-QpS3ln5oW1SZJg_QkEql7KiMUEB2V- Xz7I77quFz4Sldfx4YY5d8JgPVPxEdp9sVi&sig=AHIEtbT3eSMHa9KL0mBd2jg 88WF48wTdLQ]; Also see Bae, Sangmin, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment*, State University of New York Press (2007) at 112 and Chapter 3, at 41 for a complete discussion of South Africa’s struggle and victory over capital punishment.


To the extent one is worried about those released from death row and given a life sentence, as is always the case with prison inmates, we must trust our parole system to
make good decisions on the possible release of any inmate from prison, not just those who may be parole eligible capital murder inmates.

Those whose death sentences have been set aside and a life punishment assessed, or those that received a life sentence initially, may become eligible for parole based on the law in effect at the time of the commission of their crime. For those whose crimes occurred from Aug. 29, 1977 through Aug. 31, 1987, parole eligibility is at 20 years; from Sept. 1, 1987 through Aug. 31, 1989, parole eligibility is at 15 years; Sept. 1, 1989 through Aug. 31, 1993 parole eligibility is at 35 years; Sept. 1, 1993 through Aug. 31, 2005 parole eligibility is at 40 calendar years with the vote of the full Board of Pardons and Paroles being required, regardless of date of offense (vote must be of 2/3 of full Board to approve - Section 508.046 of the Texas Government Code). See: Parole in Texas: Answers to Common Questions, Texas Board of Pardons and Paroles (2006), available at http://www.tdcj.state.tx.us/bpp/publications/PIT_eng.pdf. Effective Sept. 1, 2005, for offenses that occur on or after that date, a life sentence for a capital murder is without the possibility of parole. TEX. PENAL CODE ANN. § 12.31 (Vernon 2009).

The chances for release on parole for capital murder are “slim to none.” For the past 20 years all new capital life sentences have fallen into the 35 or 40 year minimum requirement. How the Parole Board will handle these cases is yet to be seen. It is reported that in Fiscal Year 2001, of the 60 capital offenders considered, parole was only approved for three. B. Habern, D. O’Neil, What About the Parole Process When One Has a Life Sentence on a Capital Murder Charge? (2001) available at http://www.paroletexas.com/articles/life_sentence_parole2.htm.

According to the statistics provided by Executive Services of the Texas Department of Criminal Justice, from the years 1995 through 2009 there were 1933 considerations for those serving a sentence for a capital offense (which would include Special Review and Medically Recommended Intensive Supervision considerations that may be before initial parole eligibility) and only 71 inmates were actually released to parole – that is less than an average of 5 per year – which equates to an average per year parole rate over the 15 years of 3.7% (the average parole rate for capital offenders just during 2008-2009 was only 6.4%). Compared to parole rates of other inmates, the Annual Report for Fiscal Year 2009 of the Texas Board of Pardons and Paroles shows the overall approval rate for parole considerations for all crimes (23,182 cases approved) during that year was 30.26%, the violent aggravated non-sexual offenses (2,513 cases approved) rate was 24.29%, and the approval rate for violent aggravated sexual offenses (795 cases approved) was 21.44%, all much higher than the average number of those paroled for capital murder. Report available at http://www.tdcj.state.tx.us/bpp/publications/AR%20FY%202009.pdf. Some might argue that the 2009 statistics are not a fair representation. According to the Annual Report for Fiscal Year 2008 of the Texas Board of Pardons and Paroles the statistics are similar, to-wit: Overall approval rate (23,025 cases approved) was 30.74%, violent aggravated non-sexual offenders (2,236 cases approved) had a rate of 23.70%, and violent aggravated sexual offenders (429 cases approved) were at a rate of 11.47% (only the sexual offenders have seen a significant increase in the last year - the other violent offenders and overall rate remains about the same). Report available at http://www.tdcj.state.tx.us/bpp/publications/AR%20FY%202008.pdf.

If California can be used for an example, at 72 years of age Charles Manson was again denied parole in 2007 and remains in the California State Prison in Corcoran, California. He will not be eligible again until 2012. REUTERS, 72-year-old Charles Manson denied parole, May 24, 2007. Manson’s death sentence from 1971 was commuted to life when the California death penalty was declared unconstitutional in California v. Anderson, 493 P.2d 880 (Cal. 1972) superseded by statute Cal. Const., art. I.
Let there be no misunderstanding, our system for prosecution of capital felonies should immediately be abandoned, removing all living souls from death row. Why not save the precious, limited resources of this state which now are squandered on this foolish ritual? Perhaps these savings could be spent on prevention and treatment of the causes of these problems, leaving a positive legacy for the next generation. The truly enlightened, maturing society, while evolving its accepted standards of decency, recognizes madness, admits its folly and corrects its path.

