MEMORANDUM OF LAW IN SUPPORT OF MR. CLARK’S FACIAL CHALLENGES TO THE CONSTITUTIONALITY OF THE TEXAS DEATH-PENALTY SENTENCING SCHEME

“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”


“Since *Furman*, our cases have insisted that the channeling 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.”


“A careful review of our jurisprudence in this area [of mitigation] makes clear that well before our decision in *Penry v. Lynaugh*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.”


“[T]he 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.”

*Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of Contents</td>
<td>ii</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Background</td>
<td>3</td>
</tr>
<tr>
<td>I. In the Modern Death-Penalty Era, the Supreme Court Developed Four Components Essential to Rendering a Capital-Sentencing Scheme Constitutional</td>
<td>5</td>
</tr>
<tr>
<td>II. Concerns about the Impossibility of Making the Death Penalty Constitutional Continued to Grow</td>
<td>8</td>
</tr>
<tr>
<td>III. Evidence Now Abounds that Problems of Arbitrary and Unreliable Capital Sentencing Cannot Be Eradicated</td>
<td>14</td>
</tr>
<tr>
<td>Argument &amp; Authorities</td>
<td>18</td>
</tr>
<tr>
<td>I. Texas’s Modern Capital-Sentencing Scheme Was Unconstitutional from the Outset; and the Core Component That Still Exists Today, the “Future Dangerousness” Special Issue, Was and Remains Unreliable, Facilitating Arbitrary and Capricious Outcomes</td>
<td>19</td>
</tr>
<tr>
<td>A. The Myth That Texas’s Capital-Sentencing Scheme Is Constitutional Took Root Early on and Has Never Been Revisited</td>
<td>19</td>
</tr>
<tr>
<td>1. Texas’s death-penalty sentencing scheme has never been reliable</td>
<td>20</td>
</tr>
<tr>
<td>2. Texas’s current scheme includes special issues that do not ensure conformity with constitutional mandates</td>
<td>22</td>
</tr>
<tr>
<td>3. At the outset, the Supreme Court presumed the constitutionality of the “future dangerousness” special issue based on unsubstantiated premises</td>
<td>26</td>
</tr>
<tr>
<td>B. A Core Component of the Texas Capital-Sentencing Scheme Has Been Challenged Repeatedly Throughout the Modern Death Penalty Era, Yet All Such Challenges Have Been Brushed Aside Without Analysis</td>
<td>32</td>
</tr>
<tr>
<td>1. The Supreme Court has consistently avoided considering the reliability of predictions by lay jurors as well as experts that there is a “probability that the defendant would constitute a continuing threat to society,” recognizing that, were it to admit that such predictions are inherently unreliable, the Texas special issue must be deemed unconstitutional</td>
<td>32</td>
</tr>
<tr>
<td>2. Having avoided the question initially, the reliability of “scientific” testimony about future dangerousness was eventually taken up as an evidentiary rule instead</td>
<td>38</td>
</tr>
<tr>
<td>3. The CCA applied Daubert to future-dangerousness predictions but misinterpreted Barefoot in the process</td>
<td>42</td>
</tr>
<tr>
<td>4. The CCA, in Coble, defended the future dangerousness special issue by insisting on an interpretation of Jurek at odds with the opinion’s plain text</td>
<td>46</td>
</tr>
</tbody>
</table>
5. The future dangerousness special issue lives on even as scientific evidence has demonstrated that future dangerousness predictions are fundamentally unreliable. .. 50

6. The initial, provisional conclusion about the constitutionality of the future dangerousness special issue was based on an expectation that was never fulfilled. .. 60

II. The Litigation That Spawned the One, Inadequate “Improvement” to the Texas Capital-Sentencing Scheme Exposes Deeply Rooted Hostility to the Very Concept of Mitigation. .. 67

A. The Central Holding of Jurek Was Eventually Struck Down after Scores Had Been Sentenced under an Unconstitutional Scheme. ................................................................. 69

B. The Supreme Court Finally Recognized Texas’s Mitigation Problem in Penry I. ........ 71

C. Texas’s Interim “Fix” for the Mitigation Problem Created Yet Another Problem. ....... 73

D. Texas Courts Continued to Resist Clear Directives from the Supreme Court about the Role of Mitigation in Capital Sentencing Even after Penry II. ................................. 75

III. Texas’s Current Capital-Sentencing Statute Does Not Narrow the Class of People Susceptible to Being Killed by the State as Punishment for Their Crimes but Has Instead Expanded the Class of Death-Eligible Individuals in a Manner at Odds with Any Valid Penological Purpose. ......................................................................................................... 83

A. An Overinclusive Statute Has Been Amended Repeatedly to Broaden the Categories of Death-Eligible Crimes, Not to Narrow the Class of Death-Eligible Individuals.......... 84

B. Another Set of Amendments to the Penal Code Has Expanded Death-Eligibility by Expanding the Definitions of Both Life and Death in a Manner that Violates Multiple Constitutional Provisions. ................................................................................................. 97

1. Senate Bill 319 is unconstitutional because it violates the Eighth Amendment by arbitrarily expanding the availability of the death penalty for crimes not previously considered to be capital crimes. .................................................................................. 99

2. Senate Bill 319 is unconstitutional because it violates the Due Process Clause by defining fertilized eggs, embryos, and fetuses as persons. ............................................... 101

3. Senate Bill 319 is unconstitutional because it violates the Supremacy Clause by defining fertilized eggs, embryos, and fetuses as persons. ........................................... 105

4. Senate Bill 319 is unconstitutional because it violates the Establishment Clause by defining life as beginning at fertilization................................................................. 107

5. Senate Bill 319 is unconstitutional because it violates the Fourteenth Amendment’s Equal Protection and Due Process Clauses by elevating potential life over actual life in furtherance of no valid penological purpose. ....................................................... 110

IV. Texas Provides No Statutory Directive Guiding the Exercise of Prosecutorial Discretion at the County-Level, Resulting in Intolerable Arbitrariness. ................................. 117

A. Prosecutors in Texas Are Afforded Virtually Unlimited Discretion with Respect to the Decision to Seek the Death Penalty. ................................................................. 117
B. The Likelihood of Receiving the Death Penalty in Texas Depends on Entirely Arbitrary Vagaries of Geography. .................................................................................................. 119

C. The Likelihood of Receiving a Death Sentence in Texas Depends on Entirely Arbitrary Factors of Race. .............................................................................................................. 123

D. Few Safeguards Exist to Counter the Deleterious Result of Prosecutorial Overreach 126

V. In Multiple Ways, the Future Dangerousness Special Issue Is Unconstitutionally Vague and Fails to Narrow the Class of Death-Eligible Defendants. ......................................... 131

A. The Vague Text Does Not Guide Jurors Who Are Ill-Equipped to Make the Prediction Called for by the Special Issue........................................................................................ 133

B. The CCA’s Failure to Define, and Thereby Narrow, Key Terms in the Future Dangerousness Special Issue Is Without Justification. ................................................... 136

1. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague........................................................................................................................ 137

2. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague........................................................................................................................ 143

3. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague........................................................................................................................ 146

4. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague........................................................................................................................ 147

C. The CCA’s Approach to Reviewing Future Dangerousness Has Eviscerated the Right to a Fair Trial in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments........... 149

D. The Future Dangerous Special Issue, as Drafted and as Interpreted by the CCA, Unconstitutionally Places the Burden on Defendants to Prove a Death Sentence Should Not Be Imposed. ............................................................................................................. 155

VI. In Multiple Ways, the Texas Approach to Mitigation Remains Unconstitutional...... 159

A. The Supreme Court Has Been Clear That Capital-Sentencing Schemes Cannot Unduly Burden the Consideration of Mitigating Evidence. ............................................................................................................. 160

B. Texas’s Statutory Definition of “Mitigating Evidence” Is Unconstitutional Because It Limits the Wide-Open Concept of “Mitigation” as Defined in the Supreme Court’s Eighth Amendment Jurisprudence........................................................................................................... 161

C. The CCA’s Interpretation of the Statutory Definition of “Mitigating Evidence” Is Unconstitutional Because, by Operating in Contravention to the Supreme Court’s Eighth Amendment Jurisprudence, It Violates the Supremacy Clause. ........................................... 164
D. In Violation of the Eighth and Fourteenth Amendments, the CCA’s Interpretation of “Relevant” Mitigating Evidence Further Constrains the Scope of Mitigation that Juries Are Even Allowed to Hear........................................................................................................... 168

E. The Sequence and Wording of the Special Issues Impair Consideration of Mitigation and Privilege Death over Life.................................................................................................................. 172

1. The Texas capital-sentencing scheme exploits cognitive biases to privilege death over life............................................................................................................................ 172

2. The Texas capital-sentencing statute exploits the representativeness heuristic that predisposes jurors toward a death sentence................................................................. 174

3. The Texas capital-sentencing statute exploits the anchoring-and-adjustment heuristic that predisposes jurors toward a death sentence...................................................... 177

VII. The Texas Death-Penalty Sentencing Instructions Are Crafted to Deceive Jurors Thereby Impairing Their Ability to Make a “Reasoned Moral Response” to Sentencing as the Constitution Requires....................................................................................................... 182

A. Juries Engaged in Capital Sentencing Must Be Able to Make a Reasoned Moral Response about the Propriety of the Sentences Their Decisions Effect ........................................ 182

B. Texas’s Mandatory Jury Instructions Deceive in Two Critical Ways. ................. 183

1. Texas’s mandatory jury instructions deceive regarding how many jurors must agree on the answers to the special issues................................................................. 184

2. Texas’s mandatory jury instructions deceive through a material omission about the effect of their answers.............................................................................................. 185

C. The Material Misrepresentations and Omissions in Texas’s Mandatory Jury Instructions Are Anathema to Reliable Sentencing and Thus Violate the Eighth Amendment........ 186

D. The Material Misrepresentations and Omissions in Texas’s Mandatory Jury Instructions Also Violate the Defendant’s Right to Due Process Guaranteed by the Fourteenth Amendment.................................................................................................................... 191

E. The Text of the Statutory Juror Instructions Deceives, Reflecting an Improper Legislative Intent. ......................................................................................................................... 194

VIII. The Cumulative Infirmities Plaguing Texas’s Approach to the Death Penalty Violate the Eighth and Fourteenth Amendments. ................................................................. 199

Conclusion .................................................................................................................................. 200

Certificate of Service .................................................................................................................. 205
INTRODUCTION

Defendant VonTrey Clark, through counsel, submits the following Memorandum of Law in support of his facial challenges to the constitutionality of the Texas death-penalty sentencing scheme. The defense acknowledges that some of these challenges have been pursued and rejected in precedential cases; those challenges are included and expanded here to preserve them for further review in light of: long-standing errors underlying those holdings, developing law and social science, and changes that should reflect “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Moreover, these challenges are made with the benefit of hindsight that the Supreme Court, for instance, did not have when a version of the Texas scheme, some of which still exists, was challenged in *Jurek v. Texas*, 428 U.S. 262 (1976). Many arguments found here have not been presented to or considered by the Texas Court of Criminal Appeals (CCA) or the Supreme Court of the United States. Additionally, the argument about the cumulative effect of the enumerated problems with Texas’s current capital-sentencing scheme rests on an entirely new compendium of arguments.

The constitutionality of a statute may be challenged in two ways: facially and as-applied. The CCA has held that as-applied challenges are not ripe until a capital trial on the merits has begun. *See Lykos v. Fine*, 330 S.W.3d 904, 916 (Tex. Crim. App. 2011) (rejecting an as-applied challenge when it was still unknown whether the defendant would be tried, let alone convicted, of a capital-qualifying crime). By contrast, facial challenges may be brought before trial and must be addressed by the trial court or the matter is generally deemed waived on appeal. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). As the party bringing a facial challenge, Mr. Clark must show that the statute is unconstitutional in all instances. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Because this is a facial challenge to
(numerous aspects of) the Texas scheme, the specific facts of this case are not at issue now. What is at issue are the myriad ways that Texas violates all foundational requirements for a constitutionally compliant capital-sentencing scheme. As the CCA recently acknowledged, “the whole point of the concept of a statute being unconstitutional on its ‘face’ is that the facts of a litigant’s particular case are immaterial; the statute is invalid as to everyone.” State v. Doyal, -- S.W.3d --, PD-0254-18, 2019 Tex. Crim. App. LEXIS 161, n.35 (Tex. Crim. App. Feb. 27, 2019). When a statute is found facially unconstitutional, it is as if the statute were “void from its inception” and “considered no statute at all.” Smith v. State, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015).

