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Death and Texas: The Unevolved Model of Decency

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Death and Texas: The Unevolved Model of Decency

TABLE OF CONTENTS

I.	Introduction	241
II.	History of Modern Death Penalty Law	242
III.	Texas Penal Code Section 19.03 Capital Murder	246
IV.	Mens Rea in the Capital Murder Context	247
V.	Diminished Capacity	251
VI.	Party Responsibility	258
VII.	Section 19.03(a)(1) Penal Code: Murder of a Peace Officer or a Fireman	263
VIII.	Section 19.03(a)(2) Penal Code: Murder in the Course of Committing or Attempting to Commit Certain Crimes	264
	A. Nexus between the Murder and the Underlying Crime	265
	1. Robbery	265
	2. Aggravated Sexual Assault	272
	3. Kidnapping	273
	4. Burglary	274
	5. Arson	276
	6. Obstruction or Retaliation	277

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7. Terroristic Threat 279

IX. Section 19.03(a)(3) Penal Code: Murder for
Remuneration 280

X. Section 19.03(a)(4) Penal Code: Murder while
Escaping or Attempting to Escape From a Penal
Institution 282

XI. Section 19.03(a)(5) Penal Code: Murder while
Incarcerated in a Penal Institution 283

 A. Penal Institution Employee 283

 1. Combination 284

XII. Section 19.03(a)(6) Penal Code: Murder while Serving
a Sentence for Certain Crimes 287

XIII. Section 19.03(a)(7) Penal Code: Murder of more than
One Person 291

XIV. Section 19.03(a)(8) Penal Code: Murder of a Child
Under Six Years of Age 298

 A. Constitutionality 298

 B. Murder of a Fetus 299

XV. Section 19.03(a)(9) Penal Code: Murder of a Judge... 306

XVI. Capital Punishment for Non-Murder Crimes..... 306

XVII. The Legislature’s Expansion of Section 19.03 310

XVIII. The Court of Criminal Appeals’ Complicity 313

XIX. Evolving Standards of Decency 318

XX. Conclusion..... 329

XXI. Appendix A 335

XXII. Appendix B 338

*“One murder made a Villain,
 Millions a hero—Princes were privileg’d
 To kill, and numbers sanctified the crime.”**
 *BEILBYPORTEUS, DEATH: A POETICAL ESSAY, 12 (1759)
*“Confusion now hath made his masterpiece!
 Most sacrilegious murder hath broke ope.
 The Lord’s anointed temple, and stole thence.
 The life o’ the building!”*
 WILLIAM SHAKESPEARE, MACBETH act 2, sc. 3.

I. INTRODUCTION

Capital punishment practice in recent years has diverged from emphasis on guilt-innocence to dedicate virtually all resources to punishment issues. This Article attempts to avoid this myopic approach by taking stock of the current state of substantive capital law at its very foundation. After a brief history of modern death penalty jurisprudence and a restatement of the current rendition of Texas’s capital murder statute, this Article will focus first on two troubling themes in capital representation. First, how mens rea issues can address the

lack of “diminished capacity” in Texas capital punishment law while suggesting a seldom used or understood legal strategy. A second reoccurring problem in the application of the Texas capital statutes and the cases interpreting those statutes is the use of “party responsibility” to qualify a defendant other than the “trigger man” for the death penalty.

Following a detailed review of section 19.03 of the Texas Penal Code (the Code), with its history and current advancements in the law, I make the argument that the current statute is unconstitutional, that it has “unevolved” once again into a vehicle which drove previous capital statutes to be stricken as capricious, arbitrary, racist, and violative of the Eighth Amendment. Finally, I argue that rather than reintroduce the constitutional limits that once made the statute palatable the statute should be scrapped altogether. The current statute is incomprehensible to the ordinary person, subject to the capricious whims of prosecution and appellate review, and disproportionate in its application to minorities. As evidence continues to mount of the probability that innocent people are being executed, of the overbearing financial burden this remedy places upon society, and of the growing disfavor by which the death penalty is viewed, justice calls for the end to this transgression upon the human condition consistent with the evolving standards of decency in our maturing society.

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.¹ The unfettered discretion to arbitrarily² and capriciously³ impose a death sentence was labeled “freakish[]” and “wanton[].”⁴ The Court further noted the role of racism in the arbitrary administration of state statutes, as well as the disproportionate number of African American defendants in capital cases.⁵ State statutes that provided for automatic death sentences for all capital murders or first-degree murders were struck down as

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Id.* at 273 (Brennan, J., concurring); *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996); see TEX. PENAL CODE ANN. § 7.01(c) (West 2003 & Supp. 2010) (“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.

3. *Furman*, 408 U.S. at 295.

4. *Id.* at 310 (Stewart, J., concurring).

5. *Id.* at 249 (Douglas, J., concurring).

violations of not only the Eighth but also the Fourteenth Amendment.⁶

Responding to *Furman*, thirty-five states came forward with new statutes.⁷ In 1976 the Supreme Court reviewed five of the new statutes, approving three and rejecting two.⁸ 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.⁹ This is the genesis of mitigation in modern death penalty jurisprudence.¹⁰

6. The Court specifically noted:

[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.'

Id. at 305–06 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 381 (1910)).

7. *Gregg v. Georgia*, 428 U.S. 153, 179–80 n.23 (1976).

8. Statutes were approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Profitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). In *Roberts v. Louisiana*, 428 U.S. 325 (1976), and *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court struck down statutes allowing for mandatory or automatic death sentences for murder. The Court found that these mandatory death sentences failed to curb "arbitrary and wanton jury discretion" without some objective standards to "guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson*, 428 U.S. at 303.

9. *Woodson*, 428 U.S. at 304.

10. The use of the word "mitigation" has become so common among death penalty practitioners that often the uninitiated struggle with its meaning and significance. Mitigation of punishment is a "reduction in punishment due to mitigating circumstances that reduce the criminal's level of culpability, such as the existence of no prior convictions." BLACK'S LAW DICTIONARY 1093 (9th ed. 2009). Early in modern death penalty jurisprudence the Supreme Court said "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). In *Woodson*, the Court cited its previous decision in *Trop v. Dulles* wherein the Court recognized that the words of the Eighth Amendment—as to what constitutes cruel and unusual punishment—are not precise, and their scope is not static. The Eighth Amendment therefore draws its meaning from the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958). In the capital murder context this means that once a jury has found a person guilty of a capital felony with death as a possible punishment, the jury as the "sentencer" shall "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defen-

The new generation of capital sentencing statutes contain three fundamental concepts: (1) Guided Discretion, (2) Individualized Sentencing, and (3) Heightened Reliability.¹¹ The sentencing jury in a 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[,] . . . [and] 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

dant proffers as a basis for a sentence less than death.” *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). In the jury’s sentencing deliberation the considering of the defendant’s “family history” is part of the “process” of imposing the death penalty. *Eddings*, 455 U.S. 104. The Defendant should be allowed “to present any and all relevant mitigating evidence that is available.” *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). Mitigation evidence “about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse” *Penry v. Lynaugh*, 492 U.S. 302, (1989). As is stated in the introduction to this Article, the recent history of capital defense has involved the accumulation and development of punishment evidence (mitigation), the litigation of consequential punishment issues, and the allocation of virtually all defense resources to the punishment phase of trial. In 2003 the Court in *Wiggins v. Smith* clearly established the obligation to investigate a defendant’s “life history or family background” (mitigation) in a capital case is the responsibility of the defendant’s trial counsel and failure to meet this duty is a violation of the defendant’s Sixth Amendment right to effective and adequate representation. *Wiggins v. Smith*, 539 U.S. 510 (2003). See *Strickland v. Washington*, 466 U.S. 668 (1984).

11. Since *Furman*, it is clear that “vesting of standardless sentencing power in the jury violate[s] 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).
12. *Woodson*, 428 U.S. at 303.
13. *Gregg*, 428 U.S. at 199.
14. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

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

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.¹⁷ Initially, the new Texas Penal Code limited capital homicides to intentional and knowing murders committed in five specified situations and required the jury to answer three questions in a proceeding that took place after a guilty verdict.¹⁸ Essentially, the Texas scheme remains as it was originally written with a revision of the special issues put to the jury that reflects the evolution of capital punishment jurisprudence.¹⁹ The

15. *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (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.")

16. Georgia's "outrageously or wantonly vile, horrible, and inhuman" aggravating circumstance was invalidated as vague and providing no meaningful guidance. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). Oklahoma's "especially heinous, atrocious, or cruel" standard was also struck down on this same basis. *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988). "[C]hanneling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362.

17. TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010).

18. As articulated by the Court in *Jurek*:

The new Texas Penal Code [§ 19.03 (1974)] limit[ed] capital homicides to intentional and knowing murders committed in five situations: [(1)] murder of a peace officer or fireman; [(2)]murder committed in the course of kidnapping, burglary, robbery, forcible 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.

Jurek, 428 U.S. at 268.

19. Effective September 1, 1991, Texas approved new language in its sentencing procedure statute, Article 37.071 of the Texas Code of Criminal Procedure, and left the procedure for pre-September 1, 1991, cases in effect by renumbering the statute to Article 37.0711 and changing the title. The wording and number of the special issues has changed several times over the years and is beyond the scope of this Article. For the current versions see TEX. CODE CRIM. PROC. ANN. arts. 37.071, 37.0711 (West 2003 & Supp. 2010).

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 from five subsections to nine.²⁰

III. TEXAS PENAL CODE SECTION 19.03 CAPITAL MURDER

Currently, section 19.03 of the Texas Penal Code defines capital murder as follows:

- (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1)²¹ 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;
 - (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 terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6);²²
 - (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

20. See *infra* note 275 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.

21. Murder is defined in the Texas Penal Code as “intentionally or knowingly caus[ing] the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003 & Supp. 2010).

22. Terroristic threat is one in which a person threatens violence 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.

Id. § 22.07.

- (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;²³
- (6) the person:
- (A) while incarcerated for an offense under this section or Section 19.02,²⁴ murders another; or
- (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04,²⁵ 22.021,²⁶ or 29.03,²⁷ 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.²⁸

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, in which case the requisite mens rea is restricted to intentional acts only.²⁹ To develop a proper insight into the Texas capital statutes and a thorough under-

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23. "Combination" means three or more persons who collaborate in carrying on criminal activities." *Id.* § 71.01(a); *see infra* Part XI.
24. Section 19.02 defines murder in all respects, not just as applicable to the capital murder context and so includes a more complete definition of "murder". TEX. PENAL CODE ANN. § 19.02.
25. "Aggravated Kidnapping." *Id.* § 20.04.
26. "Aggravated Sexual Assault." *Id.* § 22.021.
27. "Aggravated Robbery." *Id.* § 29.03.
28. *Id.* §19.03 (footnotes added).
29. *Id.* To commit a capital murder, one must first commit a murder as defined in Texas Penal Code section 19.02. Under that section, murder is committed when a person:
- (1) intentionally or knowingly causes the death of an individual; (2) intends to cause serious bodily injury by and commits an act clearly dangerous to human life that causes the death of an individual; or (3) commits or attempts to commit a felony [(presumably with the requisite mens rea for the underlying felony)], other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in the immediate flight from the commission or attempt, he [or she] commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.
- Id.* § 19.02.

standing of their application, an appreciation for how the statutes define an intentional or knowing mens rea is essential.

Both intentional and knowing are defined in section 6.03 of the Texas Penal Code. Intentional is defined as follows: "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."³⁰ Knowing is defined as:

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.³¹

Consequently, Texas Penal Code, section 6.03 defines "three 'conduct elements' which 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."³² 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).³³

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 one exception.³⁴ 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 section 19.03(a)(2) of the Texas Penal Code.³⁵ In this scenario, the actor cannot be guilty of capital murder, only the lesser

30. *Id.* § 6.03(a).

31. *Id.* § 6.03(b).

32. *Cook v. State*, 884 S.W.2d 485, 491-92 & n.6 (Tex. Crim. App. 1994) (quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)).

33. *See Lugo-Lugo v. State*, 650 S.W.2d 72, 85-87 (Tex. Crim. App. 1983) (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.*

34. *See* TEX. PENAL CODE ANN. § 6.02(d).

35. *Id.* § 19.03(a)(2). The underlying crimes being: kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat. *Id.* at § 22.07(a)(1),(3),(4),(5),(6).

included offense of murder as defined in section 19.02 of the Texas Penal Code.³⁶

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 section 19.03(a)(2), case law has long approved this “mistake” rationalizing the “intentional or knowing” language as descriptive of the first prong of section 19.03(a)(2) that a murder defined by section 19.02 Texas Penal Code must first be committed.³⁷ “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.”³⁸ 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 the result (result of conduct) requires awareness of the lethal nature of his conduct (nature of conduct), so the distinction “blurs.”³⁹ 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.⁴⁰

36. See *Kuntschik v. State*, 636 S.W.2d 744, 747 (Tex. App. 1982); see also *Kinnamon v. State*, 791 S.W.2d 84 (Tex. Crim. App. 1990) (holding that when the defendant, while committing 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), *overruled on other grounds by Cook*, 884 S.W.2d at 488–91, as recognized in *Roberts v. State*, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008).

37. *Cameron v. State*, 988 S.W.2d 835 (Tex. App. 1999).

38. *Id.* at 851; see *Medina v. State*, 7 S.W.3d 633, 639–40 (Tex. Crim. App. 1999) (holding the trial court incorrectly defined “knowingly” with reference to nature of conduct and not as to result of conduct, but where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious); *Richardson v. State*, 744 S.W.2d 65, 83–84 (Tex. Crim. App. 1987), *vacated*, 492 U.S. 914 (1989), and 509 U.S. 917 (1993); *Wilder v. State*, 583 S.W.2d 349, 361 (Tex. Crim. App. 1979), *vacated on other grounds*, 453 U.S. 902 (1981); *Hammett v. State*, 578 S.W.2d 699, 713 (Tex. Crim. App. 1979); *Granviel v. State*, 552 S.W.2d 107, 114 (Tex. Crim. App. 1976); *White v. State*, 543 S.W.2d 104 (Tex. Crim. App. 1976).

39. *Medina*, 7 S.W.3d at 640.

40. See *Medina*, 7 S.W.3d at 639; *Cook*, 884 S.W.2d at 492 n.6; *Miller v. State*, 815 S.W.2d 582, 586 n.5 (Tex. Crim. App. 1991); *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); *Martin v. State*, No. 14-95-01135-CR, 1997 WL 269102, *4–5 (Tex. App. May 22, 1997). In *Martin*, 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

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 section 19.03(a)(2), with the culpable mental state necessary to satisfy the “conduct elements” of the underlying offense.⁴¹ A trial court should only include the “proper” culpable mental state definitions specific to the facts of a case, as to the underlying offense.⁴² It is error for a court to fail to limit its defi-

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, . . . then you will find the defendant guilty of capital murder as charged in the indictment.

1997 WL 269102 at *4 (emphasis added). 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*, as the circumstances surrounding the crime clearly demonstrated a specific intent to kill. *Id.* 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 491–92 (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) (finding error and remanding for harm analysis). 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).

41. *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994); see *Gardner v. State*, 730 S.W.2d 675, 687 (Tex. Crim. App. 1987). In an unpublished opinion, *Sandoval v. State*, No. 13-07-00392-CR, 2009 WL 2915009 (Tex. App. August 27, 2009), the court of appeals in Corpus Christi distinguished *Gardner* and *English v. State*, 592 S.W.2d 949, 954–55 (Tex. Crim. App. 1980). In *Sandoval*, the court affirmed the trial court’s failure to require the jury to find the defendant not only intended to kill but also intended to engage in the underlying felony conduct that led to the murder (i.e., robbery). 2009 WL 2915009 at *3. The jury instruction approved in *Sandoval* was that the defendant knew of the actor’s intent to kill the victim and that he acted with intent to aid the actor in committing the offense of capital murder. *Id.* In *English* and *Gardner*, the jury was instructed to determine if the defendant specifically intended to kill the victim as well as rob the victim. *Id.* It is unclear why the Corpus Christi court failed to address the issue of lack of a mens rea as to the underlying offense, other than to say that the jury charge addressed the defendant’s intent.
42. 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.

nitions, subject to a properly preserved objection and “egregious harm” analysis under *Almanza*.⁴³ 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.⁴⁴ 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.”⁴⁵ 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.⁴⁶

V. DIMINISHED CAPACITY

The substantive discussion of the statutes and, specifically, mens rea should be briefly enlarged at this point to a related topic in Texas capital jurisprudence that the courts and practitioners have been waltzing around and stepping over for some time. This Part of the Article is designed to enhance the reader’s understanding of the subtleties of mens rea applicable to the advancements in case law involving defendants with serious mental health issues. In 2000, as many as twenty percent of those incarcerated in the United States suffered from serious mental illness⁴⁷—over triple the rate in the general population.⁴⁸ This means over 320,000 people in prisons have a serious mental illness.⁴⁹ As 700,000 mentally ill people enter the jails and prisons of this country each year,⁵⁰ it is likely that a capital defendant charged with the most horrific of crimes will fall among these statis-

43. *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994); *Almanza*, 686 S.W.2d at 171.

44. *Hughes*, 897 S.W.2d at 296.

45. *Cook*, 884 S.W.2d at 492 n.6.

46. *Barnes v. State*, 56 S.W.3d 221, 234 (Tex. App. 2001); *see infra* Part VIII (discussing section 19.03(a)(2) of the 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).

47. AM. PSYCHIATRIC ASS’N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS xix (2d ed. 2000) [hereinafter APA Report].

48. *What is Mental Illness: Mental Illness Facts*, NATIONAL ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/template.cfm?section=about_mental_illness (last visited Mar. 20, 2010) (“[A]bout 6 percent, or 1 in 17 Americans . . . live with a serious mental illness. The National Institute of Mental Health reports that One (sic) in four adults—approximately 57.7 million Americans—experience a mental health disorder in a given year.”).

49. Based upon state and federal prison population of 1,613,740 at the end of 2009. *See* HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2009, at 2 tbl.1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

50. *See* APA Report, *supra* note 47.

tics. In the proper case, a meticulous application of the following principles may produce an unexpected result.

A culpable mental state must be proved beyond a reasonable doubt as an element of the offense.⁵¹ In *Cowles v. State*,⁵² 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 for the "with intent" crimes.⁵³ Several attempts have been made to introduce diminished capacity into the culpability phase of criminal trials in Texas with varying degrees of success.⁵⁴ After *Cowles*, in *Wagner v. State*, diminished capacity was a recognized doctrine.⁵⁵ In *Wagner*, the appellate court permitted evidence of a physical injury, which may have impaired the defendant's mental function and impulse control, on the issue of adequate cause to justify sudden passion.⁵⁶ *Wagner's* use of diminished capacity in this way has since been superseded by statute making sudden passion now a punishment issue.⁵⁷

Wagner, however, was a true "diminished responsibility" case in which the defendant's claim of mental abnormality showed him less

51. TEX. PENAL CODE ANN. §§ 2.01, 6.02 (West 2003 & Supp. 2010); *LaSalle v. State*, 973 S.W.2d 467, 473 (Tex. App. 1998).

52. *Cowles v. State*, 510 S.W.2d 608, 610 (Tex. Crim. App. 1974).

53. *Wagner v. State*, 687 S.W.2d 303, 311 (Tex. Crim. App. 1984); *Cowles*, 510 S.W.2d at 610. The rule in *Cowles* is dicta. See *Wagner*, 687 S.W.2d at 311; *Cowles*, 510 S.W.2d at 610.

54. In fact, a search on Westlaw for the search term "diminished capacity" yields 604 cases in Texas alone. An illustrative case is *De la Garza v. State*, where the defendant argued for the trial court to submit a requested jury instruction 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. 650 S.W.2d 870, 876 (Tex. App. 1983). 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.*

55. *Wagner*, 687 S.W.2d at 311.

56. *Wagner* predated bifurcated guilt-innocence and punishment hearings.

57. TEX. PENAL CODE ANN. § 19.02(d) (West 2003 & Supp. 2010). 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. *Id.* Is there not a constitutional challenge available in this circumstance? Unfortunately this is beyond the scope of this Article, 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.").

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*,⁵⁸ albeit dicta, 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).⁵⁹ 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.⁶⁰

Often, the Texas Code of Criminal Procedure, article 38.36(a) is used to introduce mental health evidence into the guilt-innocence phase of a murder trial.⁶¹ That article provides:

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.⁶²

In *Thomas v. State*⁶³ a clinical psychologist was not allowed to testify during the guilt-innocence phase of the trial about the condition of the defendant’s state of mind at the time of the murder as permitted by article 38.36(a). The testimony was offered on the issue of whether the defendant acted intentionally and knowingly in committing murder.⁶⁴ The court of appeals took the argument to be “some sort of insanity defense.”⁶⁵ Absent a plea of insanity or evidence raising insanity, the court found it was not a proper way to negate intent by showing the defendant did not have the “concurrent mental capability to know that his conduct was wrong.”⁶⁶ The court further noted that “[t]he negation of intent is absence of intent” and is entirely different

58. 903 S.W.2d 715 (Tex. Crim. App. 1995).

59. *Id.* at 767 n.1; Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 20 (1984). Judge Maloney cites cases from many jurisdictions supporting his contention, including *United States v. Pohlott*, 827 F.2d 889, 903–06 (3d Cir. 1987) (distinguishing doctrine of diminished responsibility from negation of mental state).

60. TEX. PENAL CODE ANN. § 8.01(a).

61. *Id.* § 19.06 (repealed 1994).

62. TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (West 2003 & Supp. 2010).

63. *Thomas v. State*, 886 S.W.2d 388, 391 (Tex. App. 1994).

64. *Id.* at 390.

65. *Id.* at 391.

66. *Id.*

than lacking the capacity to form intent due to severe mental illness.⁶⁷ This court labeled the latter “insanity.”⁶⁸ 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 post-traumatic stress disorder (PTSD) was excluded at the guilt-innocence stage of trial.⁶⁹ *Warner* 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.⁷⁰ A petition for discretionary review (PDR) was granted to determine if the trial court had erred in excluding evidence of the defendant’s alleged PTSD at the guilt-innocence stage of the trial. The Texas Court of Criminal Appeals (TCCA) concluded that their decision to grant PDR was improvident because the defendant did not preserve his complaint for appellate review by making an offer of proof or evidence after the trial court ruled the evidence inadmissible.⁷¹

Thirty years after *Cowles*, in *Jackson v. State*,⁷² the courts were still struggling with these concepts. The defendant in *Jackson* killed his brother by hitting him with a hammer while he slept.⁷³ The defendant suffered from mental illnesses⁷⁴ and complained on appeal that he was prevented from arguing to the jury that he lacked the requisite mens rea as a consequence of his illnesses.⁷⁵ The TCCA granted review “to determine whether the doctrine of diminished capacity exists in the jurisprudence of Texas.”⁷⁶ The TCCA 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).⁷⁷

Relevant evidence, however, may be presented to the fact finder to negate the mens rea element—including the accused’s history of mental illness.⁷⁸ In a murder prosecution, the trial judge has the dis-

67. *Id.*

68. *Id.*

69. *Warner v. State*, 944 S.W.2d 812 (Tex. App. 1997).

70. *Id.* at 815.

71. *Warner v. State*, 969 S.W.2d 1 (Tex. Crim. App. 1998).

72. 160 S.W.3d 568 (Tex. Crim. App. 2005).

73. *Id.* at 569.

74. *Id.* at 570–71.

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

76. *Id.* at 572.

77. *Id.* at 573.

78. *Id.* at 574.

cretion under Texas Code of Criminal Procedure article 38.36(a) to admit all relevant facts and circumstances showing the condition of the mind of the accused at the time of the offense, subject to a Texas Rules of Evidence Rule 403 objection.⁷⁹

If such evidence is admitted, the court may determine whether it raises the issue of a lesser-included offense.⁸⁰ The court in *Jackson* 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.⁸¹

The TCCA found evidence of mental illness “in this case” does not negate mens rea.⁸² The court found there is no defense in Texas that due to mental illness the defendant did not have the requisite mens rea at the time of the offense because he lacked the *mental capacity*, or was absolutely incapable of *ever* forming that frame of mind.⁸³

Recently, *Jackson* was distinguished in *Sparks v. State*.⁸⁴ The defendant in *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.⁸⁵ The court of appeals somehow interpreted *Jackson* for the proposition that the defendant’s mental condition did not negate the mens rea but provided only an excuse for his aggressive behavior.⁸⁶ Once again the court seemed to confuse diminished capacity with diminished responsibility or, perhaps, the court—as the fact finder—just did not believe that the offered proof of the defendant’s mental illness negated the mens rea of the crime. An “excuse” is a defense which diminishes capacity, not responsibility.⁸⁷

79. *Id.*

80. *Id.*

81. *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 mens rea element of the crime, then the jury could find the defendant not guilty.