§ 27. It is doubtful the repeal of the Texas death penalty statute will have any real effect on the release of any former death row inmates back to society on parole.

As mentioned above in footnote 205, the number of offenses that currently act as aggravators raising a murder to a capital murder are most commonly referred to as nine. However, a closer look at those statutes show a massive expansion of eligible crimes.

1. Murder of a peace officer
2. Murder of a fireman
3. Murder in the course of committing kidnapping
4. Murder in the course of committing burglary
5. Murder in the course of committing robbery
6. Murder in the course of committing aggravated sexual assault
7. Murder in the course of committing arson
8. Murder in the course of committing obstruction
9. Murder in the course of committing retaliation
10. Murder while attempting to commit kidnapping
11. Murder while attempting to commit burglary
12. Murder while attempting to commit robbery
13. Murder while attempting to commit aggravated sexual assault
14. Murder while attempting to commit arson
15. Murder while attempting to commit obstruction
16. Murder while attempting to commit retaliation
   Murder in the course of committing:
   17. Terroristic threat under §22.07(a)(1) (4 crimes)
   18. Terroristic threat under §22.07(a)(3) (72 crimes)

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442 Burglary could easily have been counted as 2 separate crimes with burglary of a building and burglary of a habitation having different elements.

443 Threatens to commit a violent offense to any (1) person or (2) property to cause a reaction of any type by an (3) official or (4) volunteer agency (this could be 4 different crimes, threatens violence to person to get reaction from official, threatens violence to person to get reaction from agency, threatens violence to property to get reaction from official, and threatens violence to property to get reaction from agency) (4 additional crimes).

444 Threatens to commit a violent offense to any (1) person or (2) property to (1) prevent or (2) interrupt the (1) occupation or (2) use of a (1) building, (2) room, (3) place of assembly, (4) place to which public has access, (5) place of employment or occupation, (6) aircraft, (7) automobile, (8) conveyance, or (9) public place (72 additional crimes). Threaten to commit violent offense to any:
   -person to prevent occupation of a building, room etc. (9 places total)
   -person to interrupt occupation of a building, room etc.
   -person to prevent use of a building, etc.
   -person to interrupt use of a building, etc.
   -property to prevent occupation of a building, etc.
   -property to interrupt occupation of a building, etc.
   -property to prevent use of a building, etc.
   -property to interrupt use of a building, etc.
19. Terroristic threat under §22.07(a)(4) \(^{445}\) (20 crimes)
20. Terroristic threat under §22.07(a)(5) \(^{446}\) (2 crimes)
21. Terroristic threat under §22.07(a)(6) \(^{447}\) (10 crimes)
22. Murder for remuneration
23. Murder for the promise of remuneration
24. Employs another to commit murder for remuneration
25. Employs another to commit murder for promise of remuneration
26. Murder while escaping from a penal institution
27. Murder while attempting to escape from a penal institution
28. Murder of an employee of a penal institution while incarcerated
29. Murder to establish/maintain/participate in combination/its profits
30. Murder while serving sentence for murder
31. Murder while serving sentence for capital murder
32. Murder while serving life sentence/99 yrs for Agg. Kidnapping
33. Murder while serving life sentence/99 yrs for Agg Sexual Assault
34. Murder while serving life sentence/99 yrs for Agg. Robbery
35. Murder of more than one person (mass murder)
36. Murder of more than one person (serial murder)
37. Murder of a child under six years of age
38. Murder of a judge of the many courts
39. Subsequent sexual assault of a child

When taking into consideration the component parts of terroristic threat, there are 142 separate ways to commit a capital felony. Some will say “manner and means” should not be considered separately in determined the total number of capital crimes. I disagree. There are great differences between the meanings of words like “person” and “property,” “prevent” and “interrupt,” “occupation” and “use,” and “impairment” and “interruption.” Mass murder is not serial murder, a policeman is not a fireman or a judge, attempting a crime is not the same as committing the crime, and killing for the promise of remuneration is not the same as employing another to commit murder. These are all separate criminal offenses and facts that might fit one situation will not fit another. The Legislature obviously was providing for a vast array of circumstances and hence a vast number of crimes.

\(^{445}\) Threatens to commit a violent offense to any (1) person or (2) property to cause (1) impairment or (2) interruption of (1) public communications, (2) public transportation, (3) public water, (3) gas or (4) power supply or (5) other public service (20 additional crimes).

\(^{446}\) (4) Threatens to commit a violent offense to any (1) person or (2) property to place the public or substantial group of public (assuming this is the same thing) in fear of serious bodily injury (2 additional crimes).

\(^{447}\) (5) Threatens to commit a violent offense to any (1) person or (2) property to influence conduct or activities (assuming this is the same thing) of branch or agency of (1) federal government, (2) state government or (3-5) other political subdivision of the state (this could be municipal, county or school boards) (10 additional crimes).