As explained below, Mr. Clark has identified numerous problems that, severally and cumulatively, render the Texas death-penalty scheme unconstitutional on its face such that no one can be lawfully sentenced to death or executed under it. See Furman v. Georgia, 408 U.S. 238 (1972) (invalidating all pending death sentences in the United States without case-by-case analysis or regardless of procedural posture).
BACKGROUND

To understand the constitutional challenges raised here, unpacking some of the convoluted history of the modern death penalty is essential. It has been over forty years since the death penalty was reinstated in many states, including Texas, after a brief moratorium. See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (reinstating the death penalty four years after a moratorium had been announced in Furman v. Georgia). Furman v. Georgia, the case that temporarily placed the death penalty on hold, contains no majority opinion. See 408 U.S. 238 (1972) (striking down all death-penalty schemes in the United States in a 5–4 decision, with each member of the majority writing a separate opinion). The common rationale in the decisions that created the nationwide moratorium was the realization that, as a result of giving the sentencer unguided discretion as to whether to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly, and even “freakishly,” and so infrequently that any given death sentence was cruel and unusual. Furman, 408 U.S. at 295, 310, 364, 368, 450. As one concurring justice noted succinctly: “there is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not.” Id. at 313 (1972) (White, J., concurring).

At the time of the moratorium, both death sentences and executions had been on the decline in America, even in Texas. Death sentences dropped by nearly half soon after World War II in the United States as many European countries, likely exhausted by the carnage the continent had experienced, abolished the practice altogether. See K.L. Patterson, Acculturation and the Development of the Death Penalty Doctrine in the United States, 55 DUKE L. J. 1217-1246 (2006). But after Furman, the use of capital punishment rose along virtually every dimension—and continued to do so up through the 1990s. Carol S. Steiker and Jordan M. Steiker, Capital Punishment: A Century of Discontinuous Debate, 100 J. CRIM. L. & CRIMINOLOGY 643, 669-670
(describing the post-1976 peaks in new death sentences, executions, and public support for the death penalty). Funding for capital defense, however, did not rise to support states’ renewed enthusiasm for seeking death sentences. As a prominent capital defense attorney later noted in a critique of prevailing practice at that time, death sentences correlated strikingly with the quality of representation that indigent individuals received, not with the nature of the offense. See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835 (1994).

In response to the epidemic of inadequate representation in capital cases, in 1989, the American Bar Association promulgated Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. But by 1997, when few death-penalty jurisdictions had pressed for compliance with these basic guidelines, the ABA passed a resolution calling for a moratorium on executions because of ongoing concerns with unfairness, inaccuracy, and discrimination in the administration of the death penalty. American Bar Association, Death Penalty Moratorium Resolution (1997).1

During this dramatic spike in states’ recourse to the death penalty in America, the Supreme Court devoted considerable ink and judicial attention to trying to render the administration of the death penalty constitutional. The results of the efforts to constitutionalize the death penalty, from

---

1 Available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997/. Since that time, the Supreme Court has repeatedly cited the ABA Guidelines, including those published since 1989, as relevant to determining prevailing professional norms for representing a defendant in a capital case. See, e.g., Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (noting that the ABA Guidelines “discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin.”).
the dawn of the modern death-penalty era to the present, can be summarized in terms of four basic legal mandates, outlined below

I. In the Modern Death-Penalty Era, the Supreme Court Developed Four Components Essential to Rendering a Capital-Sentencing Scheme Constitutional.

Building on legal propositions announced in early post-moratorium death-penalty cases, the Supreme Court has developed a body of death-penalty specific jurisprudence, which amounts to four foundational requirements.

First, in recognizing that “death is different,” not just in degree but as a kind of punishment, the Supreme Court concluded early on that the Eighth Amendment requires heightened reliability in the sentencing process. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”); Satterwhite v. Texas, 486 U.S. 249, 262, (1988) (Marshall, J., concurring) (emphasizing that capital punishment is “qualitatively different from all other sanctions”); Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (“Under the Eighth Amendment, the death penalty has been treated differently from all other punishments.”). Over the course of decades, the Supreme Court instructed that, while the Eighth Amendment allows the death penalty as a response to particularly egregious crimes, the procedures by which death sentences are imposed and reviewed must account for the categorical difference when the State seeks to take a human life as a punishment for a crime. (After all, there is no other crime where the State is permitted to punish the offender by perpetrating a literal “eye for eye;” for instance, the State may not legally rape rapists, burn down the homes of arsonists, or rob armed robbers at gunpoint.)

Indeed, the Supreme Court has repeatedly instructed that the concept of “reliability” is of paramount importance in avoiding arbitrary sentencing, which violates the Eighth Amendment. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the “qualitative
difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed”); accord *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (“many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion”); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“In capital proceedings generally, th[e] Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.”) (internal citations omitted). The decisions in the penalty phase must “be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

A seemingly obvious corollary of the requirement of heightened reliability in capital sentencing is that a sentence that is based on “materially inaccurate” information violates the Eighth Amendment. See *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (reminding that a death sentence cannot be predicated on mere caprice or other constitutionally impermissible or irrelevant factors). Over the years, the federal judiciary has also suggested that a commitment to reliability (including sentences based on accurate information) should be a concern shared by the defendant and the State. See *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (state and federal governments “unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial”); *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (both the State and the defendant have an “almost uniquely compelling” interest in the accuracy of criminal proceedings); see also *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000) (Garza, J., concurring) (“[W]hat separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes.”).
In addition to insisting on reliability as a baseline, the second foundational requirement is that states must implement procedures calibrated to narrow the category of offenders who can be subjected to capital punishment in a non-arbitrary fashion. That is, states must “provide a meaningful basis for distinguishing the few cases in which the [death] penalty is imposed [and even sought] from the many cases in which it is not.” Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (citations and internal quotation marks omitted); see also Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

A third foundational requirement is that states, when seeking death as a punishment, must permit defendants to present any available evidence that might convince a juror that the defendant, no matter how severe his offense or reprehensible his past, should not be put to death. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 304 (1987). This requirement is a function of the Supreme Court’s long-standing position that individualized sentencing in death-penalty cases is essential; that means giving jurors the opportunity to see the offender as a unique individual whose life is worth sparing. Otherwise, we are left with a system that dehumanizes us all. See Lockett, 438 U.S. at 605 (emphasizing that a fair capital-sentencing scheme must treat each person convicted of a capital offense with that “degree of respect due the uniqueness of the individual.”); see also Abdul-Kabir v. Quarterman, 550 U.S. 233, 263-64 (2007) (reminding that jury must decide whether “death is an appropriate punishment for that individual in light of his personal history and characteristics”); accord Penry v. Lynaugh, 492 U.S. 302, 317 (1989); California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring); Zant v. Stephens, 462 U.S. 862, 879 (1983); Enmund v. Florida, 458 U.S. 782, 801 (1982); Woodson, 428 U.S. at 304.

The fourth over-arching principle that has been emphasized throughout the decades-long attempt to constitutionalize the American death penalty is the need to account for “evolving
standards of decency.” *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion); *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). Although this principle is viewed as a substantive limit on the power of the state to punish, see, e.g., *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), it has also consistently functioned as a procedural limitation on capital-sentencing procedures. *See Gardner*, 430 U.S. at 357 (opinion of Stevens, J.); *see also Gregg*, 428 U.S. at 171-173 (opinion of Stewart, J.); *Woodson*, 428 U.S. at 289-93, 305 (plurality op.) (reviewing history of mandatory death penalty statutes to determine whether mandatory capital punishment was consistent with the Eighth Amendment, holding that it is not).

In short, the Supreme Court, since 1976, has extensively, and consistently, insisted on (1) heightened reliability in capital-sentencing procedures, (2) a process that narrows the class of death-eligible offenders in a non-arbitrary fashion, (3) a forum that allows for wide-open presentation of mitigating evidence that gives jurors a meaningful opportunity to respond and give effect to evidence that a sentence other than death is warranted, and (4) a system of review that accounts for evolving standards of decency that further narrow the rare instances when states may seek to execute one of their citizens as a punishment for the regrettably common crime of murder.

II. Concerns about the Impossibility of Making the Death Penalty Constitutional Continued to Grow.

By 1994, one of the justices who had been involved in the process since *Furman*, threw up his hands and announced: “From this day forward, I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun explained the source of his frustration as follows:

For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and
intellectually obligated simply to concede that the death penalty experiment has failed.

_Id._ (footnote omitted).

Justice Blackmun, whom President Nixon had nominated to serve on the High Court, had been convinced by his experience that the death penalty could not be saved “from its inherent constitutional deficiencies.” _Id._ These problems, including “the inevitability of factual, legal, and moral error,” mean “a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.” _Id._ at 1145-46.

Ironically, shortly after Justice Blackmun’s declaration, as executions were still on the rise, Congress decided to expand the federal death penalty and adopted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, which dramatically curtailed the ability of death-sentenced individuals to challenge the constitutionality of their convictions or sentences in federal habeas proceedings.

Then, after executions reached a peak in 1999 when 98 people were executed, 35 of them in Texas, the pendulum began to swing back the other way.²

Since 2000, not only have actual executions been on the decline, but numerous states have legislatively repealed their death penalty statutes, several state supreme courts (in Connecticut and, most recently, in Washington) have declared the death penalty unconstitutional under their state constitutions, and a few governors have granted mass clemency or announced moratoria in the

² See Death Penalty Information Center (“DPIC”), _Facts about the Death Penalty: Number of Executions since 1976_, https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=1999&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All. This modern peak is modest compared to the 200 executions per year recorded in the mid-1930s. See Franklin Zimring, _THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT_ 143-44 (Oxford Univ. Press 2003).
wake of an alarming number of exonerations based on DNA evidence.\(^3\) Most recently, the Governor of California declared a moratorium on all executions in his state, framing the issue in moral terms: “The intentional killing of another person is wrong;” he also characterized the moratorium as a first step towards the ultimate goal of ending the death penalty in California, home to the nation’s largest death row.\(^4\)

During this same period, the Supreme Court announced a series of categorical bans on the death penalty under the Eighth Amendment’s Cruel and Unusual Punishments Clause and pursuant to the concept of “evolving standards of decency” that the court first used to preclude executing the legally “insane” in *Ford v. Wainwright*, 477 U.S. 399 (1986). The categorical bans announced during this period now apply to individuals with intellectual disability, juvenile offenders, and offenders charged with crimes that did not result in death, such as child rape. *See, respectively, Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

Meanwhile, the Capital Jury Project (CJP)\(^5\) produced the first wide-ranging study of the actual process whereby death sentences were being meted out. The CJP’s study was based on

\(^3\) *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) (documenting the recurrent issues associated with wrongful convictions, including faulty forensic evidence, false confessions, mistaken eyewitness identifications, unreliable jailhouse snitches, and ineffective defense counsel).


\(^5\) The CJP was launched in 1991 by a collection of university-based researchers from 14 states with support from the National Science Foundation (NSF) to: “(1) systematically describe jurors’ exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors’ exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness.” *See* https://www.albany.edu/scj/13189.php.
interviews with nearly 2000 jurors from more than 350 capital trials in over a dozen states. The results were alarming, showing that jurors uniformly struggled to apply two of the Supreme Court’s basic requirements: on one hand, that the sentencer’s discretion to impose death must be confined, while, on the other hand, the sentencer’s discretion not to impose death (and instead extend mercy) must be virtually unlimited.

In June of 2007, in response to the CJP’s findings, a district court in New Mexico dismissed a death notice and cited CJP findings as critical to the decision. See State v. Dominguez, No. D-0101-CR-200400521 (D.N.M. 2007). Those findings included:

- the jurors’ disturbing propensity (more than 50% of the time) to decide the penalty issues before the penalty phase began, thereby effectively excluding mitigation from the sentencing calculus;
- a lack of juror understanding of what constitutes mitigation and how it relates to the jurors’ sentencing function;
- a widespread lack of understanding of the instructions given by the judge; and
- evidence that the jury decision-making process in death-penalty cases is so flawed as to violate constitutional principles.

The CJP’s data identified “seven deadly sins” of capital juries and jury-selection procedure that unfairly increase the likelihood of a death verdict:

---

6 “The interviews, typically lasting 3 to 4 hours, chronicle the jurors’ experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions. Twenty to thirty capital trials were selected in each state and samples of four jurors were drawn randomly for interviews in each capital case. The juror interviews obtained data through both structured questions with predetermined response options and open-ended questions that call for detailed narrative accounts of respondents’ experiences as capital jurors. The findings of CJP researchers have typically drawn on both the statistical data and the accounts of the jurors in their own words.” Id.
(1) premature decision-making;⁷
(2) death bias;⁸
(3) mitigation impairment;⁹
(4) a widespread belief that death is mandatory in some cases;¹⁰
(5) evasion of responsibility for sentencing decisions;¹¹
(6) the persistence of race as a factor in sentencing decisions;¹² and

⁷ The CJP found that 30.3% of jurors had decided to vote for death before the penalty phase had even begun. See William J. Bowers and Wanda J. Foglia, Still Singularly Agonizing, 39 CRIM. LAW BULLETIN 51, 57 (2003).

⁸ Many of the jurors who were death-qualified and served on capital juries probably should have been excluded because they were poised to vote for death automatically. Id. at 62. “Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim is killed (53.7%).” Id. Additionally, 10% of the CJP jurors admitted that the voir dire questions designed to ferret out these prejudices made them more likely to think that the defendant “must be” or “probably was” guilty and deserved to be sentenced to die. Id. at 65.