82. *Id.* at 572.

83. *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 simply did not form the requisite mens rea to commit the subject offense? Did the TCCA 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 TCCA confused diminished capacity with diminished responsibility just as Judge Maloney had complained in *Penry*. See *Penry v. State*, 903 S.W.2d 715, 767 n.1 (Tex. Crim. App. 1995).

84. *Sparks v. State*, No. 2-07-285-CR, 2008 WL 4180288 (Tex. App. Sept. 11, 2008).

85. *Id.* at *4.

86. *Id.*

87. BLACK’S LAW DICTIONARY defines an excuse as:

Following *Jackson* came *Ruffin v. State*.⁸⁸ The defendant in *Ruffin* was charged with aggravated assault for shooting at ten police officers. The defendant tried to offer testimony from a psychologist that he was suffering from severe delusions on the night of the event and believed that he was shooting at Muslims, not police officers.⁸⁹ The trial court excluded the testimony about the defendant's mental disease and delusions, ruling that such expert testimony was admissible only in a homicide or when the defendant pleads insanity.⁹⁰ The TCCA found that testimony of a mental disease or defect that rebuts the mens rea of the charged offense is relevant and admissible unless excluded under a specific evidentiary rule.⁹¹ Speaking to many of the issues raised in this Article, the TCCA 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.⁹²

The TCCA further noted that the "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."⁹³ Despite the ruling of the Supreme Court, the TCCA reaffirmed *Jackson* in finding that "such expert evidence might be relevant, reliable, and admissible to rebut proof of the defendant's mens rea."⁹⁴

[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 649 (9th ed. 2009).

88. 270 S.W.3d 586 (Tex. Crim. App. 2008).

89. *Id.* at 587.

90. *Id.*

91. *Id.* at 588.

92. *Ruffin*, 270 S.W.3d at 593 (citing *Jackson v. State*, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005); *United States v. Pohlott*, 827 F.2d 889, 903–06 (3d Cir. 1987)).

93. *Ruffin*, 270 S.W.3d at 595 (citing *Clark v. Arizona*, 548 U.S. 735, 779 (2006)).

94. *Id.* *Ruffin* was recently twice distinguished by the TCCA: (1) in *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010), the defendant knew he was shooting at police officers and mental illness was relevant for mitigation in punishment but did not directly rebut mens rea. (2) *Lizcano v. State*, No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (unpublished opinion), where the court noted:

[T]he excluded testimony suggested general limitations in cognitive ability, intoxication at the time of the offense, and general deficits in adap-

At the time of preparation of this Article, the most recent case to discuss this problem was *Zorn v. State*,⁹⁵ dated May 28, 2010. In *Zorn*, a friend attempted to testify that the defendant suffered from paranoid schizophrenia and other related emotional problems.⁹⁶ The trial court heard the testimony outside the presence of the jury and ruled it inadmissible at the guilt-innocence stage.⁹⁷ The appellate court found that evidence of the defendant's mental state was admissible "when it is relevant to the issue of *mens rea*."⁹⁸ 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.⁹⁹ The court noted:

[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.¹⁰⁰

Nevertheless, the *Zorn* court found the defendant's "lowered ability to navigate stressful situations explain[ed] why she was drinking and why she was in a hurry, but [did] not serve to negate the *mens rea* or to show that she could not appreciate the risk that her conduct created."¹⁰¹

It is apparent that 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. Unfortunately, many defense lawyers do not recognize it, present it, and argue it in the right way, at the appropriate time, or with authority.

tive 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.

Id. at *21.

95. 315 S.W.3d 616 (Tex. App. 2010).

96. *Id.* at 623.

97. *Id.* at 622–23.

98. *Id.* at 624; see *Ruffin*, 270 S.W.3d at 597.

99. *Zorn*, 315 S.W.3d at 624; see *Jackson v. State*, 160 S.W.3d 568, 573–74 (Tex. Crim. App. 2005).

100. *Zorn*, 315 S.W.3d at 624 (citing *Ruffin*, 270 S.W.3d at 593–94).

101. *Id.* at 625. The TCCA recently issued *Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. 2010), where a defendant, during the guilt-innocence phase, tried to introduce psychiatric testimony about defendant's substance abuse to negate *mens rea* of underlying burglary and the court found the testimony not admissible at guilt-innocence due to voluntary intoxication.

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.¹⁰² The Texas Penal Code explicitly provides that "[a] person is criminally responsible as a party to an offense" whether the offense is "by his own conduct, by the conduct of another for which he is criminally responsible, or by both."¹⁰³ 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;¹⁰⁴ (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;¹⁰⁵ or (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.¹⁰⁶

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.¹⁰⁷ Case law indicates that for a person to be held

102. *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996); see TEX. PENAL CODE ANN. § 7.01(c) (West 2003 & Supp. 2010) ("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.

103. TEX. PENAL CODE ANN. § 7.01(a).

104. *Id.* § 7.02(a)(1).

105. *Id.* § 7.02(a)(2).

106. *Id.* § 7.02(a)(3).

107. See *id.* § 7.02(b). 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." *Id.* § 15.02(a). 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. *Id.* § 15.02(d). Case law tends to indicate that the section 15.02 conspiracy "reaches further back into preparatory conduct constituting inchoate offenses . . ." *Woods v. State*, 801 S.W. 2d 932, 943 (Tex. App. 1990) (quoting 1 TEX. PENAL CODE ANN. § 15.02 (E.T. Branch, 3d ed. 1974)). Whereas, in a section 7.02(b) conspiracy, the defendant's presence at the time of the offense often is a distinguishing factor. Compare *Vodochodsky v. State*, 158 S.W.3d 502, 511 (Tex. Crim. App. 2005) (finding that the evidence was factually insufficient to convict the defendant and mitigated against the defen-

criminally responsible in this 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.¹⁰⁸ This is whether or not the person had such intent himself. 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.¹⁰⁹ "But mere presence during the commission of a crime is not enough to make one an accomplice,"¹¹⁰ and a person

defendant's party responsibility, did not show he acted as part of a conspiracy and failed to prove he was present at the scene of the shooting, but merely that he "had the bad luck of being the friend and roommate of a man determined to kill police officers and himself", with *Johnson v. State*, 853 S.W.2d 527, 534-35 (Tex. Crim. App. 1992) (discussing a case wherein the defendant was present at the time of the capital murder and unsuccessfully argued that he could not be convicted or given a death sentence using the law of parties). 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 section 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, 32 (Ill. 1974) (defining party liability, not applying the often used "natural and probable consequence" of the criminal enterprise test, but applying 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). The Illinois accountability statute for conduct of another provides, "where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act." *Id.* at 32. The defendant in *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, 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. *Id.* at 29-30. Under section 7.02(b) of the Texas Penal Code, unless the defendant 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," and a Texas court would likely 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, 500 (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, 799 (Tex. Crim. App. 2003). As in *Hill*, next discussed, the defendant would have only been responsible in Texas for the shootings if he was acting with intent to promote or assist the commission of the attempted murders at the time he solicited, encouraged, directed, aided, or attempted to aid his accomplices in the burglary.

108. *Hill v. State*, 883 S.W.2d 765, 771 (Tex. App. 1994).

109. *Hooper*, 214 S.W.3d at 13.

110. *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001) (citing *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999)).

may be charged as a party and convicted even though he was not present at the time of the offense.¹¹¹ 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.¹¹² Circumstantial evidence alone may be sufficient to show a person is a party to a crime.¹¹³

Although the workings of the special issues in punishment are beyond the scope of this Article, a person can be convicted of capital murder as a party, exposing that person to a potential death sentence, “without having the intent or actual anticipation that a human life would be taken that is required for an affirmative answer to the anti-parties issue.”¹¹⁴

111. *Rodriguez v. State*, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). Although admittedly not a capital case, Rodriguez aided in the commission of the crime and could therefore be held criminally responsible. *Id.*

112. *Id.* *Hooper* is also illustrative. In *Hooper*, the defendant was found guilty of being a party to an aggravated assault of a public servant. *Hooper*, 214 S.W.3d at 11. Lack of evidence of the defendant’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. *Id.* at 14.

113. *Powell v. State*, 219 S.W.3d 498, 504 (Tex. App. 2007); see *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).

114. *Valle v. State*, 109 S.W.3d 500, 503–04 (Tex. Crim. App. 2003); see TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(b)(2) (West 2003 & Supp. 2010); see also *Medrano v. State*, No. AP-75320, 2008 WL 5050076, at *10 (Tex. Crim. App. Nov. 26, 2008) (finding the mens rea required for the robbery supplies the mens rea for the capital murder committed by a co-conspirator). The defendant in *Medrano* furnished members of his gang the gun used in a planned robbery which became a murder of more than one person. *Id.* at *3–4. The defendant did not participate in the offense but was found guilty of capital murder and received a sentence of death. *Id.* at *1. The court found the jury could find the defendant knew there was going to be a robbery and that by giving his gang the gun he could have anticipated someone might be shot. *Id.* at *9–10. However, the jury could have found otherwise. See *id.* Under the TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(b)(2), the “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.

Two U.S. Supreme Court cases, *Enmund v. Florida*, 485 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), discussed the use of the death penalty on defendants who were not proven to have an intent to kill. 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

In a capital murder setting, using Texas Penal Code section 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,¹¹⁵ then the initial person can be held responsible and prosecuted for capital murder.¹¹⁶

Most usually, section 7.02(a)(2) is used to expand a person's criminal responsibility for the acts of others, by showing in some way he "solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid" another to commit capital murder while acting with intent to promote or assist the commission of the crime.¹¹⁷

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 of the lesser offense, not the more serious offense.¹¹⁸ It is no de-

but only in an attenuated capacity. *Enmund*, 458 U.S. at 790–91. In *Tison*, the Supreme Court clarified *Enmund* and held that the 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* *Gongora v. State*, No. AP-74636, 2006 WL 234987, at *12 (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"); *Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998); *Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995) ("[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."). A proposed repeal of the anti-parties charge was introduced in the Texas House during the 80th Legislature in 2007 but did not make the final bill. *Legislative History, HB 8*, TEXAS LEGISLATURE ONLINE (last accessed April 18, 2011), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB8>.

115. As defined in any of the nine ways set out in section 19.03 or if the person should have anticipated a capital crime would be committed as set out in section 22.021. This is assuming *Kennedy v. Louisiana*, 544 U.S. 407 (2008), has not in effect rendered this statute ineffectual and unconstitutional. *See infra* Part XVI.
116. *Fuller v. State*, 827 S.W.2d 919, 932 (Tex. Crim. App. 1992).
117. *Tucker v. State*, 771 S.W.2d 523, 529–30 (Tex. Crim. App. 1988).
118. *See Vanderbilt v. Collins*, 994 F.2d 189, 195 (5th Cir. 1993) (quoting *Hopper v. Evans*, 456 U.S. 605, 610 (1982)). 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. *Id.* at 535–36. The second step is whether there is some evidence, anything more than a scintilla, "adduced at trial to support such an instruction." *Id.* 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." *Id.* at 780 (citing

fense that the primary actor has been acquitted,¹¹⁹ 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,¹²⁰ or is immune from prosecution altogether.¹²¹ It is the criminal 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.¹²²

Occasionally, the courts have found evidence insufficient to support a conviction using the conspiracy language of section 7.02(b).¹²³ Also, it is not necessary that an individual be indicted as a party to be convicted as one, as this is not an element of an offense.¹²⁴ And fi-

Posey v. State, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). The court found the trial court was not required to *sua sponte* provide this jury instruction. *Id.* at 781; *cf.* Cordova v. Lynaugh, 838 F.2d 764 (5th Cir. 1988) (“*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 ‘in every case’ in which ‘the evidence would have supported such a verdict.’”).

119. *Cf.* Standefer v. United States, 447 U.S. 10, 25–26 (1980) (interpreting federal statute to allow conviction of accessories to federal crimes notwithstanding principal’s acquittal).
120. *See* Owens v. State, 867 A.2d 334, 340 (Md. Ct. Spec. App. 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).
121. TEX. PENAL CODE ANN. § 7.03(2) (West 2003 & Supp. 2010); *see, e.g.*, Singletary v. State, 509 S.W.2d 572, 578 (Tex. Crim. App. 1974) (“[a]n 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.”).
122. *Ex parte* Thompson, 179 S.W.3d 549, 553–54 (Tex. Crim. App. 2005) (“What matters under section 7.02(a) is the criminal *mens rea* of each accomplice; each may be convicted only of those crimes for which he had the requisite mental state.”).
123. *Isham v. Collins*, 905 F.2d 67 (5th Cir. 1990) (finding insufficient evidence where defendant was present at scene with triggerman and assisted in disposing of the murder weapon); *Turner v. McKaskle*, 721 F.2d 999 (5th Cir. 1983) (finding insufficient evidence where defendant possessed stolen property of the murder victim); *Vodochodsky v. State*, 158 S.W.3d 502 (Tex. Crim. App. 2005) (finding insufficient evidence where defendant committed a crime, bonded triggerman out of jail knowing he might commit a crime, but where state failed to show the defendant was aware of a looming specific capital murder); *Flores v. State*, 551 S.W.2d 364 (Tex. Crim. App. 1977) (finding insufficient evidence where defendant possessed deceased’s car with license plates to another car and stored deceased’s suitcase with deceased’s items inside); *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. 1989) (finding insufficient evidence where defendant supplied murder weapon to triggerman); *see* TEX. PENAL CODE ANN. § 7.02(b).
124. *Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005). The defendant in *Sorto* brought his 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 indict-

nally, 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.¹²⁵

VII. SECTION 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.¹²⁶

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.”¹²⁷ “[T]he phrase ‘lawful discharge of an official duty’ is not statutorily defined, but it does have an ordinary meaning that jurors can apply using their own common sense”¹²⁸ 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.¹²⁹ Further,

[w]hether [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

ment and proven by the finder of fact, and failure to do so violated the Sixth Amendment and defendant’s rights to due process. *Sorto*, 173 S.W.3d at 476. The court made no finding on the claim saying it was not properly preserved for review. *Id.*; 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). In Texas, 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).

125. *Coleman v. State*, No. AP-75478, 2009 WL 4696064, *10 (Tex. Crim. App. 2009) (citing *Marable v. State*, 85 S.W.3d 287, 287–88 (Tex. Crim. App. 2002)).

126. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

127. TEX. PENAL CODE ANN. § 19.03(a)(1).

128. *Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010); see *Daniels v. State*, 754 S.W.2d 214, 219 (Tex. Crim. App. 1988) (“[W]hen statutory words are not defined, they are ordinarily given their plain meaning, . . . unless the act clearly shows that they were used in some other sense.”); *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979)) (“[I]n the absence of special definitions, the language under attack [as vague] can be measured by common understanding and practices or construed in the sense generally understood.” (quoting *U.S. v. Petrillo*, 332 U.S. 1, 8 (1947) (internal quotation marks omitted))).

129. *Cockrell v. State*, 933 S.W.2d 73, 75 (Tex. Crim. App. 1996) (officer made a warrantless arrest without probable cause); *Montoya v. State*, 744 S.W.2d 15, 29 (Tex. Crim. App. 1987); see *Mays*, 318 S.W.3d at 388–89.

duties when he makes an unlawful arrest, so long as he is acting within his capacity as a peace officer.¹³⁰

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.¹³¹

VIII. SECTION 19.03(A)(2) PENAL CODE: MURDER IN THE COURSE OF COMMITTING OR ATTEMPTING TO COMMIT CERTAIN CRIMES

Under this subsection of section 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.¹³² The culpable mental state peculiar to this section is discussed in greater detail in Part IV of this Article. For this section, it is sufficient to state that the requisite mens rea in this type of capital felony is restricted to intentional murders only.¹³³

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130. *Montoya*, 744 S.W.2d at 29; see also *Hughes v. State*, 897 S.W.2d 285, 297–98 (Tex. Crim. App. 1994) (citing *Montoya* to hold that the constitutionality of a state trooper's stop was irrelevant to the consideration of whether he was lawfully discharging his duty); *Hafdahl v. State*, 805 S.W.2d 396, 401 n.6 (Tex. Crim. App. 1990) (pointing gun at motorist during routine traffic investigation is a lawful exercise of an officer's duties); *Guerra v. State*, 771 S.W.2d 453, 460–61 (Tex. Crim. App. 1988) (citing *Montoya* for the proposition that whether or not an officer was making a valid arrest has no bearing on whether the officer was acting in the lawful discharge of his duties).
131. In *Excamiella v. State*, 143 S.W.3d 814 (Tex. Crim. App. 2004), the appellant argued that the state offered no proof that he knew victim was police officer. However, the TCCA found that there was sufficient proof where an officer that performed CPR testified he unbuttoned the victim's "uniform shirt," another officer testified that clothing "clearly identified" him as a police officer, a valet parking employee said the victim was in uniform, the defendant told reporter he knew victim was police officer, and the defendant told a hospital employee he had shot a cop. *Id.* at 820–21; see also *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 and defendant knew he was an officer, so noting fourteen times in his confession); *Nethery v. State*, 692 S.W.2d 686, 698–99 (Tex. Crim. App. 1985); *Venegas v. State*, 660 S.W.2d 547, 549 (Tex. App. 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).
132. Terroristic threat is discussed in TEX. PENAL CODE ANN. § 22.07; see *supra* note 22 (providing the complete text of section 22.07). 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. TEX. PENAL CODE ANN. §§ 19.03, 22.07.
133. In defining capital murder section 19.03 first requires that one must commit murder as defined in TEX. PENAL CODE ANN. section 19.02 which allows for mur-

A. Nexus between the Murder and the Underlying Crime

There are some additional limitations to this form of capital felony. For one, there must be a nexus between the murder and the crime committed or attempted to be committed.¹³⁴ The TCCA 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.¹³⁵ The victim, or things done to the victim, may provide the nexus as the history of this language will show.¹³⁶

The evolution of this concept can best be understood by studying the relation between a robbery¹³⁷ (theft) and a murder (resulting in capital murder) through case law developments since the implementation of the modern penal code.

1. Robbery

i. *Moore v. State*¹³⁸

In *Moore*—involving an early pre-Penal Code offense—the defendant took the position that 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.¹³⁹ While beginning the process of defining the nexus requirement of section 19.03(a)(2), the TCCA 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

der to be committed with either an intentional *or* knowing mens rea. However, under section 19.03(a)(2), the mens rea for the murder must be intentional; knowing is not sufficient.

134. *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); *Ibanez v. State*, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986).

135. *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980).

136. The following baker’s dozen cases, from pre-Penal Code to modern era TCCA interpretations, show a steadfast interpretation of section 19.03(a)(2) as requiring a nexus between the underlying crime alleged as an aggravating circumstance and the commission of a murder to make the murder a capital felony, stating: “in the course of committing or attempting to commit” means “conduct that occurs 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.

137. The Texas Penal Code defines robbery as follows:

A person commits [robbery] if, in the course of committing theft as defined in Chapter 31 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(a).

138. 542 S.W.2d 664 (Tex. Crim. App. 1976).

139. *Id.* at 674.

same location and around the same time of the robbery.¹⁴⁰ 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.¹⁴¹ The court refused to adopt a construction of the statute that would make the statute "absurd or ridiculous," or that would lead to "absurd conclusions of consequences."¹⁴²

ii. *Palafox v. State*¹⁴³

The nexus requirement can also 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.¹⁴⁴ 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.¹⁴⁵ "It was only for this reason . . . that the items were taken" from the victim.¹⁴⁶ The TCCA found this was a murder and a subsequent theft and therefore not a capital murder-robbery.¹⁴⁷ There was no nexus between the murder and the alleged underlying crime of robbery which contained an element of theft.

iii. *Fierro v. State*¹⁴⁸

The question of how the state shows intent to commit the underlying crime to establish the nexus was addressed in *Fierro*. In *Fierro*, a cab driver was shot and subsequently items were taken from him.¹⁴⁹ The defense argued there was no showing of intent to commit robbery prior to the victim's death.¹⁵⁰ 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.¹⁵¹ "The fact that there was no prior discussion of robbery and no indication of intent to commit robbery mentioned in the confession

140. *Id.*

141. *Id.*

142. *Moore*, 542 S.W.2d at 673-75.

143. 608 S.W.2d 177 (Tex. Crim. App. 1979) *superseded by* TEX. R. EVID. 607 (West 2003 & Supp. 2005), *as recognized in* *Junecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996).

144. *Id.* at 182.

145. *Id.*

146. *Id.*

147. *Id.* *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. *Id.* at 183-84. Although this is no longer the law, the case is instructive on the facts.

148. 706 S.W.2d 310 (Tex. Crim. App. 1986).

149. *Id.* at 312.

150. *Id.* at 312-13.

151. *Id.* at 313.

[was] not controlling.”¹⁵² A verbal demand for money is not the “talisman of an intent to steal. Such intent may be inferred from actions or conduct.”¹⁵³

*iv. DeMouchette v. State*¹⁵⁴

Addressing the proof necessary to establish the nexus in a robbery-murder scenario is *DeMouchette*. In *DeMouchette*, the defendant claimed there was no nexus between the murders and an alleged underlying robbery.¹⁵⁵ The defendant claimed that the state’s failure to prove theft left the state with no proof of murder in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.¹⁵⁶ The TCCA 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.¹⁵⁷ 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.¹⁵⁸

*v. Barnard v. State*¹⁵⁹

In *Barnard*, a murder occurred during the commission of an aggravated robbery of a convenience store where one person was killed and another robbed.¹⁶⁰ 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.¹⁶¹ The defendant argued that since the indictment included all the detailed elements to prove robbery, including theft with its component parts, 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.¹⁶² The court quickly dispatched this argument by showing the indictment when read as a whole showed robbery

152. *Id.*

153. *Id.*

154. 731 S.W.2d 75 (Tex. Crim. App. 1986).

155. *Id.* at 78.

156. *Id.*

157. *Id.*

158. *Id.* at 78–79.

159. 730 S.W.2d 703 (Tex. Crim. App. 1987).

160. *Id.* at 707.

161. *Id.* at 709 (citing TEX. PENAL CODE ANN. § 19.03(1)(2) (West 2003 & Supp. 2010)).

162. *Id.* at 708.

as the underlying crime by detailing the elements of robbery including theft.¹⁶³

*vi. McGee v. State*¹⁶⁴

McGee addressed the nexus requirement that the aggravating element of murder must have occurred during the commission or in the immediate flight after the commission of a robbery.¹⁶⁵ The *McGee* court held that it is “sufficiently proven if the State proves the robbery occurred immediately after the commission of the murder.”¹⁶⁶ Further, “an intent to steal may be inferred from the facts.”¹⁶⁷

*vii. White v. State*¹⁶⁸

In the same year as *McGee*, the TCCA decided *White*, a case involving how the trier of fact should decide the timing of the formation of intent to commit the underlying crime.¹⁶⁹ The TCCA 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.¹⁷⁰ 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.¹⁷¹ It is permissible for the jury to infer that sequence from all the evidence admitted.¹⁷² If a theft (or robbery) was committed “as an afterthought and unrelated to” an assault (or murder),¹⁷³ then the evidence is insufficient to show a robbery-capital murder nexus.¹⁷⁴

163. *Id.* at 708–09. 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. *Id.* at 708. The TCCA 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’s purpose of using this mechanism to narrowly define offenses as aggravating circumstances 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*. *Id.* at 709.

164. 774 S.W.2d 229 (Tex. Crim. App. 1989), *reaffirmed by* *Cooper v. State*, 67 S.W.3d 221, 223 (Tex. Crim. App. 2002).

165. *Id.* at 234.

166. *Id.*

167. *Id.* at 235.

168. 779 S.W.2d 809 (Tex. Crim. App. 1989).

169. *Id.* at 815.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Cooper*, 67 S.W.3d at 224.

