I. Background

The Texas death penalty sentencing process is contained in Article 37.071 of the Code of Criminal Procedure. What follows in section I., is a brief outline of the sentencing process upon the conviction of a defendant for capital murder. The same jury that rendered the guilty verdict returns to hear additional evidence that may be offered by either the State or the Defense in support of a life sentence or death sentence. Once all evidence has been offered by both sides, the jury is given instructions in order to return a verdict.

In a death penalty case, this jury is then asked to answer (usually but not always) two questions, referred to as Special Issues. The answers to those questions determine whether the defendant is sentenced to life without possibility of parole or death. There are no other punishment options upon conviction of capital murder. The Judge is bound by the jury's decision. The jury is given some definitions and is importantly not given definitions to many of the terms used in these special issues. The two Special Issues are:

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. [1]
2. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed. [2]

The two special issues are to be taken in order and the answer to special issue #1 determines if the jury even considers special issue #2. The first special issue is generally called the "future danger question." The second special issue is generally called the "mitigation question." The jury is charged with considering all the evidence they have been given in both the guilt/innocence portion of the trial and the punishment portion of the trial and determining the answer to special issue #1. The State must prove special issue #1 beyond a reasonable doubt for the jury to answer "yes". If the State fails to prove this question beyond a reasonable doubt, the jury answers "no"

[1] It should be noted that in special issue #1 the following terms or phrases are given no definition by the statute for jurors: probability, criminal acts of violence, continuing threat and society. The jury is asked to determine the meaning of each term with no guidance from the instructions given by the court. A juror may determine that a "probability" is 1%, 10%, 51%, 70%, 99% or anything else. A juror is free to determine that "criminal acts of violence" are another murder, an assault with serious bodily injury, an assault with no injury, a shove, vandalism, disturbing the peace, shouting at someone or anything they choose. A juror is free to determine that "continuing threat" means one event in the future, multiple events in the future or that these events must continue every day until the day the defendant dies at any frequency they wish. A juror is free to determine that "society" means inside a prison, inside a prison at a highly restrictive custody level, inside a prison at a minimally restrictive custody level or they may decide it means in free-world society, where a convicted capital defendant will never be.

[2] It should be noted that in special issue #2 the term "personal moral culpability" is given no definition by the statute for jurors. Miriam-Webster defines "culpability" as "responsibility for wrongdoing or failure: the quality or state of being culpable". Jurors are not permitted to use a dictionary or anything else beyond the Court's instructions for definition of terms. It's anyone's guess how a juror defines "personal moral culpability."

and the sentencing process ends. The jury does not move to special issue #2 and the defendant is sentenced to life without parole. If the jury answers special issue #1 "yes", they then move to consider special issue #2.

The jury is again charged with considering all the evidence they have been given in both the guilt/innocence portion of the trial and the punishment portion of the trial and determining the answer to special issue #2. The statute ostensibly places no burden of proof on either side for this question. The plain language of the special issue clearly dictates that the burden of proof lies with the defendant to produce evidence that "justifies life imprisonment without parole rather than a death sentence be imposed." Common sense and use of language make clear that death is now the appropriate sentence unless the defendant can produce such evidence that "justifies…"

If the jury answers "no" that there is no "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed", then the defendant is sentenced to death. If the jury answers "yes" the defendant is sentenced to life in prison without possibility of parole.

II. Strike Code of Criminal Procedure- Article 37.071 Sec. 2(a)(2)(f)(4)

37.071 Sec. 2(a)(2)(f)(4) of the code of criminal procedure provides, in reference to the word "mitigating" contained in special issue #2 above, the following instruction to the Court and definition:

> (f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> [omitted 1-3]
>
> (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

The purported definition provided in part (4) above is unconstitutional under the 8th and 14th Amendments to the U.S. Constitution. The jury is mandated to consider mitigating evidence to be only evidence that might reduce moral blameworthiness.

Since the case of *Lockett v. Ohio*, 438 U.S. 586 (1978) and in subsequent cases[3] in the 42 years since, the United States Supreme Court has consistently held that:

> we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character

[3] See; *Eddings v. Oklahoma*, 455 U. S. 104 (1982), *Skipper v. South Carolina*, 476 U. S. 1 (1986), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *California v. Brown*, 479 U.S. 537 (1987), *Penry v. Lynaugh*, 492 U.S. 302 (1989), *McKoy v. North Carolina*, 494 U.S. 433 (1990), *Tennard v. Dretke*, 542 U.S. 274 (2004)

> or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id*. at 604

To compound the error, "moral blameworthiness" is undefined. A juror is further free to apply any definition they wish to "moral blameworthiness" from very narrow to very broad. This unfettered discretion of a juror to decide what reduces moral blameworthiness may exclude from consideration categories of evidence that have long been held to be relevant to the capital sentencing decision, including those found to be inherently mitigating. In addition to unconstitutionally limiting consideration of all evidence a defendant proffers as a basis for a sentence less than death, such unfettered discretion violates the principal of guided discretion that was the basis of reinstitution of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976) and its companion cases.[4]

In its most sinister form, prosecutors suggest to jurors in individual voir dire that they may apply the test of "reducing moral blameworthiness" to evidence that may be offered by a defendant in mitigation. They further in closing argument take full advantage of the undefined nature of "moral blameworthiness" by arguing that the specific mitigating evidence offered by the defendant does not reduce their moral blameworthiness because it doesn't address the question of where the "blame" lies for the murder in the case.