⁹ “[A] great many people who actually served as capital jurors did not understand the instructions they were supposed to be following.” Id. at 65. For example, 49.2% thought that mitigating evidence had to be proven beyond a reasonable doubt. Id. at 69.

¹⁰ Half of the CJP jurors erroneously believed that the death penalty was required if the evidence showed that the crime was “heinous, vile, or depraved” or that the defendant would be “dangerous in the future.” Id. at 72.

¹¹ For example, only 29.8% of CJP jurors believed that the jury was strictly responsible in the 10 states where a jury’s decision was binding on the trial judge. Id. at 75.

¹² In the 70 cases studied where there was a black defendant and a white victim, “the percentage of death sentences was 30% when there were fewer than five white male jurors, but rose to 70.7% when there were five or more white male jurors on the jury.” Id. at 77. Studies show that, in all regions, throughout our nation’s history, the death penalty has been used disproportionately against black offenders, especially in cases involving white victims. See John Blume & Sheri Johnson, Unholy Parallels between McKleskey v. Kemp and Plessy v. Ferguson: why McKleskey (still) matters, 10 OHIO STATE J. CRIM L. 37-63 (2012); Stephen Bright, Symposium: Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 SANTA CLARA L. REV. 433-83.
(7) the false belief that life sentences will not result in lengthy incarcerations.  

As the CJP results were synthesized, scholars began to sound the alarm. See, e.g., Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 Stan. L. Rev. 1447, 1469-70 & n.113 (1997); John Blume, et al., Lessons from the Capital Jury Project, Ch. 5 in Beyond Repair? America’s Death Penalty 144-77 (Duke Univ. Press 2003). These concerns were eventually captured in court decisions. See, e.g., United States v. Fell, 224 F. Supp. 3d 327, 336 (D. Vt. 2016).

In 2008, Justice John Paul Stevens, another Republican nominee to the Supreme Court who had cast a critical vote to reinstate the death penalty in 1976, publicly announced that he had had enough. His expression of exasperation with the punishment’s intractable problems echoes the views that Justice Blackmun had offered nearly 15 years earlier: “the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose” and is therefore “patently excessive and cruel and unusual punishment violative of the Eighth Amendment.” Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring in judgment only). Similar sentiments were also voiced by retired Justice Powell, another Republican-appointee who had been a member of the majority that upheld the new death penalty statute at issue in Gregg; he admitted that he had “come to think that capital punishment should be abolished” because it served “no useful purpose.” E.J. Mandery, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 439-440 (W.W. Norton & Co. 2013).

---

13 “Many of the CJP jurors volunteered that they believed they had to vote for death to ensure that the defendant would not get back on the streets.” Id. at 83. “But even more troublesome is the evidence that some jurors do not believe judges when they are told there is no parole from a life sentence.” Id. at 84.
By 2009, the American Law Institute (ALI), the preeminent legal think-tank, voted to withdraw the death-penalty provisions from the Model Penal Code, a publication that had provided a template for many states’ capital-sentencing schemes in the modern death-penalty era. The ALI explained its decision as arising from “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” See Carol S. Steiker & Jordan M. Steiker, No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code, 89 Tex. L. Rev. 353, 354 (2010).

While the death penalty continued to be, in principle, constitutional, actual use of the death penalty continued to decline as it had in the decades leading up to Furman v. Georgia and the moratorium (which then precipitated an unexpected and virulent backlash).

III. Evidence Now Abounds that Problems of Arbitrary and Unreliable Capital Sentencing Cannot Be Eradicated.

The contemporary decline in death sentences and executions can largely, if not entirely, be attributed to a growing public awareness that issues with the fairness, accuracy, and effectiveness of the punishment are indeed intractable. Because the death penalty remains an exceedingly rare punishment when compared to the number of offenses that states deem death-eligible, the evidence of arbitrary application is now overwhelming. See Glossip v. Gross, 135 S. Ct. 2726 (2015) (Breyer and Ginsburg, JJ., dissenting) (calling for a reconsideration of the constitutionality of the death penalty under the Eighth Amendment because of arbitrariness in application, arising, among other things, from largely unbridled prosecutorial discretion and suggesting that mere geography is a deciding factor in who is subjected to a death sentence).

Several justices on the current Supreme Court, who have played a central role in the multi-decade attempt to constitutionalize the American death penalty, have gone public with their beliefs that the problems with implementation cannot be cured and that the death penalty serves no valid
penological purpose; with its inherent arbitrariness, unreliability, and excessive, but necessary, delay, the penalty amounts to little more than “the gratuitous infliction of suffering” that has no place in a contemporary Western democracy. Glossip, 135 S. Ct. at 2772 (Breyer, J., dissenting). 14

In the wake of Justice Breyer’s dissent in Glossip, other courts have noted some salient facts: (1) fewer than 2% of the nation’s counties account for all death sentences imposed nationwide; (2) over the course of decades, reviewing courts have found significant errors in more than 2/3s of capital cases; and (3) statistical analyses have demonstrated a near certainty that innocent individuals have and will be executed. See, e.g., State v. Santiago, 122 A.3d 1 (Conn. 2015) (noting these concerning facts and relying on the federal constitutional framework to find Connecticut’s 400-year-old death penalty unconstitutional under its own constitution).

In 2019, New Hampshire became the latest state to declare an end to the modern death-penalty experiment—by legislative abolition. Earlier in the year, California, harboring the nation’s largest death row, saw a virtual end to the practice when Governor Newsom announced an indefinite moratorium on executions. And not long before, in 2018, the practice was ended by Washington state’s highest court, striking down the death penalty as unconstitutional. In reaching its decision, the court relied on a scientific study that examined the role of race in the state’s convictions from 1981 to 2014. The court found that the study demonstrated that “[i]n aggravated murder cases, jurors are more than four times more likely to impose a death sentence if the defendant is black.” State v. Gregory, No. 880867 (Wash. Oct. 11, 2018) (en banc). Based on the

---

integrity of the methodology underlying the study, the Washington Supreme Court announced that it was “confident that the association between race and the death penalty is not attributed to random chance,” and thus concluded that the state’s death-penalty scheme was unconstitutional under the state’s constitution. Id.

Capital punishment remains legal in 29 states and is also allowed by the federal government and the United States military. But only 10 states have carried out any executions since 2014, with Texas consistently responsible for the lion’s share. One third of the states that permit capital punishment, as well as the U.S. military and federal government, have not carried out any executions in at least 10 years. In fact, no other state comes close to Texas in terms of sheer number of executions. The State has put more than twice as many people to death than any other state since the death penalty was reinstated in 1976. In 1999, when executions reached a peak of 98 nationwide, Texas accounted for over a third of those executions. 2018 was no exception in terms of Texas’s disproportionate role as an executioner; in 2018 Texas was responsible for 13 of the 25 executions nationwide with the other 12 executions carried out by 7 other states, with only 1 other state carrying out more than 2 executions. That state was Tennessee, which anomalously executed 3 people in a single year after a 9-year period during which no one had been executed. See id. The story of just how out of joint Texas is, while remaining the most prodigious executioner in the country, requires focusing in on some Texas-specific aspects of the history of the modern

---


16 See John Gramlich, California is one of 11 states that have the death penalty but haven’t used it in more than a decade, available at https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/.

death penalty to then demonstrate the multiple ways Texas’s current scheme is unconstitutional on its face.
ARGUMENT & AUTHORITIES

Below, Mr. Clark presents the following arguments that, collectively or severally, are a basis for finding Texas’s current death-penalty scheme unconstitutional in all circumstances:

- Texas’s modern death-penalty sentencing mechanism was unconstitutional from the outset; and the core component that still exists today, the “future dangerousness” special issue, produces unreliable, arbitrary, and capricious outcomes.

- The litigation that spawned the one, inadequate “improvement” to the Texas death-penalty sentencing mechanism exposes deeply rooted hostility to the very concept of mitigation, yet allowing full and fair consideration of mitigation is essential to rendering the death penalty constitutional.

- Texas’s current death-penalty statute does not narrow the class of people susceptible to being killed by the state as punishment for their crimes but has instead expanded the class of death-eligible individuals in a manner at odds with any valid penological purpose.

- Unbridled discretion at the county-level means that prosecutors seek death against only a handful of the individuals accused of murder infusing the system with intolerable arbitrariness.

- In multiple ways, the so-called “future dangerousness” special issue is unconstitutionally vague and fails to narrow the class of death-eligible defendants.

- In multiple ways, the Texas approach to mitigation remains unconstitutional.

- The Texas capital-sentencing instructions are crafted to deceive jurors thereby impairing their ability to make a “reasoned moral response” to sentencing as the Constitution requires.

- The cumulative infirmities in Texas’s approach to implementing a death sentence render that punishment irremediably unreliable, arbitrary, impermissibly privileged over the exercise of mercy, and contrary to the notion that punishments must serve a legitimate purpose.

For each of these distinct reasons developed at length below, the Texas capital-sentencing scheme, riddled as it is with infirmities of a constitutional dimension, is unconstitutional in all circumstances.
I. Texas’s Modern Capital-Sentencing Scheme Was Unconstitutional from the Outset; and the Core Component That Still Exists Today, the “Future Dangerousness” Special Issue, Was and Remains Unreliable, Facilitating Arbitrary and Capricious Outcomes.

A. The Myth That Texas’s Capital-Sentencing Scheme Is Constitutional Took Root Early on and Has Never Been Revisited.

Since 1976, Texas has repeatedly modified (and resisted modifying) its death-penalty scheme. Meanwhile, the Supreme Court has considered challenges to only one aspect of the death-penalty sentencing statute that was initially—but only conditionally—upheld as constitutional. See *Jurek v. Texas*, 428 U.S. 262 (1976).

Despite significant litigation that prompted the one significant change to its statutory scheme in response to Supreme Court directives, Texas remains far from compliant with current constitutional mandates. These infirmities include instructions that direct jurors in death-penalty cases to deliberate in a manner that is completely at odds with the two most basic constitutional directives first announced by the Supreme Court over forty years ago now. Those directives are: (1) that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action[,]” *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); and (2) that every defendant is entitled to individualized sentencing that should permit the sentencer to consider “mitigating factors stemming from the diverse frailties of humankind.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (rejecting mandatory sentencing schemes in death-penalty cases as unconstitutional because they treat “all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”).
In short, since 1976, in additional to the fundamental requirement of heightened reliability in the punishment phase of a capital trial, the most basic requirements for a capital-sentencing scheme to pass constitutional muster are: (1) the process whereby the class of persons who can be deemed death-eligible must be appropriately narrowed; and (2) the process must permit sentencers to consider any and all individualized mitigating factors that might argue for a sentence less than death. As explained at length below, Texas’s current scheme does just the opposite: (1) in multiple ways, it expands the class of persons who are death-eligible; and (2) it constrains the consideration of mitigating evidence. That is, the Texas scheme broadens where it should narrow, and narrows where it should broaden.

1. Texas’s death-penalty sentencing scheme has never been reliable.

Texas continues to be a “leader” in actual executions despite a documented history of serious abuses in pursuit of the punishment. Two famous instances of such abuses are the cases of Randall Dale Adams and Clarence Brandley, both of whom narrowly escaped being executed for crimes they did not commit.

In Mr. Adams’s case, after other appeals had failed—and largely thanks to a highly acclaimed documentary film\textsuperscript{18} about the case—the CCA eventually issued a unanimous decision granting him a new trial. The decision highlights the trial court’s findings that “the State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during applicant’s trial, and knowingly using perjured testimony. In each instance, the nature of the evidence or testimony was such that beneficial results inured to the State at the expense of due process.” \textit{Ex parte Adams}, 768 S.W.2d 281, 293 (1989). Mr. Adams was subsequently exonerated.

\textsuperscript{18} \textit{See The Thin Blue Line} (1988), directed by Errol Morris.
Similarly, a post-conviction review of Clarence Brandley’s conviction acknowledged that the State’s investigative procedure was “so impermissibly suggestive that false testimony was created, thereby denying . . . due process of law and a fundamentally fair trial.” *Ex parte Brandley*, 781 S.W.2d 886, 887 (1989). After discussing the investigation that had been conducted—not so much to solve the crime, but to convict Brandley—the CCA concluded: “The State’s investigative procedure produced a trial lacking the rudiments of fairness. The principles of due process, embodied within the United States Constitution, must not, indeed cannot, countenance such blatant unfairness.” *Id.* at 894. Mr. Brandley was ultimately exonerated. Yet blatant unfairness has continued to characterize every phase of the process whereby death sentences are imposed in Texas.

Adams and Brandley are just two of the men sent to Texas’s death row in the modern era who have since been exonerated;19 numerous cases with colorable claims of wrongful convictions have never been investigated; and significant evidence exists suggesting that Texas has executed several innocent men.20 Several Texas capital cases alleging actual innocence are still being litigated, such as the case of Rodney Reed, convicted in Bastrop County in 1988—now over thirty years ago.