174. *White*, 779 S.W.2d at 814–15; *see* *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 there from, whether

viii. *Nelson v. State*¹⁷⁵

While once again struggling with intent, the TCCA in *Nelson* again recognized it is possible to have a murder followed by theft without having a murder in the course of robbery (capital murder).¹⁷⁶ In *Nelson*, what makes a theft into a robbery is the presence of the “intent to obtain or maintain control of the victim’s property” at the time of, or prior to, the murder.¹⁷⁷ This intent is the nexus that ties the theft (robbery) and the murder together to create a capital felony.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

ix. *Alvarado v. State*¹⁸¹

In *Alvarado*, the defendant believed the victims had cheated him on a drug deal.¹⁸² He and two others went to the victim’s house with knives with intent to kill the victims.¹⁸³ After they killed the victims, they searched the house for things to steal.¹⁸⁴ The TCCA found a rational jury could have found, beyond a reasonable doubt, that at or before the time of the killings the defendant formed the intent to commit robbery by taking the victim’s property and thereby establishing a nexus.¹⁸⁵ The court noted that a jury may infer the intent from the conduct of the defendant, but robbery as an afterthought and unrelated to the murder will not suffice.¹⁸⁶

any rational jury could have found the defendant guilty beyond a reasonable doubt); *Cooper*, 67 S.W.3d at 224.

175. 848 S.W.2d 126 (Tex. Crim. App. 1992).

176. *Id.* at 132.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 131–32. Interestingly, the TCCA 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 earlier when the indictment there had all the elements of robbery in it including all the elements of theft. *Compare id.*, with *Barnard v. State*, 730 S.W.2d 703, 708 (Tex. Crim. App. 1987).

181. 912 S.W.2d 199 (Tex. Crim. App. 1995).

182. *Id.* at 205.

183. *Id.* at 207.

184. *Id.* at 208.

185. *Id.* at 207.

186. *Id.*; see *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993).

x. *Holberg v. State*¹⁸⁷

The court continued to use the same language to draw a nexus between the underlying crime and the murder in *Holberg*, stating “[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.”¹⁸⁸ The TCCA noted:

[A] trial court’s charge [must] accurately track the relevant statutes, [giving] the jury clear guidance on the distinction between murder in the course of [committing or attempting to commit the underlying crime] (a capital offense), . . . and lesser included offense[s], [including murder] (a non-capital offense), and [give] the jury the option of finding appellant guilty of any, or none, of those offenses.¹⁸⁹

As the charge authorized the jury to convict on alternative theories, if any one theory was sufficient the verdict of guilt would be upheld, which it was.¹⁹⁰ As to the nexus requirement, the jury found the defendant murdered the victim, an eighty year old man, with fifty-eight stab wounds and numerous blunt force injuries, shoved the base of a lamp five inches down his throat, took \$1,400 in cash from his wallet, and spent the evening buying and snorting cocaine with a friend.¹⁹¹ The jury’s implicit finding of a nexus between the defendant’s murder of the victim while committing robbery and burglary was affirmed.¹⁹²

187. 38 S.W.3d 137 (Tex. Crim. App. 2000).

188. *Id.* at 141 (quoting *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980)).

189. *Id.* at 141. Note this quoted material is only available via Westlaw because the Southwest Reports only print the redacted version released by the court for publication.

190. *Id.* at 139 (citing *Rabbani v. State*, 847 S.W.2d 555, 558–59 (Tex. Crim. App. 1992)).

191. *Id.* In *Anderson v. Collins*, 18 F.3d 1208 (5th Cir. 1994), the court noted:

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.

Id. at 1222; 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 v. Texas*, 428 U.S. 262, 269–71 (1976). 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. *Id.*

192. *Holberg*, 38 S.W.3d at 141 (Tex. Crim. App. 2000) (quoting *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980)). The defendant, Brittany Marlowe Holdberg, remains on death row where she has been since March 27, 1998. See *Offender Information, Brittany Holberg*, TEXAS DEPARTMENT OF CRIMINAL JUS-

*xi. Cooper v. State*¹⁹³

And finally in this survey of nexus in the section 19.03(a)(2) robbery-murder context is *Cooper*. Although not a capital case, but a robbery case, the TCCA 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.¹⁹⁴ The TCCA 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.¹⁹⁵ 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.¹⁹⁶ *Cooper* stated that the nexus is “proven if the State proves that the theft occurred immediately after the assault.”¹⁹⁷ 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.¹⁹⁸ “Even if there is no other evidence of a nexus, that inference will support a conviction.”¹⁹⁹ In addition to these robbery-murder cases, there are two cases involving aggravated sexual assault²⁰⁰ that provide additional nexus concepts.

TICE, <http://www.tdcj.state.tx.us/stat/holbergbrittany.htm> (last visited Feb. 22, 2011).

193. 67 S.W.3d 221 (Tex. Crim. App. 2002).
194. *Id.* at 225; *see also* *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995) (holding that intent to commit robbery must be formed prior to or concurrent with murder); *White v. State*, 779 S.W.2d 809, 815 (Tex. Crim. App. 1989) (holding that if intent to rob were formed after murder, the murder would not be “in the course of” robbery); *Ibanez v. State*, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986) (holding that murder and robbery must be related).
195. *McGee v. State*, 774 S.W.2d 229, 234 (Tex. Crim. App. 1989).
196. *Ibanez*, 749 S.W.2d at 807.
197. *Cooper*, 67 S.W.3d at 223.
198. *Id.* at 224.
199. *Id.* Judge Meyers filed a dissenting opinion in *Cooper*, in which Judges Price, Johnson, and Cochran 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. *Id.* at 226. The dissent found no evidence that the defendant developed the requisite intent to commit theft either prior to or during the assault. *Id.* at 228. The dissent said the majority’s interpretation of *McGee* was inaccurate and that *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. *Id.* at 226. 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, 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.
200. A person commits aggravated sexual assault if the person intentionally or knowingly penetrates or contacts the anus, sexual organ, or mouth of another without consent, or does the same with a child, regardless of consent. TEX. PENAL CODE

2. *Aggravated Sexual Assault*

i. *Dorough v. State*²⁰¹

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 forty-five minutes had elapsed between the last sexual assault and the murder.²⁰²

ii. *Woolridge v. State*²⁰³

In *Woolridge*, the court found that 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.²⁰⁴ The court noted that 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.²⁰⁵ The court noted that:

‘[I]n the course of committing’ an offense listed in [Texas Penal Code], section 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 . . . [and there is] no material difference between this and the armed

ANN. § 22.021 (West 2003 & Supp. 2010). This can involve serious bodily injury or death, or fear of the same, kidnapping, and deadly weapons.

201. 639 S.W.2d 479 (Tex. Crim. App. 1982).

202. *Id.* at 480. The court here expanded the definition of “in the course of committing aggravated rape.” *Id.* 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, and the appellant threatened them with a gun the entire time. The appellant never left the scene.” *Id.* at 481. The subject murder occurred after the murder victim and the sexual assault victim had been turned loose. *Id.* at 480–81. The murder victim, instead of walking away, turned back and the defendant shot him again, this time fatally. *Id.* at 480. 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 fifty-three years of age and remains in prison serving his life sentence with no scheduled release date even though he was eligible for release over thirteen years ago. See *Offender Information Detail, John Dorough*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, <http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=02396388> (last visited Feb. 22, 2011).

203. 653 S.W.2d 811 (Tex. Crim. App. 1983).

204. *Id.* at 816.

205. *Id.*

bank robber who shoots his victim as he flees, in order to eliminate the only witness to his crime.²⁰⁶

This was the very conduct proscribed as a capital offense in section 19.03(a)(2).²⁰⁷

3. *Kidnapping*²⁰⁸

Generally, the developed rules as to nexus apply to any of the underlying crimes in section 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.²⁰⁹ The courts have determined that kidnapping cannot occur after a victim is dead.²¹⁰

Kidnapping is defined in the Texas Penal Code as “intentionally or knowingly abduct[ing] another person.”²¹¹ The definition of a “person” is an “individual.”²¹² Murder is “intentionally or knowingly caus[ing] the death of an individual.”²¹³ And an individual is defined as “a human being who is *alive*.”²¹⁴ So once a victim is dead, kidnapping is no longer possible. Additionally, any moving of a dead body could not possibly be kidnapping.²¹⁵ 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.²¹⁶

206. *Id.* (citing *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980)).

207. *Id.*; *Riles*, 595 S.W.2d at 862 (Tex. Crim. App. 1980).

208. Kidnapping is the intentional or knowing abduction of another person. TEX. PENAL CODE ANN. § 20.03 (West 2003 & Supp. 2010).

209. *Herrin v. State*, 125 S.W.3d 436, 440 (Tex. Crim. App. 2002).

210. The majority in *Herrin*, answering the dissent who pointed to acts of the defendant that indicated intent to kidnap, found evidence of the defendant’s intent to kill the victim prior to the shooting and no evidence of the defendant’s intent to kidnap the victim. *Id.* at 440 n.8. The court cited *Santellan v. State*, 939 S.W.2d 155 (Tex. Crim. App. 1997) to illustrate how moving the body after the shooting showed the defendant’s intent to kidnap the victim. *Id.* The defendant’s own statements in that case showed his intent to abduct the victim by saying he thought the victim might still be alive when he moved her, that he “wanted to get away and be with her and spend some time together,” that after the shooting he laid with the victim and held her “like [they] used to” and that he “wanted to show her how much [he] really loved her.” *Id.* at 163–64.

211. TEX. PENAL CODE ANN. § 20.03.

212. *Id.* § 1.07(38).

213. *Id.* § 19.02(b)(1).

214. *Id.* § 1.07(26) (emphasis added).

215. *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) (“We accept for purposes of analysis that a dead body cannot be kidnapped.”).

216. In *White v. State*, 779 S.W.2d 809 (Tex. Crim. App. 1989), the court noted that theft from a corpse does not rise to robbery thereby creating the nexus between the theft and the previous murder. *Id.* at 815. If murder is sufficiently proven “in the course of” committing robbery where the State proves that the robbery oc-

There are those that believe including kidnapping in the list of underlying crimes used as an aggravating circumstance to increase a murder to a capital felony may be over-broad in violation of the Eighth Amendment.²¹⁷ The Texas Penal Code defines “abduct” as 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.”²¹⁸ Restraint can be shown with slight movement or temporary confinement.²¹⁹ Virtually every murder involves some restraint of the victim’s movements. An argument can be made that using kidnapping as an aggravating circumstance hardly narrows the class of murderers who are eligible for capital punishment as contemplated by *Jurek*.²²⁰

4. *Burglary*

Burglary²²¹ 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*?²²² The TCCA has con-

curred 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 *Cooper*, that the defendant committed the murder while in the act of committing kidnapping? See *Cooper v. State*, 67 S.W.3d 221, 224 (Tex. Crim. App. 2002); *McGee v. State*, 774 S.W.2d 229, 234 (Tex. Crim. App. 1989) (finding the intent to commit the robbery can be inferred by acts and conduct of the defendant). 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 live? See *Cooper*, 67 S.W.3d at 224.

217. See *Brimage v. State*, 918 S.W.2d 466, 489 (Miller, J., concurring and dissenting).

218. TEX. PENAL CODE ANN. § 20.01(2).

219. *Hines v. State*, 75 S.W.3d 444 (Tex. Crim. App. 2002).

220. See *Brimage*, 918 S.W.2d at 484 (Miller, J., concurring and dissenting).

221. Burglary, under the Texas Penal Code, occurs when:

[W]ithout the effective consent of the owner, a person (1) enters a habitation, or building . . . not then 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(a).

222. The TCCA 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). 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 (West

sistently held otherwise, allowing the murder itself to constitute the nexus between the murder and the burglary, most notably in *Homan v. State*.²²³

The rule in *Cooper*, as to robbery-murder, is that a theft following the murder shows intent to commit robbery.²²⁴ In *Homan* the court required nothing after the murder to show intent other than the murder itself, letting the murder serve double duty by creating a nexus with the underlying crime.²²⁵ Judge Johnson in her dissent in *Homan* opined, “As the majority acknowledges, this appears to be a case of ‘bootstrapping’ to get a charge of capital murder.”²²⁶ She chastised the majority for relying “upon case law which ha[d] no basis in logic” and for “misinterpret[ing] earlier precedent.”²²⁷

2003 & Supp. 2010). 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 TCCA 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.

223. 19 S.W.3d 847, 849 (Tex. Crim. App. 2000) (“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.”). As an aside, just as in the murder-burglary scenario, in a burglary with the intent to commit a felony situation, the felony requirement is also “satisfied by the actual murder of the victim.” *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995); *See Brown v. State*, 92 S.W.3d 655, 659 (Tex. App. 2002) (citing *Homan*, 19 S.W.3d at 849), *aff’d*, 122 S.W.3d 794 (Tex. Crim. App. 2003) (noting that the court of appeals found *Brown*’s argument—that the evidence was legally insufficient when the State uses the murder to support the burglary and the “charged murder”—lacked merit citing the court of criminal appeals prior rejection of this argument in *Homan*).

224. *Cooper v. State*, 67 S.W.3d 221, 223 (Tex. Crim. App. 2002).

225. *Homan*, 19 S.W.3d at 849.

226. *Id.* at 850 (Johnson, J., dissenting).

227. *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.

5. Arson

As to arson,²²⁸ 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.²²⁹ The “intent may . . . be inferred from circumstantial evidence such as acts, words, and the conduct of the [defendant].”²³⁰ In an arson case, intent cannot be inferred from the mere act of burning,²³¹ unlike in the robbery-murder case where intent can be inferred by the mere act of a theft following the murder²³² or in a burglary-murder case where the intent to commit burglary is inferred by the murder itself.²³³

228. The Texas Penal Code defines arson as follows:

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(a). Offenses under this section range from state jail to first degree felony. *Id.* § 28.02(d)–(f).

229. *Hogue v. State*, 711 S.W.2d 9, 13 (Tex. Crim. App. 1986).

230. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (citing *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1987)).

231. *Beltran v. State*, 593 S.W.2d 688, 689 (Tex. Crim. App. 1980) (citing *Miller v. State*, 566 S.W.2d 614 (Tex. Crim. App. 1978)).

232. *See supra* subsection VIII.A.1.

233. *See supra* subsection VIII.A.4. 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 that have been discussed above.

6. *Obstruction or Retaliation*

The underlying crime of obstruction or retaliation²³⁴ can occur with no violence being committed. In these circumstances, where no injury results, only “harm,”²³⁵ 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.²³⁶ Even in those cases where the harm is more than a mere “loss or disadvantage,” but rather 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. The statute references only “injury” implying a violation of a legal right, a wrong or injustice or an actionable invasion of a legally protected interest.²³⁷ There are only a few cases involving the obstruction and retaliation portion of the capital murder statute and no clear overriding problem with the statute has developed.²³⁸

234. Obstruction or retaliation is defined in the Texas Penal Code as:

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.”

TEX. PENAL CODE ANN. § 36.06 (West 2003 & Supp. 2010).

235. Harm is defined in the Texas Penal Code as: “anything, reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.” *Id.* § 1.07(25).

236. “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.

237. Injury is defined as

(1) The violation of another’s legal right, for which the law provides a remedy; a wrong or injustice. (2) . . . Anything said or done in breach of a duty not to do it, if harm results to another in person, character, or property. Injuries are divided into real injuries (such as wounding) and verbal injuries (such as slander). They may be criminal wrongs (as with assault) or civil wrongs (as with defamation). (3) Any harm or damage. Some authorities distinguish harm from injury, holding that while harm denotes any personal loss or detriment, injury involves an actionable invasion of a legally protected interest.

BLACK’S LAW DICTIONARY 712 (9th ed. 2009). See RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

238. See *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005). The defendant in *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. *Id.* at 177. The victim and the defendant had previously been in-

In an obstruction case, the State must prove the defendant “intentionally or knowingly harm[ed] or threaten[ed] to harm another by an unlawful act” (i.e., murder in this context) and obstructed, “prevent[ed] or delay[ed]” (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.²³⁹ “Nothing . . . requires an intent to prevent the reporting of a specific crime,” and although the defendant’s reasons for obstructing are relevant to show his motive, they are not an element of the offense.²⁴⁰ Motive though “may be a circumstance indicative of [the defendant’s] guilt,”²⁴¹ and such circumstantial evidence can be legally sufficient to affirm a capital murder conviction.²⁴²

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 reported, or the defendant knows intends

involved romantically and the victim, as a police informant introduced the defendant to an undercover narcotics officer which led to the defendant’s arrest. *Id.* at 177–78. In the defendant’s taped statement he said he had broken off his relationship with the victim because she had set him up. *Id.* at 178. The defendant admitted killing the victim. *Id.* 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.* In *Ward v. State*, No. AP-75750, 2010 WL 454980 (Tex. Crim. App. Feb. 10, 2010), the defendant was convicted of intentionally murdering a city code enforcement officer, who was at the defendant’s home in a city truck wearing a city uniform, following up on a code violation. *Id.* at *1. The defendant’s arguments on appeal again had to do with matters unrelated to the effect or application of the statute. *See id.* at *2. In *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009), the defendant “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.” *Id.* at 281. The court only addressed the issue of sufficiency of the underlying burglary and only mentioned the retaliation in passing. *Id.* The victim had filed for divorce from the defendant and he had apparently confronted her on the issue of whether she was going to go through with the divorce. *See id.* at 283. The court stated that “[t]he evidence need be sufficient to prove only one of [the] two [underlying charged] felonies, not both.” *Id.* at 286–87 (citing *Rousseau v. State*, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005)).

239. TEX. PENAL CODE ANN. § 36.06(a)(2).

240. *Hall v. State*, No. AP-75121, 2007 WL 1847314, at *2 (Tex. Crim. App. June 27, 2007) (holding that trial court did not err in finding defendant guilty of capital murder and sentencing him to death).

241. *Clayton v. State*, 235 S.W.3d 772, 781 (Tex. Crim. App. 2007) (citing *Clayton v. State*, 169 S.W.3d 254, 258 (Tex. App. 2005)).

242. *See King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000); *see also Evans v. State*, No. 05-08-01289-CR, 2010 WL 779327 (Tex. App. March 9, 2010) (affirming defendant’s conviction 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).

to report, a crime.²⁴³ 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.²⁴⁴

7. *Terroristic Threat*

A person who intentionally commits a murder in the course of committing or attempting to commit certain specific forms of terroristic threat²⁴⁵ commits a capital felony.²⁴⁶ If a person threatens violence

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243. TEX. PENAL CODE ANN. § 36.06(a)(1). 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? Does 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 the underlying crime, now enough 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 that the application of the obstruction and retaliation statute as an aggravating circumstance 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. *Id.*
244. *Russeau v. State*, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005) (“[T]he evidence in a capital murder prosecution need be sufficient to establish only one of the underlying felonies alleged in the indictment.” (citing *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999))); *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995). However, in *Robinson v. State*, 266 S.W.3d 8 (Tex. App. 2008), the Jury charge presented two alternate grounds, under either of which the jury could find defendant guilty of capital murder. *Id.* at 13. The first ground was “capital murder as alleged in indictment and described in capital murder statute” (remuneration). *Id.* at 15. The second ground was legally defective as it did “not constitute capital murder under the statute” (conspiracy felony murder). *Id.* As it is impossible to tell which ground for conviction the jury selected, under *Almanza* the defendant was “egregiously harmed by the error in the jury charge.” *Id.* Judgment was reversed, and case remanded for a new trial. *Id.*
245. This portion of section 19.03 became law effective Sept. 1, 2003. See H.B. 11, 78th Leg., § 1 (Tex. 2003) (creating another new classification (or many new classifications) of crime eligible for capital punishment). TEX. PENAL CODE ANN. § 19.03(a)(2).
246. Terroristic threat, as it applies to a capital felony, is defined in TEX. PENAL CODE ANN. § 22.07(a)(1),(3),(4),(5),(6). The reader is reminded that under subparagraph (a)(1) of section 22.07, 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

(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.²⁴⁷ 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.²⁴⁸ No cases could be found which interpret terroristic threat as the underlying crime to this portion of section 19.03(a)(2).²⁴⁹

IX. SECTION 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)²⁵⁰ 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 aggravating circumstances 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 defined early on in terms of pecuniary gain.²⁵¹ It mattered not whether the gain was for the person

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. *Id.* 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. Is this something people of ordinary intelligence would know?

247. *Id.*

248. *Id.*

249. The constitutionality of a capital murder based upon such a vague underlying crime as terroristic threat which includes misdemeanors makes prosecution unlikely. Capital murder schemes have consistently been found constitutional when they “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 *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976)).

250. TEX. PENAL CODE ANN. § 19.02(b)(1) (defining murder as “intentionally or knowingly caus[ing] the death of an individual”).

251. *Beets v. State*, 767 S.W.2d 711, 733–37 (Tex. Crim. App. 1987). BLACK’S LAW DICTIONARY 1167 (8th ed. 2004) defines pecuniary as “of or relating to money.”

performing the murder or one benefitting from the murder,²⁵² but there were limits.²⁵³

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 reward given or received because of some act.”²⁵⁴ The TCCA, in defining remuneration, stated “remuneration does not require the narrow construction requiring payment by a principal to an agent.”²⁵⁵

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 remuneration.”²⁵⁶ Intent or state of mind is often shown by circumstantial evidence looking at the defendant’s actions as reliable proof of his intent.²⁵⁷ Remuneration is not limited to pecuniary gain, but “is the receipt of some benefit or compensation to be received” because of a murder.²⁵⁸ The question, for purposes of

252. *See, e.g., Beets*, 767 S.W.2d at 733–37; *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) (noting the murder 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); *O’Bryan v. State*, 591 S.W.2d 464 (Tex. Crim. App. 1979) (recovering insurance money).

253. For example, in *Rice v. State*, 805 S.W.2d 432, 434 (Tex. Crim. App. 1991), the defendant was convicted of capital murder for remuneration. The court reversed, holding the killing of a person to “insure [sic] the 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.*

254. *Beets*, 767 S.W.2d at 734. The court stated that when establishing the actor’s intent or state of mind for purposes of remuneration, the appropriate inquiry is: “[d]id the actor kill in the expectation of receiving some benefit or compensation, e.g., life insurance proceeds, pension benefits?” *Id.* at 735.

255. *Rice*, 805 S.W.2d at 434.

256. *Id.* at 434.

257. *Parrish v. State*, 950 S.W.2d 720, 722 (Tex. App. 1997) (citing *Guidry v. State*, 896 S.W.2d 381, 386–87 (Tex. App. 1995)).

258. *Underwood v. State*, 853 S.W.2d 858, 860 (Tex. App. 1993). In *Underwood*, the defendant 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 the defendant. *Id.* The court held this was sufficient evidence of remuneration, rejecting the defendant’s contention that remuneration is limited to pecuniary gain. *Id.* However, in *Urbano v. State*, 837 S.W.2d 114 (Tex. Crim. App. 1997), the court found that the defendant killed a fellow inmate in prison on behalf of a prison gang and that the defendant’s rank within the gang was increased because of the murder. *Id.* But, because 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, the defendant was not guilty of capital murder. *Id.* at 116–17.

this section is, “Did the actor kill in the expectation of receiving some benefit or compensation . . . ?”²⁵⁹

Often, murder for remuneration is thought of as “murder for hire” that involves three persons: “a principal, agent and victim.”²⁶⁰ However, this type of capital murder does not require 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.²⁶¹ Murder for remuneration also embraces the killer’s expectation that she will benefit from the death of the victim when she herself is the actor.²⁶² Sometimes, the actor’s efforts can fall short of commission and be an offense less than capital.²⁶³

X. SECTION 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),²⁶⁴ “while escaping or attempting to escape from a penal institution,” that murder is a capital felony.²⁶⁵ Once again there is no specific mens rea for the underlying aggravating circumstance 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.²⁶⁶ The TCCA affirmed his conviction after his third trial and

259. *Beets*, 767 S.W.2d at 735.

260. *Id.* at 736.

261. The decision in *Beets* overruled the court’s prior decision in *Doty v. State*, 585 S.W.2d 726 (Tex. Crim. App. 1979), which required a minimum of three actors to constitute the capital offense of murder for remuneration. *Beets*, 767 S.W.2d at 736.

262. *See Beets*, 767 S.W.2d at 733–34. (finding the indictment, which alleged defendant 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).

263. For example, criminal solicitation which 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.” TEX. PENAL CODE ANN. § 15.03(a) (West 2003). Criminal solicitation is a first degree felony if the crime solicited is a capital murder. *Id.* § 15.03(d)(1). There is also a definition within the statute for solicitation of any first degree felony. *Id.* § 15.03(d)(2).

264. *Id.* § 19.02(b)(1) (defining murder as “intentionally or knowingly causing the death of an individual”).

265. *Id.* § 19.03(a)(4) (West 2003 & Supp. 2010).

266. *Cuevas v. State*, 742 S.W.2d 331 (Tex. Crim. App. 1987).

third sentence of death.²⁶⁷ The court did not discuss issues that can advance the discussion herein of mens rea, statutory construction, or the constitutionality of the different definitions of a capital felony.