The Supreme Court in *Lockett* further stated:

> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. *Lockett* at 608.

The Ohio statute in *Lockett* limited the sentencer to 3 specific categories of mitigating evidence. The Texas jury instruction definition above, restricts any potential mitigating evidence to passing a single undefined litmus test, "reducing moral blameworthiness." The juror is left to determine what "moral blameworthiness" is in light of a previous decision that this particular defendant is "to blame" for this crime because they have already found him or her guilty of it.

Justice O'Connor explains the *Lockett* principle as "underlying *Lockett* and *Eddings*[5] is the principle that punishment should be directly related to the personal culpability of the criminal defendant"[6] and further "In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal

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[4] A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U. S. 153, 189 (1976)

[5] *Eddings v. Oklahoma*, 455 U.S.104 (1982)

[6] *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)

acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[7] In *Hitchcock v. Dugger*[8] the Supreme Court invalidated a death sentence where the jury was instructed not to consider and the Judge refused to consider evidence of any nonstatutory mitigating circumstances. The Texas jury instruction similarly restricts the consideration of mitigating evidence to a specific undefined category and nowhere is the jury provided a rationale or explanation like that of Justice O'Connor's.

The fatal defect is shown best by *Skipper v. South Carolina supra*, where the defendant was denied the ability to introduce evidence of his positive adjustment to prison life during his pre-trial incarceration the Supreme Court held "[A]lthough it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, [citation omitted] there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death."[9]

III. Reform Article 37.071 of the Code of Criminal Procedure to stop providing false information to capital jurors and coercing death sentences

When capital jurors are provided their instructions set out in part above including the two special issues above, in answering those special issues they are specifically told that to answer "yes" to future danger question and "no" to the mitigation question (the death equation) that there must be unanimity (12 votes for each). They are further instructed that in order to answer "no" to the future danger question or "yes" to the mitigation question (either answer results in a life without parole sentence) they must have 10 votes. See 37.071 Sec. 2(d)(2) and 37.071 Sec. 2(f)(2).

Section 37.071 Sec. 2 (g) provides in part, "…[jury] is unable to answer any issue submitted under subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life without parole." Translated, if a jury is unable to reach either 12 or 10 votes as required, the defendant will be sentenced to life without parole. If the jury is 6-6 on either question, life without parole, 8-4 life without parole, 11-1 in favor death, the sentence will be life without parole.

Texas capital jurors are not told this truth. They are simply left to wonder what the result is in those split voting situations. Many jurors it is learned after the fact believe that an inability to get either 12 or 10 votes will result in a mistrial causing the case to be retried at great expense and time. This is not true. There is no mistrial in the punishment stage of a Texas capital trial. A single life-voting juror believes that they must convince 9 other jurors to join them in order to return a life sentence. When faced with the impossible many will violate their conscience and are coerced to change their vote in order to prevent a "mistrial" or simply to go home or to allow the 11 other jurors hammering them "that we will be here forever" to go home. This after having

[7] *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring)
[8] 481 U.S. 393 (1987)
[9] *Skipper v. South Carolina*, 476 U. S. 1, 7 (1986)

honestly done their duty in jury service in the highest stakes jury trial in the law. They have considered all the evidence and reached their decision, yet falsely believe it does not matter because Texas law lies to them and forces participants in the trial process to stand mute.

Why? Because incomprehensibly, Section 37.071 Sec. 2(a)(1) provides in part "The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e)." Translated, no one may tell the juror or jury collectively the truth, that 1 life vote will result in a life sentence or what the result will be in a 6-6 deadlock.

In my work as a capital defender there have been jurors in during individual voir dire who see the problem, who see the scenario where a jury is unable to reach 10 or 12 and will ask "what happens if…?" Or worse still the jury communicates that question to the court during deliberation. The trial judge the only person empowered to enforce the constitutional rights of the accused, and who is charged with providing that defendant a fair trial can say nothing. The prosecutor who frequently tells the jury during voir dire that their job is to "seek justice" and not to convict, can say nothing. The capital defense attorney charged with zealously representing their client and fighting to spare them a death sentence can say nothing.

Strike 37.071 Sec. 2(a)(1) as quoted above. Strike the provisions that require 10 votes to answer a question to sentence a defendant to life. Allow truth in capital sentencing. Be honest with capital jurors, who are doing the most difficult civic duty and deserve the truth rather than learning it after the fact and having to live with the knowledge they were lied to and returned a verdict they did not believe in.

The United States Supreme Court has long professed that "death is different."[10] It has further held that "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor or the procedural safeguards of the Bill of Rights."[11]

The two suggested reforms above provide a partial response to Interim Charge 4, and address procedures in capital sentencing. They would move Texas toward compliance with the constitutional protections under the 8th and 14th Amendments to the U.S. Constitution owed to capital defendants.

[10] *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988)
[11] *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurther J., concurring)