---

19 To date, 13 men on Texas’s death row have been exonerated since 1973 as actually innocent. See DPIC, https://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st. These statistics do not include the cases where men have been removed from death row and never retried because the State had insufficient evidence of guilt to obtain a new indictment.

20 A database of likely innocent individuals who have been executed in the modern era includes Carlos DeLuna, Ruben Cantu, David Spence, Gary Graham, Claude Jones, Cameron Todd Willingham, Lester Bower, Richard Masterson, and Robert Pruett, all of whom have been executed by the State of Texas. See id. available at https://deathpenaltyinfo.org/executed-possibly-innocent.
Mr. Clark’s current challenge is not focused on the failures of due process or to provide a fundamentally fair trial that plague far too many cases in which Texas has sought and obtained a death sentence: such as underfunded and ineffective defense counsel including those who sleep through trial,\(^{21}\) prosecutorial misconduct in the form of brazenly discriminatory jury-selections\(^{22}\) and failures to disclose exculpatory evidence,\(^{23}\) or the practice of rubber-stamping a grossly inadequate appellate process.\(^{24}\) The facial challenges raised here focus on the flawed sentencing mechanisms that are a prerequisite for imposing a death sentence in Texas. As demonstrated below, even ignoring other systemic problems, the Texas death-penalty sentencing scheme is hardwired to produce unreliable, arbitrary results in defiance of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the equivalent provisions of the Texas Constitution (Article I, sections 13 and 19).

2. Texas’s current scheme includes special issues that do not ensure conformity with constitutional mandates.

The sentencing scheme in place today is not identical to the sentencing scheme that was adopted shortly after the Supreme Court decided \textit{Furman}, launching the modern death-penalty era. Several changes to the basic apparatus have been adopted, most of which have made the scheme less reliable. Only one change was a response to a successful constitutional challenge to the Texas

\(^{21}\) See, \textit{e.g.}, \textit{Ex parte Burdine}, 901 S.W.2d 456 (Tex. Crim. App. 1995).


\(^{23}\) See, \textit{e.g.}, \textit{Ex parte Adams}, 768 S.W.2d 281 (Tex. Crim. App. 1989).

scheme. The original, post-<em>Furman</em> scheme included three special issues, two of which were subsequently eliminated. Those instructions were:

On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. art. 37.0711, sec. 3(b) (submitted in death-penalty cases involving offenses committed before September 1, 1991). Only the second special issue—what is known as the “future dangerousness” issue—remains.

Despite one noteworthy change arising from repeated challenges to the death-penalty sentencing scheme that existed in Texas from 1976-1991, far more challenges to both old and newer components of the scheme have never been considered on the merits. Only a handful of challenges have been taken up by the Supreme Court of the United States. More recently, Texas has been primarily on the losing side in those cases. But as explained at length below, no challenge has resulted in a constitutionally compliant mechanism for deciding who is sentenced to death in Texas. Many challenges, for instance, to the current unconstitutional approach to

mitigation found in Article 37.071 have been presented to the Supreme Court but, so far, none of those challenges have been taken up.26

Under current Texas law, after a defendant has been found guilty, and after a separate punishment-phase proceeding, the jury is required to answer “yes” or “no” to at least two special issues before a death sentence can be imposed. First, the jury must answer whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (known as the “future dangerousness” special issue). TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1). Second, the jury must answer 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 are sufficient mitigating circumstances to warrant a life sentence (known as the “mitigation” special issue). TEX. CODE CRIM. PROC. art. 37.071, sec. 2(e). In cases like Mr. Clark’s, where the State has no proof that the defendant actually caused the death of the decedent and relies instead on the “law of parties” or a theory of “accomplice murder,” the jury is also asked to decide a third special issue: whether the defendant intended or anticipated loss of life. See TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(2) (known as the “parties” special issue).

If the jury, in a case like this one, were to answer unanimously “yes” to future danger, “no” to mitigation, and “yes” to the parties special issues, then this Court would have to impose a death

26 One such challenge is currently pending before the Supreme Court in a petition for writ of certiorari. See Brian Suniga v. Texas, No. 18-9564 (presenting the question: “Can the Texas death penalty statute, which instructs the jury to consider ‘the circumstances of the offense, the defendant’s character and background, and personal moral culpability of the defendant,’ but then limits the scope of the evidence that jurors consider mitigating to ‘evidence that a juror might regard as reducing the defendant’s moral blameworthiness,’ be reconciled with this Court’s long-established jurisprudence?”), available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-9564.html.

Importantly, only one of the above components of Texas’s sentencing scheme has remained consistent throughout the modern death-penalty era. That component is now codified as Article 37.071, section 2(b)(1) of the Texas Code of Criminal Procedure: the “future dangerousness” special issue. Since 1976, this special issue must be presented to the jury after the punishment-phase trial—thus after the same jury has already found the defendant guilty of a capital-qualifying murder and after the jury has heard further evidence relevant only to punishment. The statutory text directs the jury to return a special verdict of “yes” or “no” as to “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]” *Tex. Code Crim. Proc. art. 37.071, sec. 2(b)(1).* A unanimous “yes” vote as to “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is a requisite for imposing a death sentence. *Id.*, sec. 2(c) & (g).

This statutory provision is supposed to narrow and channel sentencing discretion since it is considered part of the State’s burden. But there is good reason why some justices, when first asked to consider the constitutionality of Texas’s scheme, believed that Texas’s statute was more like the mandatory death-penalty statute at issue in *Woodson v. North Carolina*, one of the companion cases argued with *Jurek*. According to Justice Rehnquist, the “Texas system much more closely approximates the mandatory North Carolina system which is struck down today.”
Jurek, 428 U.S. at 315. Likewise, Justice White, in a dissent defending Louisiana’s statute, maintained that the “two additional questions” in the Texas scheme (the deliberateness special issue and the future dangerousness special issue) did not change the mandatory character of the Texas scheme; as a result, he concluded “the Texas law is not constitutionally distinguishable from the Louisiana system.” Id. at 359. Yet that perspective did not capture enough votes. As explained below, no view about the specifics of the Texas scheme garnered even a bare majority when Jurek was decided. Instead, the statute was upheld based on false assumptions about how any inadequacies would be fixed by the state court through construction of key statutory terms. Meanwhile, for decades now, this statutory provision has functioned not to narrow but to broaden the application of the death penalty. Although the constitutional failings of the provision, hiding in plain view from the outset, have often been decried, the provision has never been subjected to meaningful review.

3. At the outset, the Supreme Court presumed the constitutionality of the “future dangerousness” special issue based on unsubstantiated premises.

Right after Texas enacted a new death-penalty sentencing scheme with a bifurcated punishment-phase proceeding and “special issues” for the punishment-phase jury charge, the scheme was subjected to an Eighth Amendment challenge based on the argument that, notwithstanding the modifications, the death penalty remained unconstitutional in all circumstances. The Supreme Court heard that challenge in Jurek v. Texas, 428 U.S. 262, 268 (1976). Jurek was one of five death penalty cases that the Supreme Court decided on July 2, 1976, as part of a consolidated proceeding. All five cases involved new death-penalty statutes that had been adopted by five different states (Georgia, Florida, North Carolina, Louisiana, and Texas) in an attempt to satisfy the concerns raised in Furman. The five challenges represented a coordinated strategy through which the Supreme Court was asked to go beyond Furman and declare, once and
for all, that the death penalty was a “cruel and unusual punishment” and thus unconstitutional. The strategy, however, failed.

In *Jurek*, Texas’s statute was upheld in an opinion joined by only three of the nine justices on the Supreme Court, with three others concurring only in the judgment. Importantly, the statutory scheme at issue in *Jurek* was later partially struck down. See Section II, below. Perhaps more importantly, the Supreme Court has never analyzed the chief component of the *Jurek*-era scheme that remains intact, the “future dangerousness” special issue beyond the superficial evaluation found in *Jurek* itself.

In upholding Texas’s statute, the *Jurek* plurality decision rests on four patently speculative premises. Today it is amply clear that all four of those premises have proven to be incorrect.

**First**, the Supreme Court found it significant that, in passing its new death-penalty sentencing scheme, the Texas Legislature had narrowed the capital-qualifying homicides “to intentional and knowing murders committed in [just] five situations.” *Jurek*, 428 U.S. at 268 (citing *Tex. Penal Code* § 19.03 circa 1974). As discussed in Section III below, this provision of the Texas Penal Code has since been expanded to include nine broad, multifarious categories that qualify as capital murder. See *Tex. Penal Code* § 19.03(a)(1)-(9). Thus, even if the statute had, at that time, served a narrowing function, that function was subsequently abandoned.

**Second**, *Jurek* emphasized that Texas’s highest criminal court (the CCA) had only affirmed two judgments imposing death sentences under the new statute at that point, one of which was Jerry Lane Jurek’s. In light of that fact, the *Jurek* plurality deferred to the CCA, which had offered the opinion below that the new statute “limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses.” 428 U.S. at 270. That is, a plurality of Supreme Court justices accepted, without analysis, the CCA’s
characterization of the Texas statute as furthering a narrowing function. But the assumption was untested. The facts of the crime at issue in *Jurek*—the rape, strangulation, and drowning of a ten-year-old girl—were certainly “particularly brutal.” But there was no basis at that point for concluding that the statute had succeeded in sufficiently “narrowing the categories of murders for which a death sentence may ever be imposed” to “particularly brutal” offenses. *Id.* at 265, 270. Yet *Jurek* repeatedly states, with unfounded confidence, that Texas had crafted a mechanism that successfully limited the death option to “a smaller class of murders.” *Id.* at 271. Assuming, *arguendo*, the correctness of the CCA’s initial interpretation that the new scheme served a narrowing function—an interpretation based on no more than two death sentences, and absent any pool of other cases upon which to base a proportionality analysis—the scheme has not stayed narrow. Additionally, for decades now, numerous individuals have been sent to death row merely for being part of a robbery-gone-bad that resulted in a tragic, but not “particularly brutal,” shooting death of a store clerk. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (involving a man convicted and sentenced to death in Texas as a non-shooter accomplice to the murder of a store clerk during a robbery); see also *Ex parte Jeffrey Lee Wood*, No. WR-45,500-02 (Tex. Crim. App. Nov. 21, 2018) (not designated for publication”) (denying habeas relief to death-sentenced individual who

---

27 At the same time, the *Jurek* plurality decision reminds that, to be constitutional, the sentencing scheme “must” allow the jury to consider “all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.” *Id.* at 271. Whether the Texas scheme accomplished the latter function was not an issue before the Court in *Jurek*, although the *Jurek* plurality hints that such a challenge might later percolate. *Id.* at 272. Eventually, the court did hear such a challenge, and the Texas scheme was declared unconstitutional as applied. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

28 For some reason, Texas Rules of Appellate Procedure have two different rules for criminal and civil cases emanating from the state’s respective high courts. Under Rule 47.7(a), opinions and memorandum opinions in criminal cases, including death-penalty cases, that the CCA does not designate for publication “have no precedential value but may be cited” along with the notation “not designated for publication.” By contrast, under Rule 47.7(b), opinions and
had driven the getaway car in the robbery of a gas station during which another man had shot and
killed an employee). Moreover, as explained in Section VI below, since Jurek, the CCA has not
interpreted the Texas statute so as to narrow the class of murderers eligible to receive the death
penalty, but has instead done exactly the opposite.

Third, Jurek does not involve any textual analysis of the “future dangerousness” special
issue; the opinion merely notes that the CCA “has yet to define precisely the meanings of such
terms as ‘criminal acts of violence’ or ‘continuing threat to society.’” Id. at 272. At that time—and
this was back in 1976—the Jurek plurality was content to let the CCA take care of this critical
task, and the Supreme Court presumed that the CCA would do so. Jurek even predicts that the
CCA would do so “so as to allow the defendant to bring to the jury’s attention whatever mitigating
circumstances he may be able to show.” Id. at 273 (quoting the CCA with approval). This
presumption on the part of the Supreme Court is particularly ironic, knowing, with the benefit of
hindsight, that Jurek was ultimately reversed in part because juries were not, under the 1976
scheme, provided any means to give effect to whatever mitigating evidence the defendant had been
able to show them. See Section II, below.

Fourth, in one final paragraph, the Jurek plurality alludes to two ancillary arguments that
the petitioner had made about the “future dangerousness” special issue: (1) that “it is impossible
to predict future behavior” and (2) that “the question is so vague as to be meaningless.” Jurek, 428
U.S. at 274-75. Jurek does not address the vagueness argument at all; and the impossible-to-predict
point is brushed aside based solely on the contention that making such a momentous prediction
will be easy for juries because it is “basically no different from the task performed countless times
memorandum opinions in civil cases that are designated “do not publish” have been deemed as
having precedential value from January 1, 2003 onward.
each day throughout the American system of criminal justice.” *Id.* at 275. That is, the *Jurek* plurality analogized (a) the task of predicting “future dangerousness” as a prerequisite to a death sentence to (b) a trial court’s decision whether to grant bail in ordinary criminal matters.

There are several glaring problems with this analogy.