XI. SECTION 19.03(A)(5) PENAL CODE: MURDER WHILE INCARCERATED IN A PENAL INSTITUTION

A person commits capital murder if, while the person is incarcerated in a penal institution,²⁶⁸ the person commits a murder, as defined under section 19.02(b)(1),²⁶⁹ of another person (1) “who is employed in the operation of the penal institution;” or (2) “with the intent to establish, maintain, or participate in a combination²⁷⁰ or in the profits of a combination.”²⁷¹

A. Penal Institution Employee

The murder of a prison employee was one of the first five aggravating circumstances approved in *Jurek* as properly narrowing the definition of capital murder.²⁷² To prove a section 19.03(a)(5) capital

267. *Id.* at 333.

268. Penal institution is defined in the Texas Penal Code as: “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). The Texas Code of Criminal Procedure further 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.

TEX. CODE CRIM. PROC. ANN. art. 61.02(e)(2) (West 2003 & Supp. 2010). The courts have also stated: “[A] trial court [may] take judicial notice that the [Texas Department of Criminal Justice] or a county jail “is a penal institution.” *Moreno v. State*, No. 01-91-00858-CR, 1992 WL 187375, *2 (Tex. App. Aug. 6, 1992); *Legg v. State*, 594 S.W.2d 429, 432 (Tex. Crim. App. 1980).

269. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003) (defining murder as “intentionally or knowingly causing the death of an individual”).

270. Combination is defined as: “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) (West 2003).

271. *Id.* § 19.03(a)(5) (West 2003 & Supp. 2010) (footnote added). Subparagraph (B) of section 19.03(a)(5) first became effective during the 73rd Legislature in 1993, creating another new classification of crimes eligible for capital punishment.

272. *Jurek v. Texas*, 428 U.S. 262, 268 (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; murder committed in the course of kidnaping, [sic] burglary, robbery, forcible rape, 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.” (citing TEX. PENAL CODE ANN. § 19.03)).

murder, the state has to first prove the defendant intentionally or knowingly committed murder.²⁷³ 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;²⁷⁴ both of which are factual determinations without mens rea. There are no cases discussing the construction of this statute.²⁷⁵

1. *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 not arbitrary, justified by the State's interest in preventing prison gang²⁷⁶ violence as it provides a "reasoned, principled basis for

273. TEX. PENAL CODE ANN. § 19.03 (requiring satisfaction of section 19.02(b)(1)).

274. *Id.* § 19.03(a)(5)(A).

275. *See generally* Runnels v. State, No. AP-75318, 2007 WL 2655682 (Tex. Crim. App. Sept. 12, 2007) (upholding capital murder conviction when defendant killed supervisor in prison boot factory but not discussing construction of capital murder statute); Hernandez v. State, 819 S.W.2d 806 (Tex. Crim. App. 1991) (upholding capital murder conviction of defendant when defendant murdered jail employee). 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 five additional ways) (8) murder committed for remuneration (could be four ways); (9) murder committed while escaping or attempting to escape from a penal institution (could be two ways); and (10) murder committed by a prison inmate when the victim is a prison employee. Arguably, there are nineteen different ways to commit capital murder, not counting manner and means within the statutes. Under the current statute there are now at least twenty-seven aggravating circumstances or classifications expanding by 270% the original ten component part aggravating circumstances, 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 section 22.07(a)(1), (11) under section 22.07(a)(3), (12) under section 22.07(a)(4), (13) under section 22.07(a)(5), or (14) under section 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 ninety-nine 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.

276. The Texas Penal Code defines a criminal street gang as: "three or more persons having a common identifying sign or symbol or an identifiable leadership who

distinguishing offenders eligible for capital punishment” and does not violate the Eighth Amendment.²⁷⁷ Further, Penal Code section 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.”²⁷⁸ The underlying aggravating circumstance of this section, intending “to establish, maintain, or participate in a combination²⁷⁹ or in the profits of a combination,”²⁸⁰ is a matter of specific intent. Thus, the State need not prove the actual commission of a series of criminal offenses, but rather that the defendant committed the murder “with the present intent to commit a continuing series of criminal acts.”²⁸¹ 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”²⁸² cannot be supplied through “inadvertent conduct.”²⁸³

In this context, the question always arises as to how proof of the defendant’s membership in a prison gang is admissible. The Texas

continuously or regularly associate in the commission of criminal activities.” TEX. PENAL CODE ANN. § 71.01(d). Criminal justice agencies and law enforcement agencies are required 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 TEX. CODE CRIM. PROC. ANN. art. 61.02 (West 2003 & Supp. 2010). “Gangs have been defined based on their actual or perceived threat to the orderly management of the prison. Specific gang membership was based upon identifying signs, symbols, correspondence, prior official records, associations, or self admission of inmates.” Gerald G. Gaes et. al., *The Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct*, FEDERAL BUREAU OF PRISONS, 5 (Mar. 9, 2001), http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcrim_2br.pdf. 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 twelve Security Threat Groups: Aryan Brotherhood of Texas, Aryan Circle, Barrio Azteca, Bloods, Crips, Hermanos De Pistoleros Latinos, Mexican Mafia, Partido Revolucionario Mexicanos, Raza Unida, Texas Chicano Brotherhood, Texas Mafia, and the Texas Syndicate. *Security Threat Groups on the Inside*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (August, 2007), <http://www.tdcj.state.tx.us/cid/Pamphlet-Narr%20Form-09-07.pdf>; see also *Gangs in Texas: 2001*, OFFICE OF THE ATTORNEY GENERAL OF TEXAS (2001), http://www.oag.state.tx.us/AG_Publications/pdfs/2001gangrept.pdf (describing the nature of gangs and gang statistics in Texas).

277. *Brumfield v. State*, 18 S.W.3d 921, 927 (Tex. App. 2000).

278. *Campbell v. State*, 18 S.W.3d 914, 921 (Tex. App. 2000).

279. TEX. PENAL CODE ANN. § 71.01(a) (West 2003). “‘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.” *Id.*

280. *Id.* at § 19.03(a)(5)(B) (footnote added).

281. *Campbell*, 18 S.W.3d at 921.

282. TEX. PENAL CODE ANN. § 19.03(a)(5)(B).

283. *Armstrong v. State*, 18 S.W.3d 928, 933 (Tex. App. 2000).

Rules of Evidence provide that “[a]ll *relevant evidence* is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules.”²⁸⁴ The Rules of Evidence define “relevant evidence” as: “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.”²⁸⁵

Gang membership evidence may be admissible to show bias,²⁸⁶ motive, intent, or to refute a defensive theory.²⁸⁷ Although generally gang membership evidence is relevant, and therefore admissible, if it shows a non-character purpose that tends to show commission of the crime,²⁸⁸ in a prosecution under section 19.03(a)(5)(B), the “same

284. TEX. R. EVID. 402 (emphasis added).

285. *Id.* at 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.” *Id.* at 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* *Moizon v. State*, 991 S.W.2d 841, 847 (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), *overruled by* *Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994); *Green v. State*, 840 S.W.2d 394, 410 (Tex. Crim. App. 1992), *abrogated by* *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999).

286. The Texas Rules of Evidence say nothing specifically about bias but does state that “[e]vidence of other crimes, wrongs or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” TEX. R. EVID. 404(b). The circumstances surrounding a witness’s bias or interest could always be offered as to their credibility and reasons for testifying in general 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.

287. *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 defendant’s illegal behavior); *Stern v. State*, 922 S.W.2d 282, 287 (Tex. App. 1996) (“The admission of background or ‘context of the offense’ evidence is not a question for appellate courts unless the evidence appears to have been admitted by a trial court in order to subvert rule 404(b) by letting inadmissible evidence of other crimes, wrongs, or acts prove the accused’s character under the guise of ‘background’ or ‘context.’” (citing *Mayes v. State*, 816 S.W.2d 79, 86 (Tex. Crim. App. 1991))).

288. TEX. R. EVID. 404(b); *Vasquez v. State*, 67 S.W.3d 229, 239–40 (Tex. Crim. App. 2002) (upholding trial court’s “finding that . . . 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,” and thus survived the defendant’s Rule 403 challenge).

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.²⁸⁹ 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.²⁹⁰

XII. SECTION 19.03(A)(6) PENAL CODE: MURDER WHILE SERVING A SENTENCE FOR CERTAIN CRIMES

Under this section, a person commits capital murder if the person commits murder,²⁹¹ (A) while the person is incarcerated for a previous conviction of murder or a capital murder,²⁹² or (B) while serving a sentence of life imprisonment or a term of 99 years for an offense of aggravated kidnapping,²⁹³ aggravated sexual assault,²⁹⁴ or aggravated robbery.²⁹⁵ This version of section 19.03(a)(6) became effective September 1, 1994.²⁹⁶

289. *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)).

290. *Tibbs v. State*, 125 S.W.3d 84, 94 (Tex. App. 2003) (Anderson, J., concurring) (noting that evidence the defendant was a member of a prison gang (a security threat group) was admissible to prove his intent to work in a continuing criminal activity (citing *Brumfield v. State*, 18 S.W.3d 921, 925–26 (Tex. App. 2000))).

291. Murder is defined in the Texas Penal Code as “intentionally or knowingly caus[ing] the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003 & Supp. 2010).

292. The Texas Penal Code makes it a capital murder to commit a murder while one is incarcerated for capital murder or murder. *Id.* § 19.03(a)(6)(A).

293. *Id.* § 20.04 (aggravated kidnapping).

294. *Id.* § 22.021 (aggravated sexual assault).

295. *Id.* § 29.03 (aggravated robbery).

296. In 1993, the state legislature enacted a version of section 19.03(a)(6) which read as follows: “(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.” S.B. 818, 73rd Leg., (Tex. 1993) (emphasis added). The current version of section 19.03(b)(6) 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). Interestingly, this change came out of the same legislative session in 1993 and was approved the same day as the prior version, however, did not take effect until one year later on September 1, 1994. S.B. 1067, 73rd Leg., § 19.06 (Tex. 1994). 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. Article 42.12, section 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 “inde-

In *Cannady v. State*,²⁹⁷ section 19.03(a)(6) of the Texas Penal Code was challenged for constitutionality. 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.²⁹⁸ 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

agency with a child” to the list of offenses in section 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, section 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 ninety-nine years for the following crimes: capital murder, aggravated kidnapping, aggravated sexual assault, and aggravated robbery. Prior to that time, there was no reference in section 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 section 19.03(a)(6), and removing the reference to section 3g(a)(1), the Legislature set up another new classification of capital murder under section 19.03(a)(6), now expanding the categories of those eligible for the death penalty by adding murder to section (A) of section 19.03(a)(6). Prior to the second version of section 19.03(a)(6) a person who committed murder, while serving a sentence for murder, was not eligible for capital punishment because murder was not a designated crime under section 3g(a)(1). The new and current version of section 19.03(a)(6) means that if an actor is serving a sentence of *any length* for an offense of murder, not just a life sentence or a ninety-nine year term, and that person commits another murder it is a capital felony. The Legislature effectively created a “two-strike and you’re out” rule. But this time, the “out” can be a permanent removal from the game not just being benched. See TEX. PENAL CODE ANN. § 12.42(d) (setting the punishment for a *third*, non-state jail, felony at life or a term of imprisonment with a minimum of twenty-five years and a maximum of ninety-nine years for the “three strike rule”). Further, the changes to section 19.03(a)(6), added two additional aggravating circumstances to the list of persons eligible for a capital felony, those being section 19.03(a)(5)(B) (an incarcerated person murdering another with the intent to establish, maintain, or participate in a combination or in the profits of a combination) and section 19.03(a)(8) (the murder of an individual under six years of age). Effectively, in one year, the legislature created seven new ways to commit capital murder.

297. 11 S.W.3d 205 (Tex. Crim. App. 2000). The defendant in *Cannady*, while serving two life sentences for two previous murders, killed a fellow inmate and was convicted under section 19.03(a)(6). *Id.* at 207. The TCCA 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 the *ex post facto* laws.” *Id.* at 208.
298. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Henderson v. State*, 962 S.W.2d 544, 563 (Tex. Crim. App. 1997).

must “narrow[] the categories of murders for which a death sentence may ever be imposed.”²⁹⁹

“[S]econd, the aggravating circumstance must not be unconstitutionally vague.”³⁰⁰ The test to determine if a statute is so vague as to violate due process is whether it (1) “give[s][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) “provide[s] explicit standards for those who apply [it]” to prevent “arbitrary and discriminatory enforcement.”³⁰¹

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.³⁰² Capital murder defendants do not constitute a suspect class.³⁰³ 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.³⁰⁴ Therefore, the courts use the rational basis test and the challenged statute need only be “rationally related to a legitimate governmental purpose.”³⁰⁵ Further, maintaining a “safe, orderly, and effective[ly] functioning prison” is a legitimate and compelling state interest.³⁰⁶ So creating a subclass of murderers within the category of those convicted of enumerated aggravated crimes serving a life sentence or a term of ninety-nine years and thereby exposing that subclass to capital punishment is a rational action toward maintaining safe and orderly prisons.³⁰⁷

299. *Jurek v. Texas*, 428 U.S. 262, 270 (1976).

300. *Cannady*, 11 S.W.3d at 214 (citing *Tuilaepa*, 512 U.S. at 971–72, (1994)); *Henderson*, 962 S.W.2d at 563 (citing *Tuilaepa*, 512 U.S. at 971–72).

301. *Grayned v. Rockford*, 408 U.S. 104, 108–09 (1972). *Grayned* dealt with a city’s anti-noise ordinance which had First Amendment questions. *Id.* at 105–06. 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. *Id.* at 109.

302. *Cannady*, 11 S.W.3d at 215 (citing *Henderson*, 962 S.W.2d at 560).

303. *Henderson*, 962 S.W.2d at 560.

304. *Id.* at 556.

305. *Id.* (citing *Kadrmas v. Dickenson Pub. Schs.*, 487 U.S. 450, 458 (1988)).

306. *Ex parte Hernandez*, 953 S.W.2d 275, 281 (Tex. Crim. App. 1997). The safety of prisons and the requisite public policy concerns are themes which often justify state action toward affected groups. *See e.g.*, *Basden v. State*, 897 S.W.2d 319, 321 (Tex. Crim. App. 1995) (holding that the courts, in interpreting the statute in question, may consider its purpose of deterring incarcerated inmates from assaultive offenses for the safety of the guards, inmates, and everyone in the prison); *Richardson v. State*, 865 S.W.2d 944, 956 (Tex. Crim. App. 1993) (holding that a prison may monitor phone calls using a pen register to ensure the safety of staff, administrative personnel, visitors, and the inmates).

307. *Cannady*, 11 S.W.3d at 215. Although *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 ninety-nine years for an offense of aggravated kidnapping, aggravated sexual assault, or aggravated robbery, *id.* at 207,

Using the maximum sentences used throughout the Penal Code to draw a line at ninety-nine years or life to create a sub-class of murderers from those convicted of enumerated aggravated crimes provides consistency and clarity.³⁰⁸ 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 aggravating circumstance set out in section 19.03(a)(6).³⁰⁹

The status of the defendant as an “inmate serving a particular sentence (life or ninety-nine years) is an element of the crime of capital murder.”³¹⁰ In fact, the defendant’s status “is the aggravating element that [increases a] simple murder (a first-degree felony) to a capital offense.”³¹¹ This does not violate due process or due course of law protections.³¹²

In *Cannady*, the court found inmates who commit murder in prison while serving a sentence of life imprisonment or a term of ninety-nine years for the commission of a named aggravated offense (1) make up a subclass of murderers in general and (2) create a “clear and definite category” of those that are serving sentences for such aggravated offenses.³¹³ Implicit in this ruling was that section 19.03(a)(6) of the Texas Penal Code was not constitutionally vague, that this statute did not interfere with a fundamental right or discriminate against a suspect class, and that the statute did rationally relate to a legitimate governmental purpose.³¹⁴

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 section 19.03(a)(6).

308. *Henderson*, 962 S.W.2d at 562–63. 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 section 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 aggravating circumstance. For example, a person serving a five year sentence for murder commits a capital felony if he commits another murder while incarcerated on his five 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.

309. *Cannady*, 11 S.W.3d at 215–16.

310. *Cannady*, 11 S.W.3d at 216; see *State v. Mason*, 980 S.W.2d 635, 640 (Tex. Crim. App. 1998). This formulation could also be applied to one serving any sentence for a previous conviction for murder or capital murder.

311. *Cannady*, 11 S.W.3d at 216.

312. *Id.* (citing *Jurek v. Texas*, 428 U.S. 262 (1976)).

313. *Id.* at 214.

314. *Id.* at 214–15.

XIII. SECTION 19.03(A)(7) PENAL CODE: MURDER OF MORE THAN ONE PERSON

A person commits capital murder if the person commits murder,³¹⁵ 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.”³¹⁶ Murder of the 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.³¹⁷

The multiple murders contemplated by this section require those murders be committed either intentionally or knowingly.³¹⁸ Further, capital murder is a result-of-conduct offense,³¹⁹ and a jury charge should only define “intentionally” and “knowingly” as they relate to the result of the defendant’s conduct.³²⁰

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 more than one person “during the same criminal transaction” one commits capital murder.³²¹ The term “same criminal transaction” describes multiple acts, “closely connected in time, place and circumstances . . . that arise out of a single guilty design.”³²² A “criminal transaction,” in the context of murder, is “an act, process, or instance

315. Murder is defined in the Texas Penal Code as “intentionally or knowingly caus[ing] the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003 & Supp. 2010).

316. *Id.* § 19.03(a)(7).

317. *Narvaiz v. State*, 840 S.W.2d 415 (Tex. Crim. App. 1992). *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. *Id.* at 432. The second murder is the aggravating circumstance that makes the first murder a capital felony. *See id.*

318. *Medina v. State*, 7 S.W.3d 633, 636–37 (Tex. Crim. App. 1999).

319. *Martinez v. State*, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988).

320. *See Medina*, 7 S.W.3d at 639–40. In *Medina*, the defendant complained it was not his intent to kill, but only to shoot at the house as he drove by. *Id.* at 636. The TCCA affirmed that the defendant 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,” stating the defendant’s “intent to kill can be inferred from the manner in which a deadly weapon is employed.” *Id.* at 640 (citing *Vuong v. State*, 830 S.W.2d 929, 933 (Tex. Crim. App. 1992)); *see also Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (“A charge which defines ‘intentionally’ or ‘knowingly’ as they relate to the nature of the conduct as well as the result of the conduct is error.”); *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).

321. TEX. PENAL CODE ANN. § 19.03(a)(7)(A).

322. *Chapman v. State*, 838 S.W.2d 574, 578 (Tex. App. 1992).

of carrying on or carrying out” the multiple murders.³²³ Additionally, the term “criminal transaction,” in this context, should be interpreted expansively, considering the legislature’s intent to ensure public safety by exposing those that commit multiple murders to the most severe punishment possible, and the TCCAs’ broad construction concerning other portions of the capital murder statute.³²⁴ 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.”³²⁵ When the transaction ends depends upon when the criminal conduct ceases.³²⁶ “If the evidence supports the rational inference that [the] victims were

323. *Rios v. State*, 846 S.W.2d 310, 314 (Tex. Crim. App. 1992).

324. *Chapman*, 838 S.W.2d at 577.

325. *See Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 130 S. Ct. 3411 (2010). In *Williams*, the court ruled against the defendant where the defendant offered self-defense for the second murder and alleged a different motive between the two killings. *Id.* at 676–77. But whether two murders occurred during the same criminal transaction does not depend on the defendant’s motive, and the court held the evidence was legally and factually sufficient to show both murders happened in the 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.” *Id.* at 684 (citing *Jackson v. State*, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000)). Similarly, in *Jackson v. State*, 17 S.W.3d 664 (Tex. Crim. App. 2000), two victims were found dead in the same apartment and were killed in the same manner. *Id.* at 665. The defendant’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. *Id.* The court found the jury could “rationally conclude [the defendant] 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 . . .” *Id.* at 669; *see Coble v. State*, 871 S.W.2d 192 (Tex. Crim. App. 1993). Also, in *Coble*, the court found a same criminal transaction where three murders occurred in close proximity to each other, on same road, and within a few hours, to be an uninterrupted series of events. *Id.*; *see Vuong v. State*, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992). *Vuong* involved a defendant with a semi-automatic rifle, who walked through a pool hall firing short bursts killing one person and wounding three, who 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. *Id.* at 930–31. The court found the defendant killed two victims in a continuous and uninterrupted chain of conduct occurring over a very short period of time. *Id.* at 941; *see Chapman*, 838 S.W.2d 574. In *Chapman*, two murders were committed during the same criminal transaction, where the acts occurred within fifteen minutes and 150 feet of each other, and it was the defendant’s single design to kill both victims. *Id.*

326. *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.”).

killed in the same criminal transaction,” the appellate courts will not disturb a jury verdict.³²⁷

Second, under section 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.”³²⁸ Unlike the same criminal transaction scenario, these murders need not occur in a certain time frame, location, or geographically limited area.³²⁹ These murders have an “over-arching objective or motive” and show “a regular mode or pattern of . . . behavior.”³³⁰ Only one of the murders must occur in Texas for it to have jurisdiction.³³¹

The two subsections of section 19.03(a)(7) define two mutually exclusive crimes. By definition, a defendant 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.³³² The term “same criminal transaction” amounts to something less than “same scheme or course of conduct.”³³³ What separates the two is the continuity of the killing.³³⁴ The legislative history of section 19.03(a)(7)

327. Heiselbetz v. State, 906 S.W.2d 500, 506 (Tex. Crim. App. 1995).

328. TEX. PENAL CODE ANN. § 19.03(a)(7)(B) (West 2003 & Supp. 2010).

329. Corwin v. State, 870 S.W.2d 23, 26 (Tex. Crim. App. 1993) (finding that when the defendant who abducted, sexually assaulted, and killed two women, and then attempted to abduct and killed a third, over the course of nine months and in three different counties, committed the separate crimes “during the same scheme or course of conduct”).

330. *Id.* at 28; see Feldman v. State, 71 S.W.3d 738 (Tex. Crim. App. 2002), *superseded by statute on other grounds*, TEX. CODE CRIM. PROC. ANN art. 37.071 (West 2006 & Supp. 2010), *as recognized in* Coleman v. State, No. AP-75478, 2009 WL 4696064 (Tex. Crim. App. Dec. 9, 2009) (finding that the defendant’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. 2005) (finding that, in the course of murdering 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 the separate locales and lapse of several hours between killings was the break in continuity of killings, and also finding that the evidence conformed to the indictment alleging capital murder under TEXAS PENAL CODE section 19.03(a)(7)(B)).

331. Bayless v. State, No. 05-99-01978-CR, 2003 WL 21006915, at *2 (Tex. App. May 6, 2003) (finding that section 1.04 read together with section 19.03(a)(7)(B) gave the defendant 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). Further, 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), 19.03(a)(7)(B).

332. See Rios v. State, 846 S.W.2d 310, 314 (Tex. Crim. App. 1992).

333. *Id.*

334. *Id.*; see also Coble v. State, 871 S.W.2d 192, 198 (Tex. Crim. App. 1993) (“[T]he difference between sections 19.03(a)(6)(A) and 19.03(a)(6)(B) is the degree of ‘the continuity of the killing.’”).

reveals that the “same criminal transaction” language was intended for mass murders and “same scheme or course of conduct” language was intended for serial murders.³³⁵ However, “the [l]egislature did not intend that every different-transaction multiple killing” should be a capital felony.³³⁶

Under section 19.03(a)(7), when it comes to the charging instrument, the offense may be indicted under both theories in the alternative,³³⁷ 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.³³⁸ But an appellate court will not affirm a conviction if the fact-finder finds the accused committed capital murder in both alleged ways.³³⁹ Moreover, if an indictment fails to specifically allege whether the murders were during the “same criminal transaction” or during the “same scheme or course of conduct,” the indictment is not insufficient and the trial, judgment, or other proceedings are also not affected because of a defect of form as long as the substantial rights of the accused are not prejudiced.³⁴⁰ If a motion to quash the indictment is overruled, the accused suffers no harm unless the accused did not receive notice of the prosecution’s theory.³⁴¹ If the indictment omits one element of the charged offense, this does not render an otherwise valid indictment fatally defective.³⁴² The State is not required to allege the constituent elements of the aggravated murder even in the face of a motion to quash.³⁴³

335. *Coble*, 871 S.W.2d at 199 n.10 (stating that—pursuant to legislative intent—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 would be one that “kills all senators over the course of a year for snubbing his legislation”).