First of all, unlike trial judges, who routinely decide the issue of bail in a vast array of criminal matters, jurors do not routinely sit as fact-finders in capital murder proceedings; in fact, it is highly unlikely that any juror would be asked to do so more than once in a lifetime. Thus, no juror has any frame of reference or particular expertise, borne of experience, to assess whether the defendant before them should be deemed “the worst of the worst” because there is a probability that he will commit criminal acts of violence in the future that will be a continuing threat to society.

Additionally, there is a qualitative difference—or at least there should be—in terms of the risks and costs associated with the decision to impose a death sentence and the decision whether to grant bail and, if so, in what amount. This qualitative difference is at the very heart of the Supreme Court’s modern death-penalty jurisprudence. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

Further, there is even a qualitative difference between the task, undertaken by judges (not jurors), of predicting the prospect that a specific individual will probably pose a danger in the future in other contexts, such as the civil commitment context. That practice (undertaken by judges, not jurors) is far more common and involves short-term predictions that are repeatedly reviewed on their merits; thus, such undertakings are readily distinguishable from the one-time prediction that takes place in a Texas death-penalty sentencing proceeding, which is reviewed based on the
passage of time. For example, in Texas civil commitment proceedings, the finding that persons will harm themselves or others is reviewed at increasing intervals, from an initial period of 24 hours to a maximum period of 12 months. See Tex. Health & Safety Code § 574.035.

Even if the two tasks were analogous, which they are not, it is a fundamental fallacy to presume that, because something is done often that means it is done properly. The Jurek plurality’s off-the-cuff analogy was unsupported by authority of any kind. As explained at length in Section I.B.5 below, the assumption about the ease of making a defensible future-dangerousness prediction has since been proven demonstrably wrong by actual science in the form of empirical studies.

In short, all four of the rationales offered in Jurek by a mere plurality of three justices have proven to be untenable.29 And yet Texas’s “future dangerousness” special issue remains a critical component of Texas’s death-penalty sentencing scheme. And since Jurek, courts have repeatedly assumed that a robust analysis was undertaken in Jurek, when all one has to do is look back at that opinion to see that it was not. Alarmingly, this false assumption about a decision, itself based on false premises, has been used to treat the constitutionality of this special issue as settled law.

It is now time to reverse this long-standing error whereby Texas’s death-penalty sentencing scheme, since the outset of the modern death penalty era, has rested on an entirely unstable foundation.

29 It also merits noting that Jerry Lane Jurek later obtained habeas relief in the form of a new trial based on evidence that his confession had been coerced and that his full-scale IQ was 66. Instead of a new trial, he negotiated a life sentence with the possibility of parole, entered in January 1982. This result suggests that the State of Texas concluded, at some point, that he was not, after all, a “future danger” or “the worst of the worst” such that justice required his execution. Therefore, it is reasonable to conclude that the jurors who unanimously found a “probability that [he] would commit criminal acts of violence that would constitute a continuing threat to society” were wrong.
B. A Core Component of the Texas Capital-Sentencing Scheme Has Been Challenged Repeatedly Throughout the Modern Death Penalty Era, Yet All Such Challenges Have Been Brushed Aside Without Analysis.

1. The Supreme Court has consistently avoided considering the reliability of predictions by lay jurors as well as experts that there is a “probability that the defendant would constitute a continuing threat to society,” recognizing that, were it to admit that such predictions are inherently unreliable, the Texas special issue must be deemed unconstitutional.

As noted above, since 1976, if Texas wanted to secure a death sentence, it has the burden to establish, beyond a reasonable doubt, “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” See TEX. CODE CRIM. PRO. art. 37.071, sec. 2(b)(1). For decades, to satisfy this burden prosecutors relied on a small set of medical “experts” who were willing, in case after case, to offer the opinion, as if it were a matter of scientific certainty, that the defendant was likely to be a “future danger,” no matter what.

One such “expert,” Dr. James Grigson, came to be known as “Dr. Death.” Dr. Grigson made “future dangerousness” predictions in over 124 death penalty cases, most of which resulted in a death sentence. See R. Rosenbaum, Travels with Dr. Death, VANITY FAIR, May, 1990, at 142. Dr. Grigson was paid handsomely for his services and court appearances, during which he offered opinions based, at best, on a 90-minute interview with the defendant. His testimony as to the ultimate issue of “future dangerousness” went like this:

Q: Can you tell us whether or not, in your opinion, having killed in the past, he is likely to kill in the future, given the opportunity?

A: He absolutely will, regardless of whether he’s inside an institutional-type setting or whether he’s outside. No matter where he is, he will kill again.

J. Marquart, et al., Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?, 23 LAW & SOCIETY REV. 449, 458 (1989) (quoting 1978 trial transcript of Rodriguez v. Texas as an example). In later cases, Dr. Grigson did not even bother to interview the
defendant; he would simply listen to the prosecutor’s description of the crime and characterization of the defendant and then offer the conclusion that such a person should be viewed as an irredeemable “sociopath” who would certainly kill again, no matter what the setting.

Tellingly, one of the individuals about whom Grigson made this prediction was Randall Dale Adams, despite Adams having had no history of violence—and despite his subsequently being proven innocent. Adams died in 2010 at the age of 61, having never killed anyone or engaged in any criminal acts of violence, contrary to Dr. Grigson’s predictions.30 Yet, seemingly, the fact that Adams was exonerated and freed from prison did nothing to sway Grigson’s certainty about his predictions. See Marquart, above, at 142.

In 1981, the Supreme Court agreed to review a case in which the defense had objected to the prosecution’s use of pseudo-psychiatric testimony to prove the defendant would be a future danger. See Estelle v. Smith, 451 U.S. 454 (1981). The issue arose from the State’s decision to ambush the defense at trial with the fruits of an “evaluation” of the defendant’s competency to stand trial that the prosecution had asked Dr. Grigson to do without the defense lawyer’s knowledge. Id. at 458-59. During the punishment phase, Dr. Grigson was permitted to testify, over the defense’s objection, although Dr. Grigson had not previously been disclosed to the defense as a potential witness, despite a court order requiring such disclosures. Id.

The Supreme Court’s opinion describes the entirety of Dr. Grigson’s testimony as follows:

After detailing his professional qualifications by way of foundation, Dr. Grigson testified before the jury on direct examination: (a) that Smith “is a very severe sociopath”; (b) that “he will continue his previous behavior”; (c) that his sociopathic condition will “only get worse”; (d) that he has no “regard for another human being’s property or for their life, regardless of who it may be”; (e) that “[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior”; (f) that he “is going to go ahead and commit other similar or same

criminal acts if given the opportunity to do so”; and (g) that he “has no remorse or sorrow for what he has done.”

Id. at 459-60 (internal citations omitted). The Supreme Court also noted that Dr. Grigson’s testimony was based solely “on information derived from his 90-minute ‘mental status examination,’” which had been undertaken, purportedly, only to ascertain Mr. Smith’s competency to stand trial. Id. at 460.

All members of the Supreme Court agreed with the Fifth Circuit Court of Appeals that Mr. Smith’s death sentence needed to be vacated; and a bare majority left open, but did not decide, whether this kind of expert testimony could ever be presented on the issue of future dangerousness without offending the Constitution. In dicta, the majority acknowledged that “some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are ‘fundamentally of very low reliability’ and that psychiatrists possess no special qualifications for making such forecasts.” Id. at 472 (citing Report of the American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 23-30, 33 (1974); A. Stone, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 27-36 (1975); Brief for American Psychiatric Association as Amicus Curiae 11-17). In Smith, there was, however, no analysis of the substance of Dr. Grigson’s testimony, only consensus that the defendant’s Fifth and Sixth Amendment rights had been violated by letting Dr. Grigson testify since the defense lawyer had not been apprised of the pre-trial psychiatric evaluation upon which Dr. Grigson had reputedly based his conclusions about the defendant’s future dangerousness.

A mere two years later, the Supreme Court took up yet another Texas death case in which Dr. Grigson had testified for the State about the defendant’s future dangerousness. See Barefoot v. Estelle, 463 U.S. 880 (1983). The merits question in that case was whether the State’s use of psychiatrists to make predictions about the defendant’s future dangerousness was unconstitutional
because “psychiatrists, individually and as a class, are not competent to predict future
dangerousness.” *Id.* at 884. The majority decided that the jury should be left to “make up its mind”
about which experts’ opinions to credit and should not be barred from hearing the views of the
State’s psychiatrists “along with opposing views of the defendant’s doctors.”*31* *Id.* at 898-99. The
theme of the resulting opinion was that the adversarial process would take care of any problems of
reliability. *Id.* at 899-902.

However, the end of the opinion alludes to the real concern animating the court’s decision:

“*At bottom, to agree with the petitioner’s basic position would seriously undermine and in
effect overrule Jurek v. Texas, 428 U.S. 262 (1976).*” *Id.* at 906 (emphasis added). In other words,
the *Barefoot* majority recognized that, if expert testimony about the probability of any given
defendant committing a criminal act of violence in the future was unreliable, then, perhaps, the
whole endeavor of making such predictions might be unreliable; and such a conclusion risked
destabilizing every death sentence that Texas had handed down since 1976.

*Barefoot* includes an excoriating dissent by Justice Blackmun, focused on his colleagues’
refusal to consider the American Psychiatric Association’s unequivocal condemnation of
psychiatric testimony regarding future dangerousness as a phenomenon that distorted the fact-
finding process in capital cases. The dissent spells out the precise testimony that was at issue,
including conclusory testimony from Dr. Grigson who had diagnosed Barefoot, without ever

---

31 It merits noting that, according to *Barefoot*’s footnote 5, “petitioner had not offered any
evidence at trial to contradict the testimony of Doctors Holbrook and Grigson and, critically, there
was no record that petitioner had sought and been refused funds to procure an expert of his own.”
This off-the-cuff observation ignored the reality that, at that time, Texas law provided for indigent
defendants to receive only $500—total—for *all* investigation and experts, an amount that some
experts charge for a single hour of their time. *See* TEX. CODE CRIM. PROC., art. 26.05(d) (1982)
(providing for payment of $500 for “expenses incurred for purposes of investigation and expert
testimony.”).
meeting him, as “a fairly classical, typical sociopathic personality disorder” of the “most severe category” of sociopaths who, whether in society at large or in the society of prison, was so irredeemable that Dr. Grigson found a “‘one hundred percent and absolute’ chance that Barefoot would commit future acts of criminal violence that would constitute a continuing threat to society.” Id. at 919 (emphasis retained). Only the dissent explained that the American Psychiatric Association had categorically condemned Dr. Grigson’s testimony, and this kind of testimony generally, as demonstrably unreliable. Id. at 920. “Neither the Court nor the State of Texas ha[d] cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.” Id. at 921. And Justice Blackmun called out his colleagues for ignoring the obvious: that “[i]t is impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution’s paramount concern for reliability in capital sentencing.” Id. at 923-24.

Indeed, Justice Blackmun was flabbergasted: “Surely, this Court’s commitment to ensuring that death sentences are imposed reliably and reasonably requires that nonprobative and highly prejudicial testimony on the ultimate question of life or death be excluded from a capital sentencing hearing.” Id. at 929. Allowing this kind of quackery to be put before the jury was, Justice Blackmun recognized, a grave “distortion of the truth-finding process” that is supposed to animate a trial. Id. at 931. Justice Blackmun attacked the majority opinion’s blithe conclusion that the adversarial process could be depended upon to help the jury get at the truth; and in making the attack, Justice Blackmun quoted words the Chief Justice had penned two decades earlier about the limits of the adversarial process and how jurors have difficulty distinguishing between science and pseudo-science:
The very nature of the adversary system . . . complicates the use of scientific opinion evidence, particularly in the field of psychiatry. . . . Although under ideal conditions the adversary system can develop for a jury most of the necessary fact material for an adequate decision, such conditions are rarely achieved in the courtrooms in this country. These ideal conditions would include a highly skilled and experienced trial judge and highly skilled lawyers on both sides of the case, all of whom in addition to being well-trained in the law and in the techniques of advocacy would be sophisticated in matters of medicine, psychiatry, and psychology. It is far too rare that all three of the legal actors in the cast meet these standards.

_Id._ at 933 (quoting Burger, _Psychiatrists, Lawyers, and the Courts_, 28 _Fed. Prob._ 3, 6 (June 1964)).

Even after Dr. Grigson was expelled from the American Psychiatric Association and the Texas Society of Psychiatric Physicians because of his unethical practices, he continued to testify as an expert witness on behalf of the State of Texas. See _Effect of “Dr. Death” and his testimony lingers_, _Houston Chronicle_ (June 27, 2004). This was possible because a majority in _Barefoot_ had punted on the question of reliability—even though heightened reliability in sentencing is supposed to be a pillar of a constitutionally compliant death-penalty sentencing scheme. See, e.g., _Woodson_, 428 U.S. at 305 (“Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

---

32 Recently, the CCA concluded that one of the individuals who remains on Texas’s death row because of Dr. Grigson’s testimony was not entitled to relief even though the prosecutor who had sponsored Dr. Grigson’s testimony had conceded that she would not have done so had she known that Dr. Grigson had been sanctioned for ethics violations. See _Ex parte Jeffrey Lee Wood_, No. WR-45,500-02 (Tex. Crim. App. Nov. 21, 2018).

33 At least two inmates remain on Texas’s death row who were sent there following trials featuring Dr. Grigson’s wholly unreliable speculations about future dangerousness. One of those is Jeff Wood, who was sitting in a car when someone else shot and killed a store clerk during a robbery-gone-bad; the other one is Scott Panetti, whose flagrant mental illness remains the subject of ongoing litigation about his competency to be executed. See, e.g., _Panetti v. Davis_, 863 F.3d 366 (5th Cir. 2017).
2. Having avoided the question initially, the reliability of “scientific” testimony about future dangerousness was eventually taken up as an evidentiary rule instead.

Justice Blackmun’s critique in *Barefoot* about the need for courts to ensure the reliability of expert testimony proffered in seeking a death sentence fell on deaf ears. But the concern about keeping from the jury baseless, unreliable testimony masquerading as “expertise” became the subject of a landmark civil case a decade later. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Regrettably, the Supreme Court at that time was more concerned about the problem of unreliable, quasi-scientific testimony from purported experts in cases involving money judgments than in cases involving matters of life and death.34

The *Daubert* decision was indeed a game-changer—which should have immediately been seen as changing the precedential value of *Barefoot*. After all, the foundation upon which *Barefoot* rested was the then-prevailing view that: “the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.” *Barefoot*, 463 U.S. at 898. But with *Daubert*, that foundational premise was rejected; no longer would evidentiary rules simply favor admissibility based on the unduly optimistic idea that the adversary system would resolve all issues of weight and credibility relevant to testimony presented as “science.” *Daubert* established that the trial judge should ensure that purported scientific testimony or evidence must be not only relevant, but also reliable or be deemed

---

34 This poignant irony was implicitly acknowledged by one jurist, even while concurring in the decision to deny habeas relief to a death-sentenced inmate: “Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.” *Flores v. Johnson*, 210 F.3d 456, 465 (5th Cir. 2000) (Garza, J., concurring).
inadmissible. 509 U.S. at 589. That is, *Barefoot* had entrusted the “adversary process ... to sort out the reliable from the unreliable evidence,” insisting that the jury was a “constitutionally competent” factfinder, 463 U.S. at 880 n.6, 900, but *Daubert* imposed on the judge a “gatekeeping” role; as gatekeeper, the judge must assess the admissibility of expert testimony outside the presence of the jury and arrive at a “quick, final, and binding legal judgment—often of great consequence.” 509 U.S. at 597.

Ever since *Daubert*, courts must find an expert’s testimony reliable and that the alleged expertise must actually assist the trier of fact. 509 U.S. at 590-91. The Supreme Court offered a non-exhaustive list of factors to determine reliability, including whether the expert’s theory can be tested, whether it has been subjected to peer review and publication, whether it has an acceptable rate of error, and whether it had gained general acceptance in the relevant scientific community. No single factor is dispositive. 509 U.S. at 593. The Supreme Court also explained that “the ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” 509 U.S. at 591-92. And as the Texas Supreme Court has further clarified, “[i]f the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.” *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

That is, courts as gatekeepers also have an obligation to probe the basis for an expert’s opinion for reliability. Further, *Daubert*’s progeny instructs that “an expert’s testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed

---

35 Texas actually beat the Supreme Court in arriving at this victory for enhanced reliability in expert testimony. *See Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992) (interpreting Texas Rule of Evidence 702, which mirrors the federal rule subsequently analyzed in *Daubert*). Yet binding authority has not yet recognized how *Kelly/Daubert* are incompatible with the rationale underlying *Barefoot*—although many before Mr. Clark have sought to sound the alarm.
methodology.” *Id.* In other words, the reliability of the reasoning process used to move from data to conclusion must be vetted. Any “flaw in the expert’s reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious.” *Id.* If the expert’s testimony is unreliable for any of these reasons, then “legally,” it amounts to “no evidence” at all. *Id.*

Heightened concerns about the reliability of experts’ opinions is imminently reasonable because, unlike lay witnesses, experts occupy a special status: they are “permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.” *Id.* at 592. As one moves further from the requirement of personal knowledge, deemed a sufficient indicator of reliability at common law, expert testimony must find its reliability elsewhere. *Id.* Expert testimony must be based on “scientifically valid” methodologies and reasoning. *Id.* at 593-94.

Where legal disputes are of “great consequence,” as in capital cases, the need for gatekeeping should be even more pressing. *Id.* at 597; see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (describing *Daubert*’s objective is to secure reliable and relevant testimony). And yet. . . .


Some judges then started to note the troubling tension between *Barefoot* and *Daubert*. See *Flores*, 210 F.3d at 458-70 (Garza, J. specially concurring) (noting that the Supreme Court’s decision in *Daubert* may have undermined *Barefoot*); *United States v. Sampson*, 335 F. Supp. 2d 166, 220-21 (D. Mass. 2004) (stating that there is a “serious question” as to whether the Supreme Court would, in a post-*Daubert* world, continue to hold that a jury may impose the death penalty based on its prediction of a defendant’s future dangerousness). Indeed, Arizona’s Supreme Court concluded that it is “impossible” to reconcile *Daubert* with *Barefoot*. *Logerquist v. McVey*, 1 P.3d 113, 127 (Ariz. 2000).

But to date, neither the Supreme Court nor the CCA has revisited *Barefoot* in light of *Daubert* in conjunction with the constitutional mandate of heightened reliability in death-penalty
cases. If either high court did so, it would inevitably lead to the conclusion that future-dangerousness predictions that the State’s mental-health “experts” offered for decades are inherently unreliable and thus such predictions are an improper component of a capital-sentencing scheme.

3. The CCA applied Daubert to future-dangerousness predictions but misinterpreted Barefoot in the process.

Current evidentiary standards, extant in the federal and state systems, combined with the Supreme Court’s continuing requirement that capital-sentencing procedures be conducted so as to ensure a heightened level of reliability, mean that the Eighth Amendment prohibits introducing unreliable expert testimony regarding future dangerousness. The CCA finally recognized at least half of this equation—how the legal landscape has changed since Barefoot in terms of evidentiary standards for expert testimony—in 2010. See Coble v. State, 330 S.W.3d 253 (2010).

Coble addressed, in part, the reliability of another infamous “Dr. Death” whom the State employed in numerous capital cases to opine about a defendant’s future dangerousness. Id. at 270-87 (discussing error of trial court under Texas Rule of Evidence 702 in admitting testimony of Dr. Richard E. Coons at a capital-resentencing hearing). After a careful review of the record of Dr. Coons’ voir dire testimony, the CCA concluded that Dr. Coons was unfamiliar with the current literature in his field; knew of no studies regarding the accuracy of long-term predictions; did not know if other psychiatrists rely on the methodology he uses, but doubted that they do; used criteria in his own “idiosyncratic” evaluations that “overlap and blend;” had never ascertained the accuracy of his own predictions; and could not tell what his own accuracy rate might be. Id. at 271-72, 277. Consequently, the CCA concluded that the prosecution had not satisfied its burden of demonstrating the admissibility of Coons’ testimony. Id. at 279-80.

But as the CCA gave with one hand it took away with another. While ruling that the
testimony of Dr. Coons was insufficiently reliable under Rule 702, the CCA rejected the more important argument that Coons’ testimony was inadmissible because it failed to meet the heightened-reliability requirement of the Eighth Amendment and thus admitting it violated Mr. Coble’s right to due process. In doing so, the CCA stated, incorrectly, that “the United States Supreme Court, in Barefoot v. Estelle, rejected this argument and we are required to follow binding precedent from that court on federal constitutional issues.” Id. at 270. In doing so, the CCA, however, misapprehended the scope of Barefoot’s actual holding.

Barefoot did not compel the result in Coble. Barefoot does not hold that considering the reliability of expert testimony is constitutionally irrelevant, let alone barred. As explained above, what Barefoot addressed was whether psychiatrists can ever testify about future dangerousness without injecting error into the proceeding, not whether a particular expert’s testimony was unreliable and thus admitting it would violate a defendant’s constitutional rights. 463 U.S. at 884-85 (summarizing Barefoot’s arguments on appeal as concerning whether the predictions of psychiatrists generally “are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments”). Therefore, Barefoot cannot stand for the proposition that

---

36 Curiously, Coble does not specify which of the various arguments at issue in Barefoot it had considered in reaching the conclusion that the constitutional inquiry had been foreclosed. But Barefoot did not in fact categorically reject Eighth Amendment or Due Process challenges to the admission of unreliable expert testimony.

37 The CCA itself appeared to second-guess the wisdom of this ruling when it ordered briefing in another case, Ex parte Ramey, on possible constitutional violations engendered by the admission of Dr. Coons’ testimony: “Applicant and the State shall file briefs on the above claim specifically addressing whether the holding in Coble v. State, 330 S.W.3d 253 ([Tex. Crim. App.] 2010), impacts this claim in a federal constitutional setting.” Ex parte Ramey, No. AP-76,533 (Tex. Crim. App. Apr. 6, 2011). However, the CCA ultimately concluded again, without further substantive discussion, that it was bound by Barefoot, even though Barefoot did not in fact foreclose all constitutional challenges of this nature. Ex parte Ramey, 2012 Tex. Crim. App. LEXIS 1511 * 2-3 (Tex. Crim. App. Nov. 7, 2012).
psychiatric predictions of future dangerousness were shielded in perpetuity from constitutional scrutiny.

Even while the *Barefoot* majority expressly rejected a categorical bar to the admission of such testimony, it implicitly suggested that developments in evidentiary standards might alter the constitutional analysis. And, as discussed above, evidentiary standards did thereafter develop. No longer do state or federal courts in Texas leave it to jurors to assess the reliability of expert testimony. In light of these developments in evidence law and the on-going constitutional commitment to reliability and accuracy in capital-sentencing proceedings, the holding of *Barefoot* must be interpreted consistently with the notion that the Constitution requires some indicia of reliability before expert testimony may be admitted in a proceeding where a life is at stake.38

Moreover, since *Barefoot*, the Supreme Court has readily acknowledged mounting evidence of a far broader reliability problem: that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317-18 (2009) (affirming that the ultimate goal of the Confrontation Clause is to ensure evidentiary reliability). The Supreme Court has also noted that “[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.” *Id.* Indeed, a report from the National Academy of Sciences, cited in *Melendez-Diaz*, 557 U.S. at 318, remarked that “[b]ecause forensic scientists

---

38 Although *Barefoot* held that there was no categorical bar on psychiatric predictions, it noted that “[p]sychediatric testimony predicting dangerousness may be countered ... as erroneous in a particular case[.]” 463 U.S. at 898. It certainly did not hold that “expert” testimony provided by the likes of Dr. Grigson and Dr. Coons automatically meets the threshold of heightened reliability under the Eighth Amendment. *But see Devoe v. State*, 354 S.W.3d 457, 476 (Tex. Crim. App. 2011).
often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.\footnote{39}

If unreliable expert testimony has no value to civil juries where money damages are at stake, it should not be permitted when a jury is considering the possibility of a death sentence. \textit{Barefoot} cannot stand for the proposition that all psychiatric expert testimony is admissible as a matter of constitutional law without any threshold showing of minimal reliability; yet that is what the CCA held in \textit{Coble}. Put another way: it cannot be that only Rule 702, not the Constitution, imposes limits on the quality or validity of expert testimony that can be presented to a jury deciding the critical question of whether a defendant lives or dies.

Because the ruling in \textit{Coble} is unsupported by \textit{Barefoot} itself, \textit{Coble} is in tension with developed jurisprudence regarding both capital punishment and expert witnesses and is inconsistent with other constitutional principles. Therefore, \textit{Coble} should not be viewed as the last word on the subject. Otherwise, the door remains wide open to unreliable quackery and junk science. \textit{See, e.g.}, \textit{General Electric Co. v. Joiner}, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring) (using as an example of junk science a phrenologist who would testify that future dangerousness was linked to the shape of a defendant’s skull); \textit{see also Saldano v. Cockrell}, 267 F. Supp. 2d 635, 642 (E.D. Tex. 2003), \textit{aff’d in part and dismissed on other grounds sub. nom. Saldano v. Roach}, 363 F.3d 545 (5th Cir. 2004) (holding that reliance on defendant’s race as part

of expert’s future dangerousness evaluation violated the Equal Protection Clause).  

4. The CCA, in Coble, defended the future dangerousness special issue by insisting on an interpretation of Jurek at odds with the opinion’s plain text.

Even more problematic than the CCA’s misconstruction of Barefoot in Coble, the CCA, in Coble, misrepresented the scope and basis of the Supreme Court’s decision in Jurek.

In Coble, the CCA announced that it would not conduct a factual sufficiency review of the jury’s future dangerousness verdict. In doing so, for the first time, the CCA defined Texas’s future dangerousness special issue as a question that “is essentially a normative one” because “the Legislature declined to specify a particular level of risk or probability of violence” required to answer the special issue in the affirmative. Coble, 330 S.W.3d at 265, 267-68. These statements merit close scrutiny (and reexamination) for at least three reasons.