336. *Corwin v. State*, 870 S.W.2d 23, 28 (Tex. Crim. App. 1993).

337. The alternative theories would be (1) that the defendant committed capital murder if he or she first committed murder and murdered more than one person during the same criminal transaction, or (2) that the defendant committed capital murder if he or she 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. See TEX. PENAL CODE ANN. § 19.03(a)(7) (West 2003 & Supp. 2010).

338. See, e.g., *Leal v. State*, 303 S.W.3d 292, 297 (Tex. Crim. App. 2009).

339. *Rios*, 846 S.W.2d at 314.

340. TEX. CODE CRIM. PROC. ANN. art. 21.19 (West 2009 & Supp. 2010); *Kellar v. State*, 108 S.W.3d 311, 313 (Tex. Crim. App. 2003) (holding the indictment notified the defendant of the nature of the charge even though it was defective for failing to state whether the deaths were during the same criminal transaction, or during the same scheme or course of conduct, because the defendant’s substantial rights were not harmed).

341. *Smith v. State*, 297 S.W.3d 260, 267 (Tex. Crim. App. 2009), *cert. denied*, 130 S. Ct. 1689 (2010).

342. *Studer v. State*, 799 S.W.2d 263, 270–72 (Tex. Crim. App. 1990).

343. *Dinkins v. State*, 894 S.W.2d 330, 338 (Tex. Crim. App. 1995).

In *Burkett v. State*,³⁴⁴ the indictment was not found to 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.”³⁴⁵ However, in *Smith v. State*, the indictment wholly failed to set out either subsection and was therefore defective.³⁴⁶ But after amendment of the indictment prior to trial to include “in the same criminal transaction,” the defendant had actual notice upon which the State based its allegations and was not impermissibly charged with an additional or different offense.³⁴⁷

A recent capital case of interest is *Paredes v. Quarterman*,³⁴⁸ in which the defendant 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 he was deprived of his constitutional right to a unanimous verdict regarding which of the victims he was responsible for killing.³⁴⁹ “Reasonable jurists could debate whether the jury instructions necessarily required a unanimous verdict as to each murder victim.”³⁵⁰

Section 19.03(a)(7) has been challenged for its constitutionality.³⁵¹ As discussed above,³⁵² there are two requirements addressed by a constitutional challenge upon any aggravating circumstance that qualifies a murder as a capital felony.³⁵³ First, the aggravating circumstance must apply to a sub-class of those convicted of murder—not to everyone convicted of murder.³⁵⁴ Section 19.03(a)(7) affects only that very small and specifically identifiable sub-class of persons

344. 172 S.W.3d 250 (Tex. App. 2005).

345. *Id.* at 253 (“[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. . . . [T]he only homicide offense that includes ‘same scheme or course of conduct’ as an element is section 19.03(a)(7)(B).” (alteration in original) (citations omitted)).

346. 297 S.W.3d at 267.

347. *Id.* (listing of a capital murder charge on the face of the indictment “clearly show[ed] that [the defendant] had actual notice of the capital charge,” particularly when the defense attorney worked for months, prior to trial, in preparation of a capital murder defense).

348. 574 F.3d 281 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 1050 (2011).

349. *Id.*

350. *Id.* at 293.

351. *See, e.g.*, *Corwin v. State*, 870 S.W.2d 23 (Tex. Crim. App. 1993); *Vuong v. State*, 830 S.W.2d 929 (Tex. Crim. App. 1992).

352. *See supra* notes 298–303 and accompanying text.

353. *See Cannady v. State*, 11 S.W.3d 205, 214 (Tex. Crim. App. 2000).

354. *Henderson v. State*, 962 S.W.2d 544, 563 (Tex. Crim. App. 1997).

guilty of murder.³⁵⁵ Second, the aggravating circumstance must not be unconstitutionally vague.³⁵⁶

Interestingly, a person to whom a statute clearly applies may not challenge it for vagueness.³⁵⁷ With this in mind, by understanding some “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,” section 19.03(a)(7)(A) was held not to be unconstitutionally vague as applied.³⁵⁸ Similarly, despite the indefiniteness of the phrase “same scheme or course of conduct,” section 19.03(a)(7)(B) was held not to be unconstitutionally vague as applied.³⁵⁹ Finally, the entirety of 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.³⁶⁰

Section 1.07(a)(38) of the Texas Penal Code³⁶¹ 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.”³⁶² Also, note that the Penal Code defines murder as “intentionally or knowingly caus[ing] the death of *an individual*.”³⁶³ Consequently, under section 19.03(a)(7), if one commits murder—intentionally or knowingly causing the death of an individual—and murders more than one person—defined as an in-

355. *Vuong*, 830 S.W.2d at 941. Although *Vuong* dealt strictly with subsection (A), which deals with “same criminal transactions,” the same narrowing of those eligible for the death penalty would apply to subsection (B) because few of those convicted of murder also commit other murders either as a mass murderer or as a serial killer.

356. *Cannady*, 11 S.W.3d at 214.

357. *Parker v. Levy*, 417 U.S. 733, 755–56 (1974); *Briggs v. State*, 740 S.W.2d 803, 806 (Tex. Crim. App. 1987); see also *Vill. of Hoffman Estates 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 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 section 19.03(a)—may challenge a statute for vagueness.

358. *Vuong*, 830 S.W.2d at 941.

359. *Corwin v. State*, 870 S.W.2d 23, 28–29 (Tex. Crim. App. 1993).

360. *Dinkins v. State*, 894 S.W.2d 330, 340 (Tex. Crim. App. 1995).

361. Subsection (38), which defines “person” as an “individual,” was added in 1979. See S.B. 952, 66th Leg., § 1 (Tex. 1979), *without reference to* S.B. 846, 66th Leg., § 1 (Tex. 1979).

362. The inclusion of unborn children in the definition of an “individual” occurred in 2003. See S.B. 319, 78th Leg., § 2.01 (Tex. 2003) (substituting the phrase “is alive, including an unborn child at every stage of gestation from fertilization until birth” for the previous “has been born and is alive,” and adding subsection (49), defining “death” as the failure to be born alive “for an individual who is an unborn child”).

363. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003 & Supp. 2010) (emphasis added).

dividual during the same criminal transaction or during different criminal transactions but pursuant to the same scheme or course of conduct—it is 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.”³⁶⁴

In *Lawrence v. State*, the defendant 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, i.e., it could not survive outside the womb.³⁶⁵ The TCCA, however, declined to second-guess the legislature because the legislature is free to protect the lives of whomever it defines as a human being.³⁶⁶ If a mother was noticeably pregnant and other facts of the case existed that 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, thereby qualifying these multiple murders as a capital felony.³⁶⁷

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 section 19.03(a)(7) charge of capital murder under either subsection.³⁶⁸ However, if the defendant did not know that the mother was pregnant, such as during the early stages of pregnancy, the defendant’s lack of knowledge of the embryo’s existence will not support a claim of a separate specific intent to kill the embryo.³⁶⁹

364. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007); see also *infra* Part XIV (discussing these definitions as they relate to section 19.03(a)(8) of the Texas Penal Code and the murder of a child under six years of age).

365. 240 S.W.3d at 917. The court noted the defendant focused on viability because prohibitions on abortion before viability have no “compelling state interest” and are unconstitutional. *But see* *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (holding that states may protect human life not just from viability but “from the outset of the pregnancy”).

366. *Lawrence*, 240 S.W.3d at 917–18; see *Carhart*, 550 U.S. at 157; see also *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (opining that states are free to define human beings as they see fit).

367. See *Eguia v. State*, 288 S.W.3d 1, 10 (Tex. App. 2008) (describing similar facts).

368. *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008) (“[W]ith intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane.”).

369. *Id.* (“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.”).

XIV. SECTION 19.03(A)(8) PENAL CODE: MURDER OF A
CHILD UNDER SIX 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.³⁷⁰ This statute has survived Equal Protection and Eighth Amendment challenges.³⁷¹

A. Constitutionality

When a statute is attacked for Equal Protection violations, it must be strictly scrutinized if it interferes with a “fundamental right” or discriminates against a “suspect class.”³⁷² Otherwise, the statute will survive the challenge if the “challenged classification [here using six years of age as the dividing line between murder and capital murder] is rationally related to a legitimate governmental purpose.”³⁷³

First, capital murder defendants are not a suspect class.³⁷⁴ Next, life, as the most basic of fundamental rights, loses that status for those convicted of capital murder.³⁷⁵ Consequently, to survive a constitutional Equal Protection challenge, the State only has to show that the challenged classification of children under six years of age within section 19.03(a)(8)—as the aggravating circumstance that raises murder to capital murder—is rationally related to a legitimate governmental purpose.³⁷⁶

A state has a “legitimate, and in fact compelling, interest” in protecting children’s well-being even when another’s constitutionally protected rights are involved.³⁷⁷ Within the category of “children,” this legitimate, compelling interest allows the creation of a sub-class of “young children.”³⁷⁸ 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

370. TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(8) (West 2003 & Supp. 2010). Section 19.03(a)(8) first became law in 1993. *See* S.B. 13, 73rd Leg., § 1 (Tex. 1993). In 2011, the legislature amended section 19.03(a)(8) and raised the qualifying age of the child to ten. *See* S.B. 377, 82nd Leg., § 1 (Tex. 2011).

371. *Henderson v. State*, 962 S.W.2d 544, 560–63 (Tex. Crim. App. 1997).

372. *Kadrmaz v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988).

373. *Id.* This test is called the “rational basis” test.

374. *Henderson*, 962 S.W.2d at 560; *see also* *Janecka v. State*, 739 S.W.2d 813, 834 (Tex. Crim. App. 1987) (finding the capital murder defendant not a member of a suspect class).

375. *Henderson*, 962 S.W.2d at 561.

376. *Kadrmaz*, 487 U.S. at 458; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (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.”).

377. *Henderson*, 962 S.W.2d at 562.

378. *Id.*

innocence, and vulnerability” and to express society’s moral outrage against the murder of young children.³⁷⁹

In *Black v. State*,³⁸⁰ the defendant argued that section 19.03(a)(8) violated Equal Protection because it does not require proof of the child’s age as an aggravating circumstance, or require proof of the actor’s knowledge concerning that age.³⁸¹ The TCCA found that this statute *does* require proof that the child’s age is under six, but *does not* require proof of the defendant’s specific intent as to the nature of the circumstances of the crime.³⁸² There is no requirement in section 19.03(a)(8) that the actor know or intend that the victim is a child under six.³⁸³

As discussed above,³⁸⁴ 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 aggravating circumstance must apply to a subclass of those convicted of murder—not to everyone convicted of murder—and “the aggravating circumstance must not be unconstitutionally vague.”³⁸⁵ In *Henderson v. State*,³⁸⁶ the TCCA found that section 19.03(a)(8) met both tests because “murderers of children under six is a subclass of murderers in general, and ‘children under six’ is a clear and definite category.”³⁸⁷

B. Murder of a Fetus

After the 2003 changes in the Penal Code,³⁸⁸ the legislature chose to define an “individual” as “a human being who is alive, including an

379. *Id.*

380. 26 S.W.3d 895 (Tex. Crim. App. 2000).

381. *Id.* at 897–98 (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.”).

382. *Id.*

383. *Id.* at 897; *see also* Ramos v. State, 961 S.W.2d 637, 638 (Tex. App. 1998) (stating the *In re M.A.* 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.” (citing *In re M.A.*, 935 S.W.2d 891, 894 (Tex. App. 1996)); McCollister v. State, 933 S.W.2d 170, 172 (Tex. App. 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).”).

384. *See supra* notes 298–303 and accompanying text (discussing Cannady v. State, 11 S.W.3d 205 (Tex. Crim. App. 2000)).

385. *Tuilaepa v. California*, 512 U.S. 967, 971–972 (1994).

386. 962 S.W.2d 544 (Tex. Crim. App. 1997).

387. *Id.* at 563.

388. *See Eguia v. State*, 288 S.W.3d 1 (Tex. App. 2008) (discussing the 2003 changes in the Penal Code definitions of “individual” and “person” and how those changes

unborn child at every stage of gestation from fertilization until birth.”³⁸⁹ This statutory definition has been held to be unambiguous as to the proscribed conduct.³⁹⁰ By prohibiting the intentional or knowing killing 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.”³⁹¹

The Supreme Court has recognized that states may protect human life “from the outset of the pregnancy.”³⁹² The legislature may protect the lives of human beings as it defines them, and a court should not “second-guess” the democratic process.³⁹³ 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.³⁹⁴ 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

relate to section 19.03(a)(7) intent to kill an embryo while murdering the mother); *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008) (same); *supra* Part XIII (examining *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007)).

389. TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2003 & Supp. 2010); *see also supra* note 362 (citing specific changes made by the 78th Texas Legislature in 2003). This change greatly expanded the pool of victims the murder of which qualifies the offender for capital punishment, and thereby expanded the classifications of capital eligible crimes and those eligible for prosecution.

390. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007). The defendant in *Lawrence* was charged with capital murder and prosecuted under section 19.03(a)(7), wherein he was found guilty of capital murder by committing a multiple murder, i.e., the shooting death of a pregnant woman and her four-to-six week old embryo. *Id.* at 914. The defendant argued that the definition of “individual” in section 1.07(a)(26) 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*, 240 S.W.3d at 915. The defendant brought this complaint about the vagueness of the statute by a motion to quash the indictment. *Id.* at 914. The court ruled that this was not the proper vehicle with which to attack an element of a crime as unconstitutional. *Id.* at 916. The TCCA refused to review the appellate court’s holding that the evidence was sufficient, finding the statutory definition of an “individual” was not impermissibly vague. *Id.*

391. *Lawrence*, 240 S.W.3d at 915–16.

392. *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.” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992))).

393. *Lawrence*, 240 S.W.3d at 917–18.

394. *Roe v. Wade*, 410 U.S. 113 (1973); *see also 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.” (citing *Casey*, 505 U.S. at 846)).

unborn against the mother's "will."³⁹⁵ Judge Johnson voiced her concern that the statute in the future may be unconstitutional "as applied" in a circumstance where the defendant had no notice of the mother's pregnancy and as a result could not have intended the death of the mother's unborn child.³⁹⁶

395. See *Lawrence*, 240 S.W.3d at 917.

396. *Id.* at 918–19 (Johnson, J., concurring). 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 the defendant knew the victim-mother was pregnant and intended to kill her unborn child. *Id.* at 919 (Cochran, J., concurring). The TCCA 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*, Nov. 21, 2007 (a little over thirty months before the preparation of this Article), a search of the history of *Lawrence* and the citing references showed *Lawrence* was cited five times as authority on these issues—twice by the TCCA itself—and was distinguished once. Three of these cases did not advance the development of the issues raised in *Lawrence*, and will now be discussed briefly: First, in *Holmes v. State*, No. 01-06-00975-CR, 2008 WL 963021 (Tex. App. Apr. 10, 2008), in a non-death capital trial, the defendant was convicted of killing his pregnant wife, and there was evidence he knew she was pregnant. *Id.* at *6. The defendant attacked the definition of "individual" on Establishment Clause grounds, see *id.* at *7, an argument addressed and overruled in *Flores v. State*, 245 S.W.3d 432, 436 (Tex. Crim. App. 2008). On Eighth Amendment grounds, the defendant claimed the definition expanded cases eligible for prosecution as a capital murder in an "arbitrary" and "capricious" manner. *Holmes*, 2008 WL 963021, at *7–8. 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 it overruled this challenge as being previously rejected in *Vuong*. *Id.* (citing *Lawrence*, 240 S.W.3d at 915); see *Vuong v. State*, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992). Second, in *Sanders v. State*, No. 01-07-00775-CR, 2009 WL 884741 (Tex. App. Apr. 2, 2009), another non-death capital trial, the defendant was convicted of killing a pregnant woman who was carrying his baby. *Id.* at *1–2. The evidence showed the defendant knew she was pregnant but did not want his other girlfriend to know of the relationship. *Id.* at *7. The court found, following *Lawrence*, that by shooting the woman in the head at close range, the defendant would have awareness (knowing) that their unborn child's death would be reasonably certain to result. *Id.* at *5–7. The court rejected the defendant's argument that the definition of "individual" violates the Establishment Clause "because 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 v. Kurtzman*, 403 U.S. 602 (1971), and *Flores*. *Id.* at *9. The defendant also made an unsuccessful Eighth Amendment argument similar to *Eguia v. State*, see *infra* notes 408–09 and accompanying text, which was overruled following *Lawrence*—although probably more closely following the same court's reasoning in *Eguia* from six months earlier. *Sanders*, 2009 WL 884741, at *10–11. Last, the decision in *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 905 (2011), was issued during the final stages of preparing this Article. Although subject to revision or withdrawal, it is the latest case involving the death of the unborn and the mother. The defendant in *Estrada* was convicted of capital murder for murdering a pregnant woman and their thirteen-week-old unborn child and was sentenced to

Less than three months after the ruling in *Lawrence*, in *Flores v. State* the TCCA once again addressed the constitutionality of section 1.07(a)(26) and its definition of an “individual.”³⁹⁷ The defendant made two constitutional arguments not previously made in this regard.³⁹⁸ 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, the defendant argued an Equal Protection violation as women terminating their own pregnancies are exempted from prosecution under the Penal Code.³⁹⁹ The defendant’s vehicle for making

death. *Id.* at 279. A new punishment hearing was granted on evidentiary concerns unrelated to the constitutionality of the statutes defining the unborn as “human beings” and “individuals,” thereby making their murder a capital felony. *Id.* at 279, 286–88. The defendant filed a “motion to declare application of the death penalty to the non-consensual termination of a pregnancy unconstitutional.” *Id.* at 308. The court said it was “questionable whether this motion preserved many of the claims presented” in the seven points of error addressing these issues. *Id.* These points of error involved virtually all the same issues raised by the line of cases following *Lawrence*. See *Sanders*, 2009 WL 884741, at *8–11; *Holmes*, 2008 WL 963021, at *7. The only point of error preserved for appeal was a violation of *Roe v. Wade*. *Estrada*, 313 S.W.3d at 309. 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. *Id.* at 309–10 (citing *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)); see also *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (addressing the vagueness issue). 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.” *Estrada*, 313 S.W.3d at 309–10.

397. 245 S.W.3d at 436.

398. The defendant also made a Due Process argument under *Roe*, which had previously been rejected in *Lawrence*, and an “overbroad” argument not raised in his petition for discretionary review, which the court summarily overruled. *Id.* at 436.

399. *Id.* at 435 (claiming the mother participated by cooperating in his attempts to terminate the pregnancy). Section 19.06 reads, “[t]his 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” TEX. PENAL CODE ANN. § 19.06 (West Supp. 2010). This conduct would include all the chapter 19 crimes: Section 19.02 (murder); section 19.03 (capital murder); section 19.04 (manslaughter); section 19.05 (criminally negligent homicide, and presumably section 19.02(d) (murder-sudden passion). Similarly, section 22.12 reads, “[t]his 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. This conduct would include all the chapter 22 assaultive offenses that could possibly apply to the unborn, to-wit: Section 22.01 (assault); section 22.02 (aggravated assault); section 22.04 (injury to a child); and section 22.05 (deadly conduct). It is clear section 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

this claim was through a pre-trial motion to quash the indictment, and the TCCA criticized the defendant for attempting to address this “issue” through a pre-trial motion.⁴⁰⁰ The court expressed no opinion on the underlying merits of the Equal Protection claim,⁴⁰¹ so the issue remains unresolved.

The defendant also made an Establishment Clause⁴⁰² argument that by defining an “individual” to include the unborn the statute adopts “a religious point of view over a secular one.”⁴⁰³ In overruling this claim, the TCCA used the three-prong *Lemon* test 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?⁴⁰⁴ 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.⁴⁰⁵

of law enforcement and prosecutors never fails to amaze. Finally, section 49.12 reads, “[s]ections 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.” TEX. PENAL CODE ANN. § 49.12. In *Ex parte Vela*, No. AP-75562, 2006 WL 3518116 (Tex. Crim. App. Dec. 6, 2006), the defendant pled guilty to endangering her unborn child by ingesting controlled substances while pregnant, was convicted under section 22.04 of the Penal Code and was sentenced to eighteen months state jail imprisonment. *Id.* at *1. The TCCA overturned the conviction because of the mother’s exemption provided by section 22.12. *Id.* Certainly the argument can be made that with the definition in section 1.07(a)(26) of a child—including a fetus from fertilization through birth—and the unqualified language of sections 19.06, 22.12 and 49.12, that whatever the behavior of a mother toward her unborn child may be, i.e., intentional, knowing, reckless, criminal negligence, 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), 6.03.

400. *Flores*, 245 S.W.3d at 437.

401. *Id.* at 436–37. In a footnote, the court stated, “[i]n 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.” *Id.* at 437 n.14 (citing TEX. R. APP. P. 33.1 (West 2003 & Supp. 2005); see also, e.g., *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (holding that an “as applied” due process challenge is not preserved for appeal if appellant did not raise a “specific, timely objection” at trial) (citing *Garcia v. State*, 887 S.W.2d 846, 861 (1994)).

402. *Id.* at 438. The First Amendment to the Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

403. *Flores*, 245 S.W.3d at 438.

404. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)); *Holberg v. State*, 38 S.W.3d 137, 140 (Tex.Crim.App. 2000) (citing *Lemon*, 403 U.S. at 612–13).

405. *Flores*, 245 S.W.3d at 438. (“Otherwise, no law against theft or murder could pass constitutional muster, because those laws are consistent with religious strictures

However, from a careful reading of *Flores*, some constitutional challenges to these and other issues were not settled.⁴⁰⁶ As an example, in *Eguia v. State*, the First District for the Texas Court of Appeals held the statutory definitions of “individual” and “death” valid under both the Establishment Clauses of the U.S. Constitution and the Texas Constitution,⁴⁰⁷ 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.”⁴⁰⁸ 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.⁴⁰⁹ The legislature may expand the list of aggravating factors, and in fact, it did narrow those who qualify for capital murder by passing section 19.06, which exempts mothers and certain medical personnel from criminal liability.⁴¹⁰

In *Lawrence*, Judge Johnson saw potential constitutional challenges should the facts of a case fail to show the defendant knew the woman murdered was pregnant and, as a result, the defendant could not have intended the death of the mother’s unborn child.⁴¹¹ In *Rob-*

such as the Ten Commandments.” (citing *Harris v. McRae*, 448 U.S. 297, 319 (1980)).

406. The court, however, failed to address the defendant’s overbroad and equal protection arguments. *Id.* at 436–37 (Cochran, J., concurring). Judge Cochran, joined by Judge Johnson, made the following point in her concurring opinion:

[T]he 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 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.

Id. at 442 (Cochran, J., concurring).

407. *Eugia v. State*, 288 S.W.3d 1, 11–13 (Tex. App. 2008). Article 1, section 6 of the Texas Constitution, which concerns freedom of worship, states:

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.

TEX. CONST., art. I, § 6 (emphasis added).

408. *Eguia*, 288 S.W.3d at 11; see also *supra* notes 397–405 and accompanying text (discussing *Lemon* and *Flores*).
409. *Eguia*, 288 S.W.3d at 12.
410. *Id.* at 13.
411. 240 S.W.3d 912, 918–19 (Tex. Crim. App. 2007) (Johnson, J., concurring).

erts v. State,⁴¹² Judge Johnson's factual requirements were presented but as a transferred intent issue, not as a constitutional challenge, distinguishing *Roberts* from *Lawrence* on the facts.⁴¹³ The defendant in *Roberts* was convicted of causing the death of two individuals—a pregnant woman and her embryo—during the same criminal transaction.⁴¹⁴ As a result-of-conduct offense, capital murder “is defined in terms of [the defendant’s] objective to produce . . . a specified result, i.e., the death of the named decedent.”⁴¹⁵ Put in other words, the culpable mental state must relate to the result of the conduct.⁴¹⁶ The State attempted to use the doctrine of transferred intent to assign intent to the defendant for the death of the embryo.⁴¹⁷ 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.”⁴¹⁸ The record reflected that neither the defendant nor anyone else knew the woman was pregnant.⁴¹⁹ Thus, with no knowledge of the embryo’s existence, the defendant “could not form a separate specific intent to kill the embryo, as is required by statute.”⁴²⁰

412. 273 S.W.3d 322 (Tex. Crim. App. 2008).

413. *Id.* at 325, 327–32. The defendant’s point of error in this regard read: “[W]hether proof that [the defendant] killed a pregnant woman and her embryo in the same transaction established capital murder when [the defendant] was unaware of the pregnancy.” *Id.* at 325.

414. *Id.* at 324–25.

415. *Id.* at 329 (citing *Kinnamon v. State*, 791 S.W.2d 84, 88–89 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

416. *Id.* at 328–29 (quoting *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003)).

417. *Id.* at 327–28. Texas Penal Code section 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) (West 2003 & Supp. 2010).

418. *Roberts*, 273 S.W.3d at 331.

419. *Id.* at 327.

420. *Id.* at 330–331 (“A classic example of proper application of transferred intent is the act of firing at an intended victim while that person is in a group of other persons. If the intended person is killed, the offense is murder. If a different person in the group is killed, the offense is murder pursuant to Tex. Penal Code § 6.04(b)(2).”).

XV. SECTION 19.03(A)(9) PENAL CODE:
MURDER OF A JUDGE

A person commits capital murder in Texas if the person commits murder as defined under section 19.02(b)(1) of the Texas Penal Code,⁴²¹ and:

[T]he 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.⁴²²

There are no reported Texas State cases citing this subsection of section 19.03.⁴²³

XVI. CAPITAL PUNISHMENT FOR NON-MURDER CRIMES

In addition to the capital offenses listed in section 19.03, there is still another way for a person to commit a capital offense. Still a part of Texas' capital statutes is section 12.42(c)(3) of the Penal Code, which makes it a capital offense to commit aggravated sexual assault of a child as a repeat offender,⁴²⁴ and article 37.072 of the Code of Criminal Procedure, which sets forth the procedures to be followed in such repeat sex offender capital cases.⁴²⁵ Interestingly, in 2008, the

421. A person commits murder if he "intentionally or knowingly causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(b)(1).

422. TEX. PENAL CODE ANN. § 19.03(a)(9) (emphasis added). Subsection (9) of section 19.03(a) became effective September 1, 2005. See S.B. 1791, 79th Leg., § 1 (Tex. 2005).

423. See TEX. PENAL CODE ANN. § 19.03(a)(9) (noting that Westlaw contains no notes of decisions for this particular section).

424. Specifically, this section states:

[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).

TEX. PENAL CODE ANN. § 12.42(c)(3).

425. The following are selected portions of the procedures to be followed in repeat sex offender capital cases:

Supreme Court in *Kennedy v. Louisiana*⁴²⁶ declared unconstitutional a Louisiana statute similar to Penal Code section 12.42(c)(3), which was used to convict and sentence to death a defendant for raping his eight-year-old stepdaughter.⁴²⁷

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, or did not actually engage in the conduct prohibited by Section 22.021, Penal Code, but intended that the offense be committed against the victim or another intended victim

. . . .
(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. CODE CRIM. PROC. ANN. art. 37.072 (West Supp. 2010); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.071 (procedure in a capital murder case); TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (procedure for offenses committed before September 1, 1991).

426. 554 U.S. 407 (2008).

427. *Id.* at 412–13, 422–23. The Louisiana statute in question read as follows:
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 at hard labor without benefit of parole, probation, or suspension of sentence.

(1) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

Id. at 416–17 (quoting LA. REV. STAT. ANN. § 14:42 (2007 & Supp. 2010). This statute was amended following the case in 2003 by S.B. 761, 2003 Reg. Sess., § 1 (La. 2003), and in 2006 by H.B. 435, 2006 Reg. Sess., § 1 (La. 2006).

The Louisiana Supreme Court applied a balancing test set out in *Atkins v. Virginia*⁴²⁸ and *Roper v. Simmons*,⁴²⁹ examining whether there was a national consensus on capital punishment for crimes less than death and whether such punishment was excessive.⁴³⁰ The Louisiana court affirmed the defendant's conviction and death sentence, finding "the death penalty for the rape of a child under twelve is not disproportionate."⁴³¹ The Louisiana high court believed adoption of similar laws in five other states justified the death penalty in this situation and showed a trend toward adoption of such statutes.⁴³²

The defendant argued three main points to the Supreme Court: that (1) 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, (2) *Coker v. Georgia*⁴³³ should apply to all rapes regardless of the age, and (3) the Louisiana statute violated the Eighth Amendment for failing to narrow the class of offenders eligible for the death penalty.⁴³⁴

In a 5–4 decision,⁴³⁵ the 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.⁴³⁶ Applying the death penalty in such a case would be an exercise of "cruel and unusual punishment" in violation of a na-

428. *Atkins v. Virginia*, 536 U.S. 304, 311–13 (2002) (executing a prisoner with mental retardation offends contemporary standards of decency).

429. *Roper v. Simmons*, 543 U.S. 551, 568–74 (2005) (executing a person who was under eighteen when capital crime was committed is cruel and unusual).

430. *State v. Kennedy*, 957 So.2d 757, 782–89 (La. 2007).

431. *Id.* at 759, 793.

432. *Id.* at 788. The five states adopting similar statutes to Louisiana were: Georgia, see GA. CODE ANN. § 16-6-1 (2003 & Supp. 2005); Montana, see MONT. CODE ANN. § 45-5-503 (2005); Oklahoma, see OKLA. STAT. ANN. tit 10, § 7115 (West 2009) (current version at OKLA. STAT. ANN. tit. 21, § 843.5 (West Supp. 2011)); South Carolina, S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2009); and Texas, see TEX. PENAL CODE ANN. § 12.42(c)(3) (West 2003 & Supp. 2010). In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), 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. *Id.* at 422–25. 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*.

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

434. Brief for Petitioner at 33–63, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 466093, at *28–50.

435. Justice Kennedy delivered the opinion of the majority, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. *Kennedy*, 554 U.S. 407.

436. *Id.* at 421.

tional consensus on this issue and the country's evolving standards of decency.⁴³⁷

This decency “presumes respect for the individual and thus moderation or restraint in the application of capital punishment.”⁴³⁸ The Court felt there were “special risk[s] of wrongful execution” as the primary witness can be unreliable because of her special vulnerability to being induced into providing false testimony or the opportunity that she may provide imagined testimony.⁴³⁹ Further, the Court felt that asking a child to participate in a legal process that takes years forces the child to make a moral choice before she is of a “mature age to make that choice.”⁴⁴⁰

The minority of the Court wrote there was no national consensus on prohibiting the death penalty of child rapists.⁴⁴¹ Rather, they felt the trend was toward the application of the death penalty in such cases.⁴⁴² They vehemently opposed the majority's application of a “blanket condemnation”⁴⁴³ 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.⁴⁴⁴

Whether or not in response to the views of the minority, when the Texas Legislature met for its 81st legislative session during 2009, it failed to repeal or remove Penal Code section 12.42(c)(3) or article 37.072 of the Code of Criminal Procedure from Texas' statutory provisions.

The Texas Legislature and the TCCA must share the responsibility for this lengthy analysis. Had Texas Penal Code section 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 pen-

437. *Id.* at 420–23, 445–46.

438. *Id.* at 435 (citing *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 v. Dulles*, 356 U.S. 86, 100–01 (1958) (footnote omitted).

439. *Kennedy*, 554 U.S. at 443.

440. *Id.*

441. *Id.* at 459–60 (Alito, J., dissenting).

442. *Id.*

443. *Id.* at 464.

444. *Id.* at 465–66. 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.

alty scheme.⁴⁴⁵ But politicians invariably refuse to leave things alone, and now they have created a monster.

VII. THE LEGISLATURE'S EXPANSION OF SECTION 19.03

The Texas Legislature never seems to find an end to its assault on the artifice of Texas' death penalty jurisprudence, section 19.03 of the Penal Code. As if not aware that the judicial branch has set the precepts for constitutionality, what were five original offenses approved in *Jurek* have ballooned into ten categories encompassing a surprisingly large number of capital crimes.⁴⁴⁶ As shown in Appendix A, there are now at least 146 ways to commit capital murder in Texas.⁴⁴⁷ Given these many ways to commit capital murder, a creative prosecutor or police officer can almost always find 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?⁴⁴⁸

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 twenty-four cases, ten were prosecuted as capital murders⁴⁴⁹ but nineteen could have qualified as capital murder under the current scheme.⁴⁵⁰ Two more could arguably have been filed as capital mur-

445. *Jurek v. Texas*, 428 U.S. 262 (1976).

446. These ten categories include nine categories of section 19.03 capital murder, and the section 12.42(c)(3) category for the capital felony of repeat aggravated sexual assault of a child. See TEX. PENAL CODE ANN. §§ 19.03, 12.42(c)(3) (West 2003 & Supp. 2010).

447. See *infra* Appendix A.

448. 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. *Grayned v. Rockford*, 408 U.S. 104, 108–09 (1972). 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. *Id.*

449. *Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. 2010); *Contreras v. State*, 312 S.W.3d 566 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 427 (2010); *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 1606 (2011); *Clark v. State*, 324 S.W.3d 620 (Tex. App. 2010); *Odom v. State*, No. 2-09-096-CR, 2010 WL 2331439 (Tex. App. June 10, 2010); *Johnson v. State*, No. 03-08-00448-CR, 2010 WL 2133900 (Tex. App. May 28, 2010); *Logan v. State*, No. 07-09-00150-CR, 2010 WL 2010921 (Tex. App. May 20, 2010); *Nickerson v. State*, 312 S.W.3d 250 (Tex. App. 2010); *Caldwell v. State*, No. 14-08-01019-CR, 2010 WL 1655471 (Tex. App. Apr. 27, 2010); *Malone v. State*, No. 2-08-360-CR, 2010 WL 851409 (Tex. App. Mar. 11, 2010).

450. Of those nineteen, ten were actually filed as capital, see *supra* note 449, and the nine that were filed as "plain" murder are referenced below.

der,⁴⁵¹ and only three could not fit into section 19.03, or I lacked the creativity, or failed to have the facts necessary, to qualify them.⁴⁵²

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);⁴⁵³ (2) the death of a ten-month old victim (victim under the age of six);⁴⁵⁴ (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);⁴⁵⁵ (4) the murder of an estranged wife by her husband during a divorce (retaliation or obstruction);⁴⁵⁶ (5) the murder of a victim to steal a large amount of

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451. The two cases that qualify as “maybe’s” are (1) *M’Bowe v. State*, No. 03-09-00160-CR, 2010 WL 2133909 (Tex. App. May 27, 2010), involving 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. *Id.* at *1; see TEX. PENAL CODE ANN. § 22.07(3) (terroristic threats). (2) *Morales v. State*, No. 05-09-00182-CR, 2010 WL 1965889, at *1-4 (Tex. App. Apr. 14, 2010), involving 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. *Id.* at *1-4.
452. The three cases that could not easily fit into an existing capital category were: (1) *Anderson v. State*, No. 01-09-00108-CR, 2010 WL 1839945 (Tex. App. May 6, 2010), where an abused girlfriend was shot in the head (which could qualify under retaliation if she had attempted to report a crime or had previously reported a crime). *Id.* at 1-2, 4. (2) *Franks v. State*, No. 03-08-00129-CR, 2010 WL 1730032 (Tex. App. Apr. 28, 2010), involving 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). *Id.* at *1. (3) *Chaney v. State*, 314 S.W.3d 561 (Tex. App. 2010), involving a struggle over a loaded weapon that was reversed and should never have been filed as a murder. *Id.* at 563-73.
453. *Hill v. State*, No. 03-09-00213-CR, 2010 WL 2540603, at *1 (Tex. App. June 25, 2010) (finding victim was intentionally beat to death with a shotgun, and defendant was in possession of \$991 stolen from victim at the time of the murder).
454. *King v. State*, No. 05-08-01716-CR, 2010 WL 2293418, at *1 (Tex. App. June 9, 2010) (reiterating that the murder of a child under six can be intentional or knowing).
455. *Ramsour v. State*, No. 05-09-00094-CR, 2010 WL 1909595, at *1-3 (Tex. App. May 12, 2010) (claiming self-defense, defendant intentionally shot victim who was in a wheelchair and then took others into nearby apartment and took drugs).
456. *Langley v. State*, No. 03-08-00722-CR, 2010 WL 1632700, at *1 (Tex. App. Apr. 23, 2010). It is important to note that murder in retaliation or for obstruction must be intentional. *Id.* The defendant in *Langley* told his son he was going to kill his wife before leaving his home, upon returning home the defendant told his son he shot “her.” *Id.* The defendant then called 9-1-1 and told them he had shot and killed his estranged wife. *Id.* When police found the victim she had sustained multiple gunshot wounds and was dead. *Id.* It would be difficult not to see this as an intentional act.

marijuana (robbery-murder);⁴⁵⁷ (6) the murder of a wife who tried to serve her stalking husband with a protective order (retaliation);⁴⁵⁸ (7) the murder of a man who was subject to repossession of property by an employee of his creditor (remuneration);⁴⁵⁹ (8) a felony murder DWI for killing two pedestrians (killing more than one person during same transaction);⁴⁶⁰ and (9) the murder of a seventeen-month-old son by his father (victim under the age of six).⁴⁶¹

That is nineteen of twenty-four cases (and perhaps twenty-one of twenty-four cases) chosen at random. Almost eighty percent of the sample reported cases involving the intentional or knowing death of another could have been filed as capital.⁴⁶² Some would argue the reason so many capital murders were reported was because many “plain” murders are pled guilty, foreclosing an appeal. Or, 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 Texas prosecutors are exercising more discretion, in Dallas and Houston in particular.⁴⁶³ I would not have been surprised if all nine of these murders, a few years ago, would have been filed as capital murders. But because prosecutors—for whatever reason—are choosing not to file cases as capital, points to the exact problem in the early 1970s addressed in *Furman*—the arbitrary and capricious exercise of the power to place one person in jeopardy for a capital sentence while allowing another to face less harsh sentencing, and the contin-

457. *Wells v. State*, 319 S.W.3d 82, 92–93 (Tex. App. 2010). The defendant in *Wells*, and another man, tied a victim up with zip ties and duct tape, and shot the victim in the head to steal fifty pounds of marijuana. *Id.* at 92–93. There appears to have been no argument that the shooting was anything less than intentional. *Id.*

458. *Dozier v. State*, No. 01-08-00901-CR, 2010 WL 1241558, at *1 (Tex. App. Apr. 1, 2010). Again, murder in retaliation must be intentional. *See supra* note 456. The defendant in *Dozier* bought a gun and two boxes of ammunition. *Dozier*, 2010 WL 1241558, at *1. The next day, he rented a car and went to his wife’s employment and 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. *Id.* The defendant chased her down, grabbed her, and shot her in the back of the head. *Id.* Certainly these must be seen as intentional acts leading to the victim’s death, i.e., murder.

459. *Hernandez v. State*, 309 S.W.3d 661, 662–63 (Tex. App. 2010) (murder for remuneration can be intentional or knowing).

460. *Sandoval v. State*, 310 S.W.3d 73, 74 (Tex. App. 2010) (mass murder can be knowing or intentional).

461. *Hampton v. State*, No. 2-09-021-CR, 2010 WL 670033, at *1 (Tex. App. Feb. 25, 2010) (murder of a child under six can be intentional or knowing).

462. *See supra* notes 449–452.

463. 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.

ued over-representation of minorities on death row.⁴⁶⁴ 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 that states must “restrict the use of capital punishment to a small category of the most heinous crimes.”⁴⁶⁵

Pandering to a political climate it perceived as requiring more and more crimes to become death eligible, the Texas Legislature, over the past thirty-four years, has greatly expanded capital murder—including crimes that seldom occur.⁴⁶⁶ Texas no longer has that rational, “effective mechanism” for narrowing those who are death-eligible, as was approved in *Jurek*.⁴⁶⁷ A critical examination of some of the rulings of the TCCA—outlined above—will underscore the court’s participation in this expansive development.

XVIII. THE COURT OF CRIMINAL APPEALS’ COMPLICITY

As if oblivious to this growth in death eligible offenses, the TCCA—on the whole—takes a results oriented, outcome approach to shaping and interpreting the law. The same political pressures felt by the Texas Legislature, in a state dominated by one political ideology,⁴⁶⁸ 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 when those with supervisory authority over their actions will once again declare an end to this process, as the Supreme Court 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.”⁴⁶⁹

Within the footnotes accompanying the above compilation are numerous occasions where I wonder about the machinations of the TCCA, to-wit: (1) the trial court’s focus on defense counsel’s use of the words “mental capacity” in refusing to allow argument on reduced

464. See *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (“[T]he state does not respect human dignity when, without reason, it inflicts upon some people a *severe* punishment that it does not inflict upon others.” (emphasis added)).

465. *Id.* at 375 (Burger, C.J., dissenting).

466. See TEX. PENAL CODE ANN. § 19.03(a)(9) (West Supp. 2010) (murdering a judge in retaliation has never been applied because of the crime’s nonoccurrence).

467. *Pulley v. Harris*, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976)).

468. Texas has given its popular vote to the Republican candidate for U.S. President in nine out of the last ten Presidential elections. See *Presidential Election Results*, TEX. SEC’Y OF STATE, <http://www.sos.state.tx.us/elections/historical/presidential.shtml> (last visited May 26, 2011).

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

mens rea, and the TCCA dodging the issue by claiming an “incomplete record;”⁴⁷⁰ (2) the TCCA finding there was “no evidence” showing a connection between the low intellectual functioning of a defendant and his perception that he was shooting at the police;⁴⁷¹ (3) the TCCA finding that the mens rea of a party to a robbery—who participated only in the preparation—albeit providing the guns—“supplied” the mens rea for a capital murder when the murder was committed by a co-conspirator;⁴⁷² (4) the TCCA placing blame on the 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;⁴⁷³ (5) the TCCA refusing to decide if a defendant’s due process rights 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;⁴⁷⁴ (6) the TCCA criticizing the prosecution for allowing a defendant’s statements to go unchallenged;⁴⁷⁵ (7) the TCCA finding proof of a theft occurring immediately after an assault is enough evidence from which the fact finder

470. See *Jackson v. State*, 160 S.W.3d 568, 571–72 (Tex. Crim. App. 2005).

471. *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *21 (Tex. Crim. App. May 5, 2010), cert. denied, 121 S. Ct. 999 (2011).

472. *Medrano v. State*, No. AP-75320, 2008 WL 5050076, at *10 (Tex. Crim. App. Nov. 26, 2008); *Mosley v. State*, 983 S.W.2d 249, 263 n.18 (1998). The ruling in *Medrano* particularly ignored *Enmund v. Florida*, 458 U.S. 782 (1982) and the requirement of proof of the attenuated party’s intent to commit murder. See *Enmund*, 458 U.S. at 797–801. Further, this decision merely mentioned, without addressing the “reckless indifference” test as set forth in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), which is required to allow the attenuated party’s execution. Instead, the court in *Medrano* used the “should have anticipated” language from section 7.02(b) to allow the conviction and the anti-parties charge of article 37.071 of the Code of Criminal Procedure to allow a sentence of death. See *Medrano*, 2008 WL 5050076, at *10.

473. There are too many cases to list them all. See, e.g., *Tolbert v. State*, 306 S.W.3d 776, 780 (Tex. Crim. App. 2010) (finding the trial court was not required to sua sponte provide [a] jury instruction). Why not? That is one of the few responsibilities of a trial court during trial. See *State v. Kitchens*, 10 A.3d 942, 953 (2011). 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?

474. *Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005).

475. *Palafox v. State*, 608 S.W.2d 177 (Tex. Crim. App. 1979), superseded by statute, TEX. R. EVID. 607, abrogation recognized in *Janecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996). 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. *Id.* at 178. 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. *Id.* at 182–83. Why else would the court criticize the State? Perhaps there was no evidence available to challenge the defendant’s statements of

can infer intent to commit a robbery, thereby justifying a capital murder charge;⁴⁷⁶ (8) the TCCA finding the shooting of a sexual assault victim's companion, after both were set free, was in the course of committing aggravated sexual assault;⁴⁷⁷ (9) the TCCA failing to acknowledge other judges' concerns that the use of kidnapping as an aggravating circumstance for a capital prosecution may be overbroad;⁴⁷⁸ (10) the TCCA allowing a murder 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;⁴⁷⁹ (11) the TCCA allowing proof of a "theft," which occurred after the victim was dead, to infer the defendant's intent prior to the murder—even though one can no more steal from the dead than kidnap or sexually assault the dead;⁴⁸⁰ (12) the TCCA allowing the use of general verdicts to remove the necessity for specific proof of each crime alleged in the indictment—even if they are simply alternate ways of proving a capital murder occurred;⁴⁸¹ (13) the TCCA allowing the use

his own intent. It's not beyond the realm of possibility that the defendant was telling the truth of his intent.

476. *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 from 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. *See id.* at 225–28 (Meyers, J., dissenting). 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 section 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. *See id.* The TCCA should not allow the assumption of an element of a capital crime that should be proven beyond a reasonable doubt. *See TEX. CODE CRIM. PROC. ANN.* art. 38.03 (West 1979 & Supp. 2010) (stating that "[a]ll 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").
477. *Dorough v. State*, 639 S.W.2d 479, 480–81 (Tex. Crim. App. 1982).
478. *See Brimage v. State*, 918 S.W.2d 466, 490 (Tex. Crim. App. 1997) (Miller, J., concurring and dissenting).
479. *Homan v. State*, 19 S.W.3d 847, 849 (Tex. Crim. App. 2000).
480. *Cooper v. State*, 67 S.W.3d 221, 225 (Tex. Crim. App. 2002); *see also supra* notes 193–200 (discussing *Cooper* and the possible ramifications thereof).
481. *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009), *cert. denied*, 131 S. Ct. 103 (2010). The facts of *Gardner* led the TCCA to the ridiculous conclusion that the defendant took his own keys to his estranged wife's home, let himself in against his wife's wishes, killed his wife, then took her keys from her purse, locked the house, left her keys outside in a toolbox before leaving, and then stopped down the road to throw his keys away. *See id.* at 282–84. The TCCA ignored discussing the retaliation aspects, which made much more sense, but fo-

of obstruction or retaliation as an aggravating circumstance when only mere “harm” or “attempted harm” is alleged and no injury is sustained by the victim;⁴⁸² (14) the TCCA excusing a defective indictment which failed to set out the elements of the crime because the defendant’s substantial rights were not affected;⁴⁸³ (15) the TCCA refusing to rule on a defendant’s claim that a statute was unconstitutional because the issue was not raised using a pre-trial motion to quash;⁴⁸⁴ (16) the TCCA refusing to rule on constitutional challenges because of the form of a motion;⁴⁸⁵ (17) the TCCA overruling a constitutional challenge because it was not in the petition for discretionary review;⁴⁸⁶ (18) the TCCA not addressing an “as applied” constitutional challenge because it was not addressed at trial;⁴⁸⁷ and (19) the TCCA failing to address overbroad and Equal Protection arguments even though other judges warned of problems with the statute.⁴⁸⁸

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

For example, if a defendant commits murder and the allegation is that he or she committed it prior to, or during the commission or attempt to commit, aggravated sexual assault, will the nexus exist if the evidence shows nothing more than the defendant completed the sexual intercourse after the murder? Again, murder is “intentionally or knowingly causing the death of an individual.”⁴⁸⁹ An “individual” is defined as a “human being who is alive.”⁴⁹⁰ Therefore, sexual inter-

cused on finding that the evidence led to these conclusions. *Id.* This case is obviously a murder, not a capital murder, but because of the use of retaliation, it fits under section 19.03. No rational jury could find 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 TCCA did not address the retaliation aggravating circumstance, as they too believe it is unconstitutionally vague or over broad. *See also* *Russeau v. State*, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005) (determining that the evidence did not have to be sufficient to support a finding of both robbery and burglary in order to convict defendant of capital murder, but that adequate evidence of either crime would suffice).

482. *See Sewell v. State*, 629 S.W.2d 42, 46 (1982).

483. *Kellar v. State*, 108 S.W.3d 311, 313–14 (Tex. Crim. App. 2003).

484. *Lawrence v. State*, 240 S.W.3d 912, 915–16 (Tex. Crim. App. 2007).

485. *Estrada v. State*, 313 S.W.3d 274, 307–12 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 905 (2011).

486. *Flores v. State*, 245 S.W.3d 432, 436 (Tex. Crim. App. 2008).

487. *Id.* at 437 n.14.

488. *Id.* at 442 (Cochran, J., concurring).

489. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003 & Supp. 2010).

490. *Id.* § 1.07(26).

course after a murder could not be assumed to establish the proper nexus to make the murder rise to a capital felony.⁴⁹¹ But why not?