First, the CCA seems to fault the Legislature for declining to define key terms in the future dangerousness special issue. Id. at 267-68. Yet in Jurek, back in 1976, the Supreme Court had blessed Texas’s statutory scheme in part because it presumed that the CCA, not the Texas Legislature, would take responsibility for defining the vague terms in the special issue. In Coble, the CCA simultaneously admits that it never did so and suggests that it had no obligation to do so. As explained in Section V below, the terms are unconstitutionally vague and impermissibly broaden the class of individuals who are vulnerable to a death sentence. Instead of construing these terms, before or in Coble, the CCA abandoned any pretext that it would finally adhere to the Supreme Court’s long-standing mandate that “a state capital sentencing scheme must rationally

narrow the class of death-eligible defendants[.]” *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Although *Coble* cites this very language, 330 S.W.3d at 269, the CCA’s interpretation of the future dangerousness special issue, announced in *Coble*, has permitted a veritable free-for-all. See id. (stating that this special issue permits jurors to consider evidence of “the internal restraints of the individual, not merely the external restraints of incarceration”).

Second, in *Coble* the CCA did not explain what it meant by the word “normative.” The word is a term of art in philosophy and social science. There is no “plain meaning” suggested by the word. The word normative comes from the Latin “norm,” meaning a carpenter’s T-square, a rule, or a prescription. In ordinary English, a “norm” is what is customary or habitual as in what is deemed “normal.” There is, however, no ordinary meaning of “normative.” In philosophy and social science, “normative” describes what *ought* to be as opposed to what *is*. That is, the term of art has almost the opposite meaning implied by the lay terms “norm” and “normal.”

In the sciences of psychometrics and statistics, “normative” takes on yet another meaning that must be defined by recourse to reference groups or reference samples to be interpreted properly. For instance, what is “normative” when comparisons are made to one reference group (which in psychological testing is sometimes referred to as a “standardization sample”) are not applicable to “normative” comparisons to other groups. Modern psychological tests designed to assess behavior now routinely include multiple reference groups and normative standards, each of which must be carefully defined for any given test to be considered valid. C.R. Reynolds & R.W. Kamphaus, *Behavior Assessment System for Children* (3d Pearson Clinical Assessment 2015); see also C.R. Reynolds & R.B. Livingston, *Mastering Modern Psychological Testing: Theory and Methods* (Pearson Higher Education 2012). This context illuminates just how ambiguous the term is that the CCA used so casually in *Coble*. That this ambiguous term was
employed to sidestep addressing entrenched problems with a statutory provision that is key to obtaining a death sentence under current Texas law is profoundly alarming. See Section V.

Even more alarming is the fact that the word “normative” had already been employed in an entirely different context within the narrow body of Texas death-penalty jurisprudence when Coble further muddied the water. For about thirty years, the CCA has supposedly considered non-capital sentencing a “normative process, not intrinsically factbound.” Murphy v. State, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (emphasis added); Miller-El v. State, 782 S.W.2d 892, 894-95 (Tex. Crim. App. 1990). More recently, the CCA implied that the mitigation special issue called for a “normative” approach: “one could argue that the broad scope of the mitigation special issue makes it similar to the noncapital sentencing determination… the determination is normative as it is with respect to the mitigation special issue.” Williams v. State, 273 S.W.3d 200, 224 (Tex. Crim. App. 2008) (emphasis added). These other uses of the term “normative” add support to the conclusion that the CCA views the future dangerousness special issue as inviting a “not intrinsically fact[-]based,” but rather gut-based free-for-all—thus hardly an inquiry designed to narrow the category of individuals who are death-eligible.

What exactly the CCA meant when announcing in Coble that the future dangerousness special issue requires capital juries to engage in an “essentially normative” determination remains a mystery. Are jurors to determine what ought to be as opposed to what is with respect to a defendant’s propensity to engage in criminal acts of violence in the future? If so, that interpretation would plainly amplify the constitutional infirmities in the special issue, which is replete with vague terms that no one has ever defined. Or did the CCA, in stating that the future dangerousness assessment “is essentially a normative one,” mean that juries should just conjure up some view of what is “normal” behavior and use that subjective understanding to decide if the person they have
found guilty of capital murder is probably at risk to engage in some non-normal act of violence in the future? *Coble*, 330 S.W.3d at 265, 267-68. Either way, the CCA’s passing reference to an amorphous “normative” standard has only served to compound the problem of vagueness and overbreadth that have existed since the statute’s enactment.

Third, in *Coble*, the CCA supports its characterization of the future dangerousness special issue by citing *Jurek* twice in footnotes. Both citations are notable as they misconstrue what the Supreme Court actually decided in *Jurek*. The first citation is to a concurring and dissenting opinion by Judge Odom of the CCA published in the CCA’s *Jurek* decision that was subsequently appealed to the Supreme Court. Judge Odom had made the very valid point that the use of the word “probability” in the future dangerousness special issue, which the Legislature had failed to define, was vague and all-encompassing. *Coble*, 330 S.W.3d at 268 n.18 (quoting *Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App.1975) (Odom, J., concurring and dissenting)). After quoting Judge Odom at length, the CCA in *Coble* then insisted, incorrectly, that the Supreme Court had “disagreed with Judge Odom’s constitutional concerns about the vague nature of a probability in the special issue.” *Id.* As explained above, the *Jurek* plurality implied that the term was indeed vague, but elected to give the state court the opportunity to fix the problem first, which the CCA then failed to do. *See Jurek*, 428 U.S. at 272. The Supreme Court had *not* disagreed with Judge Odom but had instead simply bypassed his critique.

The CCA’s second citation to *Jurek* in *Coble* notes that the Supreme Court had stated that predicting future behavior “is not easy” but is no different from “many of the decisions rendered throughout our criminal justice system.” *See Coble*, 330 S.W.3d at n.19 (quoting *Jurek*, 428 U.S. at 274-76). Putting aside whether that comparison is specious, the CCA extrapolates from this one-paragraph comment a conclusion that does not exist. The CCA credits the Supreme Court with
having undertaken some kind of specific analysis that the Supreme Court did not in fact undertake. See id. *Jurek* does not include an analysis of the words used in the future dangerousness special issue; it does no more than express confidence that the special issue *would be* interpreted by the state court in such a way that juries would be able to consider everything and anything that might be relevant to deciding a separate issue: “What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.” *Jurek*, 428 U.S. at 276. As explained at length in Section II.A, the Supreme Court later decided that it had been wrong about this assumption, finding Texas’s death-penalty sentencing scheme unconstitutional as applied in *Penry v. Lynaugh*, 492 U.S. 302 (1989) precisely because the jury instructions did not allow jurors to consider all possible relevant information about the individual defendant whose fate it must determine. And as explained at length in Section VI below, the CCA continues to condone the exact opposite practice: of limiting, based on pinched interpretations of “relevance,” the kind of mitigating evidence jurors may have before them. In any event, the plurality decision in *Jurek* did not analyze how a future dangerousness analysis could be undertaken or whether the terms in the Texas special issue gave jurors sufficient guidance.

5. **The future dangerousness special issue lives on even as scientific evidence has demonstrated that future dangerousness predictions are fundamentally unreliable.**

Aside from baseless “expert” opinions masquerading as science, which the State put before juries through the likes of Dr. Grigson and Dr. Coons, actual science, in the form of empirical studies, has shown that purporting to predict future dangerousness is an inherently unsound practice. Overall, studies show that former death row prisoners have not been a disproportionate threat to the institutional order, to other inmates, or to custodial staff. Indeed, their total rate of
assaultive institutional misconduct is demonstrably lower than those of both the capital murder offenders who were given a life sentence to begin with and who are in the general prison population. See, e.g., Erica Beecher-Monas & Edgar Garcia-Rill, Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World, 24 CARDOZO L. REV. 1845, 1845-46 (2003) (explaining methodology and results of a series of studies undertaken by researchers to “develop an empirically based actuarial instrument that would reflect a state of the art understanding of the factors correlated with violence and their inter-relationships”). Even though evidence-based actuarial instruments “offer improvements over the unaided judgment of juries and over the kind of unscientific assertions about future dangerousness currently typical in capital sentencing proceedings,” this kind of evidence does not resolve the problems associated with making such predictions. Id. at 1848-49. “Even the most scientific predictions based on thorough examination, diagnosis of mental symptoms, past patterns of behavior, and probabilistic assessment are wrong nearly as often as they are right.” Id. at 1845.

Because making these sorts of predictions is difficult-to-impossible, when jurors are asked to determine whether an individual convicted of having committed at least one murder will act violently again, they are likely to defer to an “expert” determination, even if its reliability is questioned by another expert. See Christopher Slobogin, Dangerousness and Expertise Redux, 56 EMORY L. J. 275, 312-15 (2006) (summarizing data); Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn. Yet mental health professionals, including psychiatrists and psychologists, have no special training in making such predictions. Moreover, they are just as likely as lay people to come to conclusions based on stereotypes and bias. Erica Beecher-Monas, The Epistemology of Prediction: Future

Predictions of any kind are, by nature, speculative. In the death-penalty sentencing context, when it comes to predicting whether an individual will probably commit future acts of criminal violence, one is talking about the probability of doing so in a prison setting. Yet, popular culture aside, violence by convicted murderers in prison is rare. Twenty years ago now, an actuarial study found very low rates of expected violence for Texas inmates convicted of capital murder: the probability a capital defendant will kill again while incarcerated over the next forty years is 0.2% or about 2 in 1,000. Jonathan R. Sorensen & Rocky L. Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. Crim. L. & Criminology 1251, 1264 (2000).

Even a decade before Coble was decided, a significant study had been published suggesting that death-sentenced individuals were not inclined to commit acts of violence. The researchers had tracked the behavior of 558 former death row inmates who had been followed for 15 years after their death sentences were commuted following the Supreme Court’s decision in Furman. James W. Marquart & Jonathan R. Sorensen, A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loy. L.A. L. Rev. 5 (1989) The study found that approximately 30% of the sample had committed institutional infractions generally during that period, but only a very small segment had committed any serious acts of violence. Id. at 20-24.

Beyond the overall low rate of violence among incarcerated murderers, the fundamental problem with requiring jurors to predict future dangerousness is that this endeavor generates a high rate of false positives in specific cases. Research shows that jurors making such predictions regularly misidentify non-dangerous defendants as dangerous. For example, an early study looked
at 92 former Texas death row prisoners—each of whom had been found by their sentencing jury to represent a future danger—who later became general population inmates or were released into the broader community. James W. Marquart, Sheldon Ekland-Olson, & Jonathan Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 Law & Soc’y Rev. 449 (1989). The study compared their behavior to that of: (1) other capital murder defendants who had been life-sentenced at trial; (2) the entire prison population at the time; and (3) inmates in a single high security prison. *Id.* at 460. The study demonstrated that the inmates originally sentenced to death were no threat to institutional order and even had a lower total rate of assaultive institutional misconduct when compared to the capital murder offenders sentenced to life, the overall prison population, and inmates housed in the high security unit. *Id.* at 461, 464. The data in this early study suggested that jurors err in the direction of false positives when predicting future dangerousness. *Id.* at 466.

More recent studies reveal just how pervasive this problem of false positives is. For instance, one study examined the prison behavior of 155 Texas inmates sentenced to death after trials for which the State had hired experts to testify that the defendant posed a future risk of violence. John F. Edens, et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to “Disinvent the Wheel?”*, 29 Law & Hum. Behav. 55, 61 (2005). Because 100% of the inmates were sentenced to death, 100% of the sentencing juries had unanimously predicted, beyond a reasonable doubt, that the defendant posed a risk of future criminally violent behavior. By the time of the study, 65 had been executed, 42 remained on death row, and 48 were incarcerated but no longer on death row. *Id.* None had committed homicide in prison, and only 8 (5.2%) had committed a serious assaultive act of any kind. *Id.* at 62. Most had only minor infractions; and over 20% had no write-ups at all. *Id.* Assuming that “criminal acts of violence”
equates with a serious assaultive act (because our Legislature and appellate courts have failed to define the term), the juries that had predicted future violence had been wrong 94.8% of the time.

Another study tracked 72 male federal capital inmates whose trials involved a jury finding that they were likely to commit future violent acts (one potential aggravating factor in the federal death-penalty scheme). Mark D. Cunningham, Jon R. Sorensen, & Thomas J. Reidy, *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL. PUB. POL’Y & L. 223, 233–34 (2009). Jurors found that future violence was likely from 34 of these defendants. *Id.* at 234. But the 34 who were predicted to be a future danger and the 38 who were not had virtually identical rates of subsequent violence. *Id.* at 236 (Table 3). Most shockingly, of the 33 inmates serving a death sentence, juries had predicted in 27 instances that defendants presented a danger of future violence, but none of those individuals ended up engaging in a serious assault—a false positive rate of 100%. *Id.* at 239 (Table 4).