Does the TCCA make an assumption that the defendant will not follow through with the intent to have sexual intercourse with the victim merely because the victim dies? Where does this jump in logic originate? Using the reasoning and language of *Cooper v. State*, 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 defendant is a necrophiliac and did not intend a sexual act until the victim was dead].”⁴⁹² Isn’t this the same logic applied in the robbery–murder scenario?

The concepts of assumption of intent by inference and of 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 assumptions in other areas of the criminal law to bypass long standing legal traditions of burden of proof and presumption of innocence.⁴⁹³ The court’s tendency, all too often, is to

491. See *Santellan v. State*, 939 S.W.2d 155 (Tex. Crim. App. 1997). In *Santellan*, the defendant was indicted and convicted for the offense of capital murder (murder committed in the course of attempting to commit kidnapping). *Id.* at 159. Evidence showed that for two days after the victim’s death the defendant had various sexual relations with the corpse of the victim. *Id.* at 161. The abuse of the corpse was a legally separate offense to the indicted offense, falling under a different provision which criminalizes the abuse of a corpse. *Id.* at 167–70; see TEX. PENAL CODE ANN. § 42.10. But see *White v. State*, 779 S.W.2d 809 (Tex. Crim. App. 1989) (holding that 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).

492. 67 S.W.3d 221, 224 (Tex. Crim. App. 2002).

493. 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). (2) Sexual assault being one of the enumerated sexual acts with a child (a person younger than seventeen years of age) without regard to consent (with some exceptions). *Id.* § 22.011(a)(2). (3) Aggravated sexual assault being the same basic behavior with a person younger than fourteen years of age (with exceptions). *Id.* § 22.021(a)(B). (4) In *Johnson v. State*, 967 S.W.2d 848, 849–50 (Tex. Crim. App. 1998), a mistake of fact regarding complainant’s age was no defense to aggravated sexual assault or sexual assault of a child. (5) In *Aguirre v. State*, 22 S.W.3d 463, 475 & n.48 (Tex. Crim. App. 1999), indecency with a child statute did not require the State to prove the defendant knew the victim was under seventeen years of age. The mens rea does not apply to the age of the child, implying that the rule is the same for capital murder of a child under six. *Id.* (discussing *Zubia v. State*, 998 S.W.2d 226, 227 (Tex. Crim. App. 1999)). (6) A person is presumed to possess any obscene material, device, or image if he or she possesses six or more of them. TEX. PENAL CODE ANN. §§ 43.23, 43.26. (7)

bend precedent and legal tenets to make the conviction of an accused easier and more certain.⁴⁹⁴

XIX. EVOLVING STANDARDS OF DECENCY

Because executions are down in the United States, there are those that would argue this is much ado about nothing.⁴⁹⁵ As Figure 1⁴⁹⁶ shows, during the thirty-three years following *Gregg*, *Profit*, *Jurek*, and the reinstatement of executions, there was an initial twenty year increase. However, over the last ten years, there has been a dramatic decrease in executions nationwide. During this same period, even in Texas, executions have flattened or subtly declined, as shown in Figure 2.⁴⁹⁷ Figure 3 confirms that this trend continues as the executions of Whites in Texas have taken a marked downturn.⁴⁹⁸

Those opposing the death penalty should take these statistics as encouraging that the “evolving standards of decency,”⁴⁹⁹ which some ridicule, are indeed leading us toward a more mature society. There

Even to some extent it is the defendant’s burden in a Fourth 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) There is a presumption that a business owner knows property is stolen if he acts knowingly or recklessly in loaning twenty-five dollars or more (with restrictions). TEX. PENAL CODE ANN. § 31.03. (9) A presumption exists that deadly force is reasonable in certain circumstances. *Id.* § 9.32(b). (10) In certain situations, there is a presumption that one knew the person was a public servant. *Id.* §§ 22.01(d), 22.02(c), 22.11(e), 38.14(c). (11) And the following offenses, all in the Texas Penal Code., 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 or possession of identifying information), 34.02 (money laundering), 37.10 (tampering with governmental record), 38.12 (barratry and solicitation), and 42.01 (disorderly conduct).

494. *See supra* notes 470–488 and accompanying text.

495. “For there was never yet philosopher, That could endure the toothache patiently.” WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act 5, sc. 1.

496. *See infra* Appendix B. All execution statistics in Figures 1–5 are from the Texas Department of Criminal Justice. *See Executions by Year*, TEX. DEPARTMENT CRIM. JUST., <http://www.tdcj.state.tx.us/stat/annual.htm> (last updated Oct. 22, 2010).

497. *See infra* Appendix B.

498. *See infra* Appendix B.

499. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Trop*, Chief Justice Warren noted that “the words of the [Eighth] Amendment are not precise, and . . . 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.” *Id.* at 100-01. Justice Scalia also 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

will be those that will argue that the reduction in executions shows

interpreted by nine lawyers? What do I know about the evolving standards of decency of American society? I'm afraid to ask.

See Justice Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005) (transcript on file with Nebraska Law Review). 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 . . ." U.S. CONST. art. III, § 2, cl. 1. When deciding matters involving the Eighth Amendment to the U.S. Constitution, it is the job of the judiciary to interpret the law. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The use of nine lawyers (or thousands of lawyers in the lower courts) is the way it was "originally" intended. See *id.* 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." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); see also *Marbury*, 5 U.S. (1 Cranch) at 177 (1803) ("It is emphatically the province and 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 Chi., Ill., 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring) (citations omitted) (quoting *McDonald*, 130 S. Ct. at 3096, 3099, 3101 (Stevens, J., dissenting)). 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 eighteenth 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." 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.

Id. at 3119 (Stevens, J., dissenting) (citation omitted) (quoting THE FEDERALIST No. 14, at 72 (James Madison) (Clinton Rossiter ed., 1961)). In continuing to decide "the rights we want to protect and discarding those we do not," *id.* at 3052 (Scalia, J., concurring) (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:

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 as varied and individualistic as the states themselves.⁵⁰⁰

Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, 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.

Id. at 3046 (footnote omitted). 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 mark the progress of a maturing society” in interpreting Eighth Amendment jurisprudence and to give those standards effect. *Trop*, 356 U.S. at 101. Paraphrasing Justice Scalia, if you think *Trop* was a 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.

500. Although space does not allow an in-depth analysis of the many reasons executions are down nationwide, some of the reasons for this decline could be: (1) the increase in the use of an option of life without parole and the improvement in defense resourcefulness and skill, e.g., the use of mitigation specialists. *See generally* Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAGAZINE, July 6, 2003, at 32 (describing the jurors’ decision for the imposition of life without parole). (2) The fear of executing the innocent. *See* Frank R. Baumgartner, *Death Penalty’s Vanishing Point*, NEWS & OBSERVER, Jan. 24, 2010, at A17. (3) The financial burden placed on the states. *See* CAL. COMM’N ON THE FAIR ADMIN. OF JUST., REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 84 (2008) [hereinafter CAL. REPORT]. (4) The public opinion supporting life without parole over death. *See* Bob Egelko, *Field Poll: Support Remains Strong for Capital Punishment*, S.F. CHRONICAL, July 22, 2010, at C1 (stating that 70% of surveyed voters supported the death penalty, but stating a smaller survey of voters showed that 42% preferred life in prison without parole and 41% preferred death, a reversal in ten years from 44% favoring death and 37% favoring life without parole); John Wagner, *Md. Voters Remain Divided on Death Penalty*, WASH. POST (May 11, 2010, 1:02 PM), http://voices.washingtonpost.com/annapolis/2010/05/md_voters_remain_divided_on_de.html (showing Maryland citizens consistently support the use of the death penalty by a 60% majority but continue to “prefer the punishment of life in prison with no chance of parole than the death penalty—by 49 percent to 40 percent,” which was down slightly from a 51 percent majority in 2007). (5) The non-use by states that have it available, for whatever reasons. *See Almost Half of U.S. Jurisdictions have had no Executions in 10 Years*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/almost-half-us-jurisdictions-have-had-no-executions-10-years> (last updated Jan. 5, 2011) [hereinafter *U. S. Jurisdiction Executions*] (showing that at the end of 2010, eight states and the U.S. Military currently have a death penalty but have had no executions in the last ten years, those states being: Colorado, Idaho, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania, and Wyoming). (6) The

The basis of my complaint is that Texas' substantive capital murder statute—Penal Code section 19.03—has become unwieldy and impossible for the ordinary person to understand, and those that are prosecuted for capital murder, 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 1972, Justice Douglas commented:

[W]e 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.⁵⁰¹

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 and 5⁵⁰²—are any indication, perhaps those 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 comprise 12.9% of the U.S. population and 12% of the Texas population,⁵⁰³ still

abolition of the death penalty during this same period of time in New Mexico in 2009 and New Jersey in 2007. See *State by State Database: New Mexico*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state_by_state (last updated 2010); *State by State Database: New Jersey*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state_by_state (last updated 2010). (7) The death penalty statute in New York was declared unconstitutional in 2004 and was not replaced. See *State by State Database: New York*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state_by_state (last updated 2010). (8) Or perhaps the inhuman method of execution had an influence. See Editorial, *Abolish the Death Penalty in Nebraska*, LINCOLN J. STAR (Feb. 9, 2008, 6:00 PM), http://journalstar.com/news/opinion/editorial/article_056e712e-43e8-53ef-bff9-6fdb89021e7.html (opining that as the only state that continued to use the electric chair as its sole means of execution, Nebraska's method of execution was ruled cruel and unusual punishment, and quoting the editors from a medical journal—PLoS Medicine—that “[t]here is no humane way of forcibly killing someone,” and further suggesting that “[i]nstead of rushing to pass a new means of capital punishment, the Legislature should take this opportunity to finally get rid of the death penalty”). (9) The counter efforts of politicians and those with a political voice fighting the use of capital punishment. See Dave Perry, *Perry: Death Penalty Dollar Diversion Overdue*, AURORA SENTINEL, (Apr. 27, 2010, 1:35 PM), http://www.aurorasentinel.com/opinion/columnists/article_13b4f6cc-fb26-5fd5-8203-f0e343f2f88.html (commenting that there is “[n]othing like a little discourse over human extermination to separate the ranks at the Capitol”).

501. *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

502. See *infra* Appendix B.

503. *Texas, QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Feb. 12, 2011) (reflecting 2009 data).

represent 41.53% of those on death row nationwide⁵⁰⁴ and 38.87% in Texas.⁵⁰⁵ Shockingly, in 2008, African Americans constituted 50% of those executed in Texas, 54% in 2009, and 58% in 2006.⁵⁰⁶ Clearly, this is the same type of disproportionality that *Furman* addressed.

504. CRIMINAL JUSTICE PROJECT, NAACP, LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 1 (Fall 2009) [hereinafter NAACP].

505. *Gender and Racial Statistics of Death Row Offenders*, TEX. DEPARTMENT CRIM. JUST., <http://www.tdcj.state.tx.us/stat/racial.htm> (last updated Feb. 10, 2011).

506. *Executions by Year*, TEX. DEPARTMENT CRIMINAL JUSTICE, <http://www.tdcj.state.tx.us/stat/annual.htm> (last updated Oct. 22, 2010). For those that wonder if African Americans commit 50% to 58% of the homicides in Texas, statistics for 2008 show that of the 1,003 arrests in Texas for murder and manslaughter that year, African Americans accounted for 30% of the total. See TEX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS 2008, at 90 (2009). Although 33% of those arrested for murder were African Americans, only 10% of the manslaughter arrests were Black. See *id.* 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 United States Department of Justice do lump murder and manslaughter arrests together in one category, so the same convention is used here. See U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2008, at tbl.43 (2009). Interestingly, African Americans nationwide are indeed 50% of the arrests for murder and manslaughter, *id.*, 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 overall population? In fact, of all the total arrests in Texas during 2008, African Americans constituted 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). See TEX. DEP'T OF PUB. SAFETY, *supra*, at 90. 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 Article. Because of the difficulty in understanding the language of the Texas Code of Criminal Procedure article 37.071, “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, seem[s] to activate and amplify racialized decision-making.” Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 492 (2009) (citations omitted). Further, mitigation is not weighed as heavily for African Americans as for Whites, and White jurors tend to sentence African Americans to death more frequently than if the defendant is White. *Id.* at 492–94; see also Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621 (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 population in general by over 300%. Compare *Texas QuickFacts*, *supra* note 503, with *Gender and Racial Statistics of Death Row Offenders*, *supra* note 505. Even to the most ardent supporters of the death pen-

alty—unless they believe African American are inherently more violent than others—these statistics must be troubling. The Baldus study, discussed in the early case of *McCleskey v. Kemp*, 481 U.S. 279 (1987), 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 1970s, indicated defendants of all races with white victims received the death penalty in 11% of the cases, but defendants of all races with African American victims received the death penalty in only 1% of the cases. See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); *McCleskey*, 481 U.S. at 286. Among other findings were: (1) African American defendants with white victims were given the death penalty in 22% of the cases, while white defendants with white victims received the death penalty in 8% of the cases; (2) the death penalty was given in only 1% of the cases with African American defendants and black victims, and 3% of the cases with white defendants and African American victims; (3) prosecutors sought death in 70% of the cases with African American defendants and white victims, 32% of the cases with white defendants and white victims, 15% of the cases with African American defendants and African American victims, and 19% of the cases with white defendants and African American victims; and (4) that those with white victims were 4.3 times more likely to be given death than those with African American victims. *McCleskey*, 481 U.S. at 286–87 (citing Baldus, *supra*). 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. GEN. STAT. § 15A-210 (2009) (“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.”). With this in mind comes contemporary research in a new study forthcoming in the North Carolina Law Review by Michael Radelet and Glenn Pierce. See Michael L. Radelet & Glen L. Pierce, *Race and Death Sentencing in North Carolina 1980–2007*, 89 N.C. L. REV. (forthcoming 2011) (working draft on file with author and Nebraska Law Review). Therein the researchers examined 15,281 homicides in North Carolina occurring during the years 1980 through 2007, which included 368 death sentences. *Id.* at 1. The study finds that those suspected of “killing Whites are over three times more likely to be sentenced to death than those who are suspected of killing African Americans.” *Id.* at 16. “Overall, 1.2 percent of those suspected of killing African Americans are sentenced to death, compared to 3.9 percent of those suspected of killing Whites . . .” *Id.* In North Carolina, the victim’s race is a “strong predictor” of who receives a death sentence in a homicide case and it is a “significant factor in the decision to seek . . . the death penalty.” *Id.* at 21–22. The data presented by Radelet and Pierce “reveal[s] strong racial disparities in death sentencing in North Carolina.” *Id.* at 23. In news accounts, Dr. Radelet comments that “[i]t’s just kind of baffling that, in this day and age, race matters.” Anne Blythe, *Victim’s Race Skews Death Penalty*, NEWS & OBSERVER, July 23, 2010, at 1A. “It turns out the racial biases tend to be lower where there are not as many death sentences.’ Radelet said.” *Id.* Additionally, Dr. Radelet commented: “It confirmed the worst fears. . . . It turns out the race of the defendant doesn’t matter at all, . . . [i]t all depends on the race of the victims.” Brittany Anas, *CU-Boulder Research: Victim’s Race Matters in Death Penalty*, BOULDER CAMERA (July 22, 2010), http://www.dailycamera.com/cu-new/ci_15581301. Quoting Mark Rabil, an assistant capital defender, “[The study] shows that predominantly white juries and prosecutors have been more protective of white life than of minority victims.” Michael Hewlett, *Disparity Seen in Death Penalty*, WINSTON SALEM J. (July 23, 2010), <http://www2.journalnow.com/news/2010/jul/23/disparity-seen-in-death-penalty-ar-392583/>. Perhaps

In contrast, 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.⁵⁰⁷ 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."⁵⁰⁸ Is this evidence that "the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory pattern . . . [and t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups"⁵⁰⁹ once again?

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

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 a system of capital punishment cannot be devised that is race neutral—and there are those that believe it cannot be so created. See Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 4, 2010, at A11 (reporting The American Law Institute in Fall 2009 pronounced their capital punishment project a failure and walked away, abandoning their efforts "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment") In the article, Franklin E. Zimring, a law professor at the University of California, Berkeley, is quoted saying The American Law Institute was "the only intellectually respectable support for the death penalty system in the United States." *Id.* The continued use of the current system is on the collective conscience of those who persistently ignore the science.

507. The Hebrew Bible states "breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him." *Leviticus* 24:20. The King James version of the Christian Bible states "[b]reach 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*." *Leviticus* 24:20. Those that make this argument forget the teachings in the Christian New Testament that it is not ours to reap vengeance. See *Romans* 12:19 (King James) ("Dearly beloved, avenge not yourself, but *rather* give place unto wrath: for it is written, Vengeance *is* mine; I will repay, saith the Lord."); *Hebrews* 10:30 (King James) ("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: "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." *Matthew* 5:38–39 (King James). To the accused: "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." *Matthew* 5:44 (King James).

508. *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring).

509. *Id.* at 249–50 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1st ed. 1967)).

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.⁵¹⁰

So which way are our standards of decency evolving? Or are they evolving 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 aggravating circumstances,⁵¹¹ I believe that the four dissenters in *Kennedy v. Louisiana* would 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.”⁵¹²

The story of the failed execution of Romell Broom in Ohio last year should offend even the most ardent death penalty supporters. For almost two and one half hours, Broom’s arm was stuck over, and over, and over—18 times—in an ultimately unsuccessful attempt to open a vein in his arm to execute him, with the Governor finally stopping the attempts.⁵¹³ Is this the evolution of decency?⁵¹⁴

What about the innocent? The Innocence Project has helped exonerate 241 inmates through post-conviction DNA testing, of which seventeen were former residents of death row.⁵¹⁵ The current controversy in Texas over the 2004 execution of Cameron Todd Willingham, whom many believe to be an innocent man, and Governor Perry’s “midnight massacre” of the leadership of the Forensic Science Commission, shows that the evolution of decency in Texas is mutating once again into a system that finds itself “wanton” and “capricious” in

510. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008).

511. *Id.* at 422–23.

512. *Id.* at 447–62 (Alito, J., dissenting). It 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 *Kennedy v. Louisiana* may only be a mutation. See *id.* at 461. “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.” Scalia, *supra* note 499.

513. Alan Johnson, *Effort to Kill Inmate Halted: 2 Hours of Needle Sticks Fail: Strickland Steps In*, COLUMBUS DISPATCH, Sept. 16, 2009, at A1; Mike Mentrek, *Failed Execution of Romell Broom Prompts Efforts to Block 2nd Attempt*, CLEVELAND.com (Sept. 17, 2009, 9:00 A.M.), http://blog.cleveland.com/metro/2009/09/failed_execution_of_romell_bro.html.

514. For a compilation of thirty-two botched executions, see Michael L. Radelet, *Some Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CENTER (Oct. 1, 2010), http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#_edn63.

515. Dahlia Lithwick, *Innocent Until Executed: We Have No Right to Exoneration*, NEWSWEEK, September 14, 2009, at 25.

the arbitrary prosecution and execution of those the state chooses for death.⁵¹⁶ One commentator recently placed the number of total wrongful executions at 138.⁵¹⁷ Given the number of exonerations in recent years, including many off death row,⁵¹⁸ it seems highly improbable that there has not been at least one innocent person executed, despite the hopeful wishes of some.⁵¹⁹

And the financial costs? California, with 694 inmates on death row, has not executed anyone in five years and has executed only a total of thirteen since 1977.⁵²⁰ Each execution in California costs \$250 million,⁵²¹ and each year California spends \$126.2 million more keeping the inmates on death row than it would cost to hold them in prison for life without parole.⁵²² In Texas, as far back as 1992, the

516. See David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42, 62–63; Morgan Smith, *Agency Needs More Time for Willingham Case*, TEXAS TRIB. (Apr. 26, 2010), <http://www.texastribune.org/texas-dept-criminal-justice/death-penalty/agency-needs-more-time-for-willingham-case/>.

517. Daniel B. Wood, *Ronnie Lee Gardner: Is Utah Firing Squad a More Humane Execution?*, CHRISTIAN SCI. MONITOR (June 17, 2010), <http://www.csmonitor.com/USA/Justice/2010/0617/Ronnie-Lee-Gardner-Is-Utah-firing-squad-a-more-humane-execution> (citing John Holdridge, director of the ACLU's Capital Punishment Project).

518. See *id.* (noting that a Cleveland based criminal defense attorney placed the number of death row inmates who have been exonerated at 250 in recent years).

519. For instance, Scalia has stated:

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 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, 548 U.S. 163, 188 (2006) (Scalia, J., concurring).

520. NAACP, *supra* note 504, at 32; Paul Elias, *Calif. Case Spotlights Dysfunctional Death Penalty*, ABC NEWS (Apr. 25, 2010), <http://abcnews.go.com/US/wireStory?id=10471927> (noting the last execution in California was January 17, 2006 when Clarence Ray Allen was put to death).

521. Editorial, *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22.

522. See CAL. REPORT, *supra* note 500, at 84; see also Editorial, *supra* note 521 (citing the figure of \$114 million). The California Commission cites several studies discussing the differences in the costs of the trials, and in some cases, the appeals: (1) A Kansas study that shows adding a death penalty to a murder trial increases the cost by 70%. KANSAS LEGISLATIVE DIVISION OF POST AUDIT, PERFORMANCE AUDIT REPORT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 11 (2003). (2) In Tennessee, adding a death penalty to a murder trial increases the cost by 48%. See EMILY WILSON ET AL., TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES 16 (2004). (3) In Indiana, the trial and appeal of a capital case costs five times over the trial and appeal of a non-capital murder case. See KATHRYN JANEWAY, IND. CRIMINAL LAW STUDY COMM'N, THE APPLICATION OF INDIANA'S CAPITAL'S SENTENCING LAW 1–122, 124–211 (2002). (4) A California study showed the increased cost in just the trial

average cost of a capital trial and appeal was \$2.3 million, three times the cost to house that inmate for forty years in a single cell at the highest security level.⁵²³

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- of a capital case over a non-capital murder case is \$1.27 million. Rone Tempest, *Death Row Often Means a Long Life*, L.A. TIMES, Mar. 6, 2005, at A1 (citing report). (5) An ACLU study showed a \$1.1 million difference between the most expensive non-death murder case and the least expensive capital trial. NATASHA MINSKER, ACLU OF N. CAL., THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA 32 (Clair Cooper & Elise Banducci eds., 2008).
523. Christy Hoppe, *Executions Cost Texas Millions—Study Finds It’s Cheaper to Jail Killers for Life*, AUSTIN BUREAU OF THE DALL. MORNING NEWS, Mar. 8, 1992, at 1A; see also TEX. PUB. POL’Y FOUND., 2009–2010 LEGISLATOR’S GUIDE TO THE ISSUES 104 (Bill Peacock ed., 2008) (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). Philip Cook, an economist at Duke’s Sanford School of Public Policy, found North Carolina would save \$11 million per year by abolishing death row. Phillip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 498, 502 (2009) This figure is up from his last study in 1993 showing an annual savings of \$4 million. *Id.* With 173 people currently on North Carolina’s death row, and no executions since August 2006, this would amount to a savings of \$63,500 per-inmate per-year for the rest of the inmate’s life. See Mandy Locke, *Study: End Death Cases, Save Money*, NEWS & OBSERVER (Dec. 28, 2009), http://nl.newsbank.com/nl-search/we/Archives?p_action=print&p_docid=12CE3CAACBFD2720. Using this 1992 figure of a cost of a capital trial and appeal of \$2.3 million, see Hoppe, *supra*, and the costs of forty years of incarceration in a single cell at one-third of this figure (\$766,667), see *id.*, with the current population of death row in Texas (315 as of March 25, 2011), and using the Indiana study that a murder trial costs one-fifth of a capital trial, see JANEWAY, *supra* note 522, had all 315 Texas Death Row inmates been tried as non-death murder cases, after paying for the total cost of the trial and appeal (\$460,000—one-fifth of \$2.3 million) and the forty years of incarceration (\$766,667 at 1992 costs, which would take most inmates well into their later years, see Hoppe, *supra*), and adding back the savings for each inmate not waiting the ten year average on Death Row (\$193,450, based on the cost per-day of administrative segregation (death row) in Texas in 1998 at \$53, see *Death Row Facts*, TEX. DEPARTMENT OF CRIM. JUST., <http://www.tdcj.state.tx.us/stat/drowfacts.htm> (10.6 year average) and Tanya Eiserer, *Life in Administrative Segregation Can Make, Break a Prisoner*, ABILENE REP.-NEWS (April 26, 1998), <http://www.texnews.com/1998/local/adseg0426.html>), the State would have saved almost 400 million, and this is after allowing for every variable to err on the side of a conservative estimate. The population of death row is available at the Department of Criminal Justice Website. See *Gender and Racial Statistics of Death Row Offenders*, TEX. DEPARTMENT OF CRIM. JUST., <http://www.tdcj.state.tx.us/stat/racial.htm> (last updated March 25, 2011). Statistics provided by the Executive Services of the Texas Department of Criminal Justice show a per-day cost on death row during fiscal year 2002 to be \$61.58. Letter from Alicia Frezia Nash, Open Records Act Coordinator, Exec.Servs., Tex. Dep’t of Crim. Just., to Patrick Metzger, Assoc. Professor, Tex. Tech Univ. Sch. of Law (July 19, 2010) [hereinafter Nash Letter] (on file with author and Nebraska Law Review). *But see* CRIM. JUST. POL’Y COUNCIL, MANGOS TO MANGOS: COMPARING THE OPERATIONAL COSTS OF JUVENILE AND ADULT CORRECTIONAL PROGRAMS IN TEXAS 12, 34 (2003) (stating the figure computed by the Criminal Justice Policy Council for that year is \$61.63). Using the figure of \$61.58 for a per-day cost, the add back for the ten years saved would be \$224,767 or an additional \$31,317 savings per inmate over the \$409

million savings just calculated (a total of almost \$10 million additional). Admittedly, these calculations do not reflect adjustments for inflation and are meant for illustrative purposes only. But they also do not include the savings on other resources, e.g., law enforcement, court personnel, expert witnesses, prosecution, trial courts, appellate courts, and defense counsel. These expenses would be saved by freeing up the time now dedicated to capital cases—time better applied to other matters. Additionally, an intangible benefit would be the relative quick disposition of each case, reducing the time the victim's family and loved ones have to dedicate themselves to this process before going on with their lives. According to the Texas Department of Criminal Justice, the current per-day costs on death row are computed by the Texas Legislative Budget Board (LBB) since fiscal year 2002. See Nash Letter, *supra*. But a search of the LBB website, <http://www.lbb.state.tx.us/>, did not reveal any current data on death row per-day costs. The LBB showed during fiscal year 2008 a system wide cost per bed at \$47.50. See Nash Letter, *supra*. This represents an increase of only 8% over the previous six years (TDCJ showed costs per-day system wide for fiscal year 2002 was \$44.01, see CRIM. JUST. POLY COUNCIL, *supra*, at 34). 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." See Barton Email, *supra*. 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, a political motivation becomes apparent. The per-bed cost for death row calculated for fiscal year 2001 was \$60.30, see CRIM. JUST. POLY COUNCIL, *supra*, at 12, and for fiscal year 2002 it was \$61.63, see *id.* This is an increase of only 2.2% per-year between fiscal year 2001 and fiscal year 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. That is almost a 22% increase in costs for the past nine years at this modest rate of growth. At that rate, in nine more years the cost of death row will be \$89.19 per-day or \$10.25 million per-year assuming the population does not change. At today's cost, for each year the 315 inmates are kept on death row, the total cost is a little over \$8.43 million, compared to the system-wide cost of almost \$5.35 million—as per the 2008 \$46.51 per-day cost. See email from John Barton, Pub. Info. Officer, Tex. Legislative Budget Bd., to Patrick Metzke, Assoc. Professor, Tex. Tech. Univ. Sch. of Law (July 22, 2010) [hereinafter Barton Email] (on file with author and Nebraska Law Review). That is an estimated increased cost per-year of over three million to house 315 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 from \$793 million in 1990 to \$2.94 billion in 2008." TEX. PUB.POLY FOUND, *supra*, at 104. 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*, BOS. GLOBE, Feb. 14, 2010, at C1 (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

XX. CONCLUSION

As I prepared this compilation of over thirty years of vitiating section 19.03 jurisprudence, our political institutions—the Texas Legislature (Legislative), the prosecutors (Executive), and the TCCA (Judicial)—confirm and reinforce what we have been told for many years about the capital punishment scheme in Texas: This whole process has little to do with “justice” and everything to do with maintenance of political power.⁵²⁴

What does it say about a society that ties a man to a chair, puts a sack over his head, slaps a Velcro target on his chest, and has five other human beings shoot four .30-30 caliber bullets through his beating heart?⁵²⁵ For instance, 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.⁵²⁶ This is not an *evolution*; it is a disintegration of decency—an all-out attack on the character and soul of our people. Garner’s execution has opened up the debate once again.⁵²⁷

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 for 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, see Cook, *supra*, and Lock, *supra*, Texas could possibly 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.

524. Thank you to *Millard Farmer* of Atlanta, Georgia, whose advice is never forgotten and who continues to inspire and illuminate.

525. See Christopher Smart, *Utah Execution Reopens Death-Penalty Debate*, SEATTLE TIMES (June 16, 2010, 6:34 PM), http://seattletimes.nwsourc.com/html/nationworld/2012136377_utahdeath17.html?sysyndicati=rss.

526. *Id.*

527. *Id.* A Salt Lake City reporter described the execution:

[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. . . . [C]ounting 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 [sic] 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.

In Texas, as a society, we find ourselves right back where we began, killing people through a system that arbitrarily selects minorities for prosecution and execution at a rate of over three times their population in the state.⁵²⁸ In Texas, there are 146 different ways to commit a capital crime,⁵²⁹ which is well beyond the ordinary person's ability to understand what behavior is proscribed. In Texas, the state that steadfastly clings to a statute making capital the sexual assault of a child where death was not intended.⁵³⁰ In Texas, where only one white person has ever been executed for the killing of an African American.⁵³¹

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."⁵³² Reasons given were the impossi-

Ben Winslow, *Convicted Murderer Ronnie Lee Gardner Executed by Firing Squad*, FOX 13 NEWS (June 13, 2010, 9:48 AM), <http://www.fox13now.com/news/firingsquad/kstu-utah-man-facing-firing-squad-execution-ronnie-lee-gardner,0,7337567.story>. It was described by the reporter as "a violent death." *Gardner Execution Described as a Very Violent Death*, FOX 13 NOW, <http://www.fox13now.com/videobeta/?watchId=D83153b3-5cb2-43c9-ae59-4a4b1af8407e> (last visited March 6, 2011).

528. See *supra* notes 503–06.

529. See *infra* Appendix A.

530. See TEX. PENAL CODE ANN. § 12.42(c)(3) (West 2003 & Supp. 2010).

531. The only White person executed in Texas for killing an African American was Larry Allen Hayes from Conroe, Montgomery County, Texas. See *Executed Offenders*, TEX. DEPARTMENT CRIM. JUST., <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last updated May 4, 2011). On July 15, 1999, Mr. Hayes killed his wife, Mary Evelyn Hayes, a white woman, and eighteen-year-old Rosalyn Ann Robinson, a black woman, who was working at a nearby convenience store. *Hayes v. State*, 85 S.W.3d 809, 812–814 (Tex. Crim. App. 2002). After shooting Ms. Robinson, Mr. Hayes took her car. *Id.* Mr. Hayes volunteered for his execution on September 10, 2003, after spending less than three years on death row. See TEX. DEPARTMENT CRIM. JUST., *supra*. As the average length of time on death row is 10.6 years, and as 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 awaiting its first execution of a white person for the murder of a black person. See *Death Row Facts*, *supra* note 523. Additionally on death row are the only other white men that run a reasonably good chance of 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. See *Offenders on Death Row*, TEX. DEPARTMENT CRIM. JUST., <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last updated May 4, 2011). Their co-defendant, Shawn Allen Berry, was the last to be tried of the three and was given a life sentence by a jury. See Jeremy Peters, *Texas Jury Picks Death Sentence in Fatal Dragging of a Black Man*, N.Y. TIMES, Feb. 26, 1999, at A1. 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.

532. Liptak, *supra* note 506.

bility of designing a death penalty system that would (1) be fair and without racial disparities, (2) not be enormously expensive, (3) not risk executing innocent people, and (4) not be affected by the political underpinnings involving elected officials.⁵³³

Professor Samuel R. Gross, the Thomas and Mabel Long Professor of Law at the University of Michigan Law School, is quoted as 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*]—has said that the death penalty in the United States is a moral and practical failure.”⁵³⁴

As states such as New Mexico,⁵³⁵ New Jersey,⁵³⁶ and Illinois⁵³⁷ abolish their death penalty, and as states such as California have no executions,⁵³⁸ and as Colorado, Idaho, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania, Wyoming and the U.S. Military have not seen an execution in over ten years,⁵³⁹ the TCCA finds every way to justify these prosecutions by bending definitions of intent, avoiding constitutional rulings, and creatively applying the facts of a case to the law to allow our unconstitutional system to flourish.⁵⁴⁰

As the legislature expands the number of crimes eligible for capital punishment to 146,⁵⁴¹ and reversals on direct appeal become an aberrance, when will the appellate courts acknowledge that we have returned to the capricious and arbitrary exercise of power that Justice Douglas discussed in *Furman*? 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.”⁵⁴²

533. *See id.*

534. *Id.*

535. *See* Tim Gaynor, *New Mexico Gov. Bill Richardson Bans Death Penalty*, REUTERS (March 18, 2009, 9:39 PM), <http://www.reuters.com/article/2009/03/19/us-usa-deathpenalty-idUSTRE52I0I820090319>.

536. *See* Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html?_r=2.

537. *See* John Schwartz, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/10/us/10illinois.html>.

538. Elias, *supra* note 520.

539. *See* U.S. Jurisdiction Executions, *supra* note 500.

540. *See supra* Part XVIII.

541. *See infra* Appendix A.

542. *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

Ultimately, “[t]he degree of civilization in a society can be judged by entering its prisons.”⁵⁴³ Today, when entering the prisons of Texas, people find the largest governmental killing machine in the nation⁵⁴⁴ and seventh most active in the world.⁵⁴⁵ Contrastingly, even considering its long, storied history of apartheid and oppression of its Black population, in 1995 South Africa’s Constitutional Court courageously and unanimously agreed—against public opinion—that the death penalty was substantively inconsistent with protection of a human being’s “right to life” and the post-apartheid constitutional prohibition on “cruel, inhuman, and degrading treatment or punishment.”⁵⁴⁶ In response to this decision, Archbishop Desmond Tutu commented that 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.”⁵⁴⁷

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.”⁵⁴⁸ Leave the convicted

543. This quote is generally attributed to Fyodor Dostoevsky. See FYODOR DOSTOEVSKY, *THE HOUSE OF THE DEAD* (H. Sutherland Edwards trans., 1962).

544. Number of executions by state since 1976:

	Total	2010	2009
Texas	460	13	24
Virginia	107	2	3
Oklahoma	92	1	3
Florida	69	1	2
Missouri	67	0	1

DEATH PENALTY INFO.CTR., *FACTS ABOUT THE DEATH PENALTY* 3 (2010). This chart shows the five states that have executed the most since 1976. *Id.* Overall, Texas has executed more than four times its nearest rival, and during the last two years, while other states have been modest, Texas is out front setting the pace as always. *Id.*

545. In 2009, the five countries with the highest rates of execution were China (unknown, but 1,718+ in 2008), Iran (388+), Iraq (120), Saudi Arabia (69), United States (52, of which 24 were just in Texas alone). After Yemen (30+), Texas would rank seventh in the world in executions. AMNESTY INT’L, *DEATH SENTENCES AND EXECUTIONS 2009*, at 24 (2010).

546. *State v. T. Makwanyane* 1995 (3) SA 391 (CC) at para.8, 10, 144–51. For a complete discussion of South Africa’s struggle and victory over capital punishment, see SANGMIN BAE, *WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT* 41–61, 11–12 (Zehra F. Kabasakal ed., 2007).

547. Howard W. French, *South Africa’s Supreme Court Abolishes Death Penalty*, N.Y. TIMES, June 7, 1995, at A3.

548. JOHN STUART MILL, *ON LIBERTY* 22 (London, John W. Parker & Son, 2nd ed. 1859).

in prison unless they serve their full sentence or earn the right to be released on parole, and few will earn parole.⁵⁴⁹

549. 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 August 29, 1977 through August 31, 1987, parole eligibility is at twenty years; from September 1, 1987 through August 31, 1989, parole eligibility is at fifteen years; September 1, 1989 through August 31, 1993, parole eligibility is at thirty-five years; September 1, 1993 through August 31, 2005 parole eligibility is at forty calendar years with the vote of the full Board of Pardons and Paroles being required, regardless of date of offense (vote must be of two-thirds of full Board to approve). See TEX. BD. OF PARDONS & PAROLES, *PAROLE IN TEXAS: ANSWERS TO COMMON QUESTIONS* 13–32 (2005). Effective September 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 (West 2003 & Supp. 2010). The chances for release on parole for capital murder are “slim to none.” BILL HABERN & DAVID O’NEIL, *WHAT ABOUT THE PAROLE PROCESS WHEN ONE HAS A LIFE SENTENCE ON A CAPITAL MURDER CHARGE?* 2 (2001). For the past twenty years, all new capital-life sentences have fallen into the thirty-five or forty year minimum requirement. *Id.* How the parole board will handle these cases is yet to be seen. It is reported that in fiscal year 2001, of the sixty capital offenders considered, parole was only approved for three. *Id.* According to the statistics provided by Executive Services of the Texas Department of Criminal Justice, from the years 1995 through 2009 there were 1,933 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), but only seventy-one inmates were actually released on parole—that is less than an average of five per-year, which equates to an average per-year parole rate of 3.7% over the fifteen years (the average parole rate for capital offenders just during 2008–2009 was only 6.4%). See EXEC. SERVS., TEX. DEP’T OF CRIM. JUST., *PAROLE CONSIDERATIONS BY THE YEAR OF THE CONSIDERATION*, at 1 (2010) (on file with author and Nebraska Law Review). 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 of 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 of which are much higher than the average number of those paroled for capital murder. TEX. BD. OF PARDONS & PAROLES, *ANNUAL REPORT FOR FISCAL YEAR 2009*, at 17, 34 (2010). 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 offenses (2,236 cases approved) was 23.70%, and violent aggravated sexual offenses (429 cases approved) was 11.47%. TEX. BD. OF PARDONS & PAROLES, *ANNUAL REPORT FOR FISCAL YEAR 2008*, at 17 (2009). Only the sexual offenders have seen a significant increase in the last year—the other violent offenders and their overall rates remained about the same). *Id.* If California can be used as an example, at seventy-two years of age, Charles Manson was again denied parole in 2007, and he remains in the California state prison in Corcoran, California.

Let there 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 that are currently squandered by 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. A truly enlightened, maturing society, while evolving its accepted standards of decency, recognizes madness, admits its folly, and corrects its path.

where he will not be eligible again until 2012. See Associated Press, *72-Year-Old Manson Again Denied Parole; Next Chance Will be in 2012*, L.A. TIMES, May 24, 2007, at B5. Manson's death sentence from 1971 was commuted to life when the California death penalty was declared unconstitutional in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), superseded by constitutional amendment, Cal. Const. art I, § 27. See Associated Press, *supra*. Thus, it appears doubtful the repeal of the Texas death penalty statute would have any real effect on the release on parole of former death row inmates. Also, the fear of capital murder inmates is unfounded. See J.K. Price et al., *Criminal Acts of Violence Among Capital Murder Offenders in Texas*, J. OF CRIMINOLOGY & CRIM. JUST. RES. & EDUC. 1 (2009) (indicating capital murder death offenders are no more or less likely to commit criminal acts of violence than other groups of inmates).

XXI. APPENDIX A

As mentioned in Part III, above, the number of offenses that currently act as aggravating circumstances, raising a murder to a capital murder are most commonly referred to as nine. A closer look at those statutes, however, shows a massive expansion of eligible crimes.

1. Murder of a peace officer.⁵⁵⁰
 2. Murder of a fireman.⁵⁵¹
 3. Murder in the course of committing kidnapping.⁵⁵²
 4. Murder in the course of committing burglary.⁵⁵³
 5. Murder in the course of committing robbery.⁵⁵⁴
 6. Murder in the course of committing aggravated sexual assault.⁵⁵⁵
 7. Murder in the course of committing arson.⁵⁵⁶
 8. Murder in the course of committing obstruction.⁵⁵⁷
 9. Murder in the course of committing retaliation.⁵⁵⁸
 10. Murder while attempting to commit kidnapping.⁵⁵⁹
 11. Murder while attempting to commit burglary.⁵⁶⁰
 12. Murder while attempting to commit robbery.⁵⁶¹
 13. Murder while attempting to commit aggravated sexual assault.⁵⁶²
 14. Murder while attempting to commit arson.⁵⁶³
 15. Murder while attempting to commit obstruction.⁵⁶⁴
 16. Murder while attempting to commit retaliation.⁵⁶⁵
- Murder in the course of committing:
17. Terroristic threat under section 22.07(a)(1)⁵⁶⁶ (four crimes).
 18. Terroristic threat under § 22.07 (a)(3)⁵⁶⁷ (seventy-two crimes).

550. TEX. PENAL CODE ANN. § 19.03(a)(1) (West 2003 & Supp. 2010).

551. *Id.*

552. *Id.* § 19.03(a)(2).

553. *Id.* Burglary could easily have been counted as two separate crimes, with burglary of a building and burglary of a habitation having different elements.

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *Id.* §§ 19.03(a)(2), 22.07(a)(1). Under this section, one commits a capital offense if he or she 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. *Id.* § 22.07(a)(1). This could be four 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. *Id.*

567. *Id.* §§ 19.03(a)(2), 22.07(a)(3). Under this section, one commits a capital offense if he or she 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 em-

19. Terroristic threat under § 22.07 (a)(4)⁵⁶⁸ (twenty-four crimes).
20. Terroristic threat under § 22.07 (a)(5)⁵⁶⁹ (two crimes).
21. Terroristic threat under § 22.07 (a)(6)⁵⁷⁰ (ten crimes).
22. Murder for remuneration.⁵⁷¹
23. Murder for the promise of remuneration.⁵⁷²
24. Employs another to commit murder for remuneration.⁵⁷³
25. Employs another to murder for promise of remuneration.⁵⁷⁴
26. Murder while escaping from a penal institution.⁵⁷⁵
27. Murder while attempting to escape from a penal institution.⁵⁷⁶
28. Murder of a penal institution employee while incarcerated.⁵⁷⁷
29. Murder to establish/maintain/participate in combination with profits while incarcerated.⁵⁷⁸
30. Murder while serving sentence for murder.⁵⁷⁹
31. Murder while serving sentence for capital murder.⁵⁸⁰
32. Murder while serving life sentence/ninety-nine years for aggravated kidnapping.⁵⁸¹

ployment or occupation, (6) aircraft, (7) automobile, (8) conveyance, or (9) public place. *Id.* at § 22.07(a)(3). A possible cumulative total of seventy-two crimes. Threaten to commit violent offense to any:

- person to prevent occupation of a building, room, etc. (nine 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.

568. *Id.* §§ 19.03(a)(2), 22.07(a)(4). Under this section, one commits a capital offense if he or she 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, (4) gas, (5) power supply, or (6) other public service. *Id.* at § 22.07(a)(4). A total of twenty-four additional crimes.
569. *Id.* §§ 19.03(a)(2), 22.07(a)(5). Under this section, one commits a capital offense if he or she 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. A total of two additional crimes.
570. *Id.* §§ 19.03(a)(2), 22.07(a)(6). Under this section, one commits a capital offense if he or she 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). *Id.* at § 22.07(a)(6). A total of ten additional crimes.
571. *Id.* § 19.03(a)(3).
572. *Id.*
573. *Id.*
574. *Id.*
575. *Id.* § 19.03(a)(4).
576. *Id.*
577. *Id.* § 19.03(a)(5)(A).
578. *Id.* § 19.03(a)(5)(B).
579. *Id.* § 19.03(a)(6)(A).
580. *Id.*
581. *Id.* §§ 19.03(a)(6)(B), 20.04.

33. Murder while serving life sentence/ninety-nine years for aggravated sexual assault.⁵⁸²
34. Murder while serving life sentence/ninety-nine years for aggravated robbery.⁵⁸³
35. Murder of more than one person (mass murder).⁵⁸⁴
36. Murder of more than one person (serial murder).⁵⁸⁵
37. Murder of a child under six years of age.⁵⁸⁶
38. Murder of a judge of the many courts.⁵⁸⁷
39. Subsequent sexual assault of a child.⁵⁸⁸

When taking into consideration the component parts of terroristic threat, there are 146 separate ways to commit a capital crime. Some will say “manner and means” should not be considered separately in determining the total number of capital crimes, but I disagree. There are great differences between the meaning 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 provided a vast array of circumstances, and hence, a vast number of crimes.

582. *Id.* §§ 19.03(a)(6)(B), 22.021.

583. *Id.* §§ 19.03(a)(6)(B), 29.03.

584. *Id.* § 19.03(a)(7)(A).

585. *Id.* § 19.03(a)(7)(B).

586. *Id.* § 19.03(a)(8).

587. *Id.* § 19.03(a)(9).

588. *Id.* § 12.42(c)(3); TEX. CODE CRIM. PROC. ANN. art 37.072 (West Supp. 2010).

XXII. APPENDIX B

TABLE I

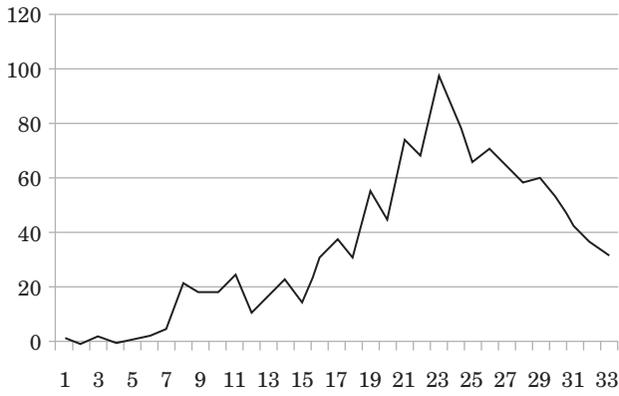


TABLE II

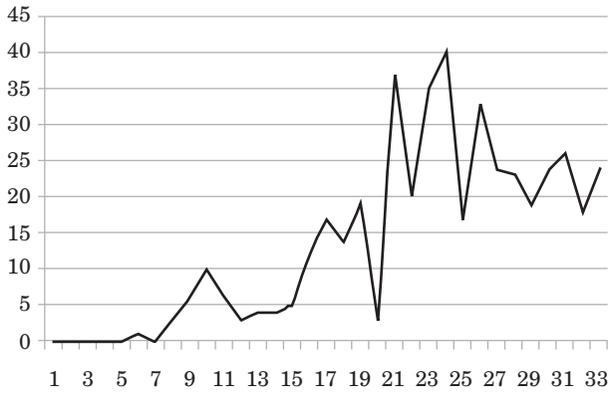


TABLE III

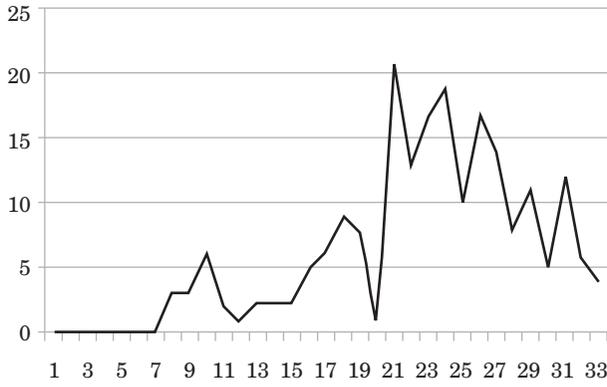


TABLE IV

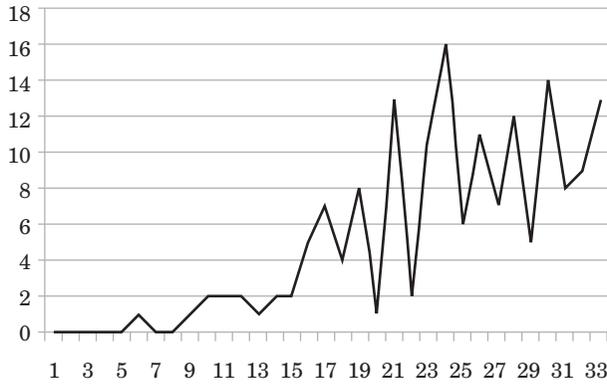


TABLE V