Yet another study focused on 115 Oregon inmates convicted of capital murder. Thomas J. Reidy, Jon R. Sorensen, & Mark D. Cunningham, *Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy*, 31 BEHAV. SCI. L. 286, 292 (2013). Oregon juries, as in Texas, must find that the defendant will probably commit future acts of violence as a predicate to imposing a death sentence. *Id.* at 291. In the Oregon study, jurors had found 78 of the pool of 115 defendants to pose a continuing threat. *Id.* at 296. Of the 78 found to be a future danger, only 50 were then sentenced to death. *Id.* at 298. Thereafter, the 78 predicted to be violent and the 37 who were not predicted to be violent committed assaultive infractions at identical rates of 5.9 incidents per year per 100 inmates. *Id.* When restricting outcome of assaultive behavior to those incidents resulting in a serious or fatal injury, juries were correct 97% of the time in finding no future danger, and nearly always wrong (98.7%) when predicting future violence was likely. *Id.* at 299. Juries are
thus consistently reliable in predicting that a defendant will not commit a future act of criminal violence but consistently unreliable in predicting that a defendant will commit a future act of criminal violence, the unreliable condition being the condition that results in a death verdict.

Since 1973, there have been 165 inmates exonerated of the crimes that put them on death row. Of those, 13 have come from Texas so far under the post-Furman, Jurek-approved capital-sentencing statute, meaning that juries had predicted that all 13 of them would probably commit further acts of violence when, in fact, they were actually innocent of the predicate violent act. This phenomenon, standing alone, should undermine any confidence in the special issue as a means to narrow and channel those against whom a state-sanctioned killing can be lawfully sought.

In Coble, some of this uncontroverted science was before the jury—and then before the CCA. But, suddenly, the CCA decided that it was not its place to review jurors’ findings of future dangerousness for factual sufficiency.

Up until Coble, the CCA had been willing to conduct factual sufficiency reviews of future dangerousness verdicts. As recently as 2009, the year before the CCA decided Coble, the CCA had held that it could review the objective evidence of future dangerousness—as opposed to a jury’s “normative” decision on mitigation. See, e.g., Young v. State, 283 S.W.3d 854, 865 (Tex. Crim. App. 2009) (“We have held that, while this Court can review the objective evidence of future dangerousness, we do not engage in reviewing the jury’s normative decision on mitigation, whether it answers in the affirmative or the negative.”) (citing Colella v. State, 915 S.W.2d 834, 845 (Tex. Crim. App. 1995)). The CCA reviewed for—and found insufficient evidence of—future dangerousness.

41 The Death Penalty Information Center maintains a sortable database of exonerations available at https://deathpenaltyinfo.org/innocence.

42 See id.
dangerousness, for instance in 2007. See Berry v. State, 233 S.W.3d 847, 863-864 (Tex. Crim. App. 2007). As recently retired Judge Alcala noted in 2016, the CCA had actively reviewed jury findings of future dangerousness for sufficiency of evidence in the 1980s and had occasionally reformed sentences from death to life when the evidence of future dangerousness was found insufficient. See Ex Parte Murphy, 495 S.W.3d 282, 284 n.3 (Tex. Crim. App. 2016) (Alcala, J., concurring in part and dissenting in part). Not until Coble was decided in 2010 did the CCA reverse course, announcing that the issue of future dangerousness was, in its view, a “normative” question—without explaining its understanding of the non-obvious, ambiguous term “normative.” Coble, 330 S.W.3d at 267-68, 298. This announcement was also made without acknowledging that this development constituted a sea change; the CCA simply treated the change as if this had always been the way the law worked.

Why the sleight of hand?

Coble, a case involving a retrial nearly twenty years after the original conviction, had put before the fact-finder real data and real science exposing the fallacy of the initial prediction that Billie Wayne Coble would probably commit acts of criminal violence in prison. The data were not only specific to Mr. Coble—showing that he had not proven to be a person prone to criminal acts of violence—but also showing how, more often than not, these predictions were demonstrably incorrect.

Coble had been originally convicted of capital murder in 1990 for shooting three people to death in one episode. After being granted a new punishment trial by a federal habeas court, he was retried and again sentenced to death in 2008. Id. at 261. By the time Mr. Coble was retried, he was 60 years old and in poor health, having suffered a heart attack while incarcerated. Id. at 266. By the time of his re-trial, he also had an 18-year history of making positive contributions to his prison
society and an “impressive history of nonviolence in prison.” Id. at 266, 269. As explained above, the prosecution called Dr. Richard Coons to testify (as they had in the original trial); and Dr. Coons again insisted that the 60-year-old Coble would, in Dr. Coons’ opinion, probably commit criminal acts of violence constituting a continuing threat to society. This time around, relying on the Daubert standard, the CCA found that the trial court had abused its discretion by admitting Dr. Coons’ opinion on Coble’s future dangerousness. Id. at 279-80. But the CCA was aggressively silent regarding the obvious: Dr. Coons’ 1990 prediction regarding Mr. Coble’s future dangerousness had been dead wrong.

The CCA also largely ignored the controverting evidence that the defense had put on at trial to counter the State’s future dangerousness case. The defense had called, for instance, forensic psychologist Dr. Mark Cunningham, whose work is cited above and who, in contrast to Dr. Coons, has extensively researched the efficacy of future-dangerousness predictions and demonstrated how jurors’ predictions in capital cases have largely been wrong. During the re-trial, Dr. Cunningham testified that he placed Mr. Coble in the lowest risk-of-violence category based on empirical studies, data, and statistical analysis. Id. at 282. Dr. Cunningham’s opinions, grounded in actual science and supported by a reliable methodology, posed such a sharp contrast to the baseless opinions of Dr. Coons that the CCA recognized that admitting the latter had to be deemed erroneous. Id. at 286-87.

But the CCA did not acknowledge the substance of Dr. Cunningham’s opinions, although amply supported by empirical evidence. To do so would require acknowledging that the future-dangerousness inquiry, in all instances, cannot survive scrutiny. Dr. Cunningham’s data, supported by other similar studies, have exposed the baselessness of such predictions, which have proven to be worse than a mere coin toss in terms of accuracy. Instead of taking the opportunity in Coble to
acknowledge the mistaken assumptions underlying Jurek, which had been sidestepped in Barefoot, the CCA made new law. Suddenly, the future-dangerousness prediction was redefined as a “normative” assessment that depended on the jurors’ views of the “character for violence of the particular individual.” Id. at 267-68.

This new, ex post facto interpretation of the future dangerousness special issue is completely divorced from any legislative intent. Indeed, the legislative history suggests that the Legislature had no reasoned basis for selecting the words that it did. Legislators made no record of how they believed jurors should approach future-dangerousness assessments because the special issue had not even been drafted when the bill was discussed in the House and Senate committees. The special issue was added at the eleventh hour by a conference committee on the final day of the 1973 session and approved the same day by both houses without discussion. See Eric Citron, Note, Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty, 25 YALE L. & POL’Y REV. 143, 162-163 (2006). The legislative history exposes the ad hoc way Texas’s post-Furman statute came to include the future dangerousness special issue:

Beginning in January 1973, committees and subcommittees began hearing testimony and thinking about a new death penalty in Texas. On May 10th, the House gave its best interpretation of Furman and passed a mandatory death penalty bill. Two weeks later, the Senate debated between that mandatory bill and a more discretionary approach, finally opting for the latter. With only Memorial Day weekend to go before adjournment, the House called a conference committee to resolve the differences between the two bills. On the very last day, the conferees presented a scheme which appeared in neither the House nor the Senate bill, along with newly minted language about “a probability” that the defendant would be a “continuing threat.” That same day, both houses passed the committee report by huge margins without specifically considering the new language on future dangerousness.

Id. at 162-63.

Years later, in Coble, even as the CCA declared the future-dangerousness inquiry to be a “normative” one, the CCA also stated that the future dangerousness special issue was meant to
ensure that no defendant will be sentenced to death unless the jury finds the defendant “poses a real threat of future violence.” *Coble*, 330 S.W.3d at 267-268. But this statement begs the question: what is a “real threat”? If someone is to be deemed a “real threat,” shouldn’t that determination be supported by competent evidence instead of whim, unbridled speculation, bias, prejudice, or no more than the fact of the capital crime itself?

Given the empirical data before the CCA in *Coble*, and given the CCA’s recognition that “tea-leaf” psychological opinions are inappropriate evidence of future dangerousness, the CCA had an opportunity to craft a meaningful standard that would finally guide and narrow jurors’ discretion in answering the future dangerousness special issue. That is, adopting an appropriate, non-circular standard would have addressed at last the Supreme Court’s expectation, announced in 1976 in *Jurek*, that several vague terms in the future dangerousness special issue would be construed so as to narrow, in a non-arbitrary manner, the class of people who would be subjected to the death penalty in Texas. Adopting a standard for the future dangerousness special issue that is consistent with contemporary scientific understanding would have accorded, not only with the Supreme Court’s long-standing Eighth Amendment jurisprudence, but also with the Legislature’s recent emphasis on closing the gap between scientific advancements and the law that so often lags far behind.43 But that did not occur.

Instead of following through at last on the obligation to construe key terms and thus craft a coherent, constitutionally compliant standard or declaring that the special issue was facially vague, the CCA went in the opposite direction, tacitly approving the State’s use of the future dangerousness special issue.

---

43 For example, the Legislature created the Texas Forensic Science Commission in 2005 to address the problem of convictions based on junk science; then, in 2015, the Legislature enacted landmark legislation embodied in Article 11.073 of the Texas Code Criminal Procedure, allowing for habeas relief on new science; and the 2017 passage of Article 11.0731 now allows for habeas relief when faulty testing of certain biological materials is discovered.
dangerousness special issue to *broaden* the class of death-eligible defendants. In *Coble*, the CCA sanctioned a “normative” approach to the future dangerousness special issue that had, historically, been associated only with the concept of “moral blameworthiness” in the mitigation special issue. As explained in Section VI below, the mitigation assessment—and the decision whether to extend mercy—is supposed to be wide-open. But by describing future dangerousness assessments as “normative,” in the face of empirical data showing an entrenched problem of false positives, the CCA further untethered the class of people vulnerable to the death penalty from any standard at all, thereby undermining the heightened reliability requirement that is supposed to operate in capital-sentencing proceedings.

Before *Coble*, the CCA routinely denied facial challenges to the future dangerousness special issue but occasionally considered as-applied challenges based on factual sufficiency. After *Coble*, the CCA has routinely denied both facial and as-applied challenges. Along the way, the CCA has never acknowledged that the Supreme Court had only provisionally blessed the Texas sentencing scheme in *Jurek* based, in part, on the threshold assumption that the CCA would undertake the important work of construing key terms to avoid vague and impermissively broad applications. This important work has never been done.

6. **The initial, provisional conclusion about the constitutionality of the future dangerousness special issue was based on an expectation that was never fulfilled.**

As noted above, when the Supreme Court reviewed the Texas capital-sentencing scheme in 1976, the court declined to consider vagueness and overbreadth challenges to the future dangerousness special issue based, *inter alia*, on the assumptions that: (1) the CCA was going to construe key terms; and (2) the state court should be trusted to address the problems. *See Jurek*, 428 U.S. at 272. These assumptions amount to an admission that the plain text, standing alone,
does not do enough to serve the purported function of narrowing the class of murderers who are
dea th-eligible. It was clear to a plurality of the Supreme Court that the statutory text needed to be
construed by a court, but the Supreme Court elected, in 1976, to defer to the state’s highest
criminal court to have the first crack at construing state statutory law.

In adopting that position, the Supreme Court was, in 1976, consistent: it took the same
position in companion cases challenging other states’ capital-sentencing schemes as
unconstitutionally vague and overbroad. For instance, in Gregg, one of the companion cases to
Jurek, the Supreme Court made a similar assumption about the then-new Georgia capital-
sentencing scheme. Georgia’s statute then included an aggravating factor inviting the jury to
decide whether the murder was “outrageously or wantonly vile, horrible or inhuman” in that it
involved, for instance, “depravity of mind” or aggravated battery. Gregg, 428 U.S. at 201. The
petitioner had challenged the constitutionality of this aggravator, arguing that any murder could
be said to involve depravity of mind or aggravated battery; but the Supreme Court insisted: “there
is no reason to assume the Supreme Court of Georgia will adopt such an open-ended construction.”
Id.

Importantly, the Supreme Court’s holding in Gregg was based on at least some evidence
that the state court in Georgia had already shown a willingness to narrow vague, overbroad
statutory language through statutory construction. But in Jurek, the court admitted that there had
only been two death sentences under Texas’s new scheme, one of which was Mr. Jurek’s.
Therefore, the Supreme Court relied on no more than an expectation that the state court in Texas

44 Other members of the Court felt the statute was a mandatory sentencing mechanism and
others found it unconstitutional; the three-member plurality of justices who signed the opinion
finding it constitutional suggested, without discussion, that it needed to be construed to avoid
vagueness—but left this task to the CCA.
would undertake this job. See Jurek, 428 U.S. at 272 (noting that the CCA had “yet to define precisely the meanings of such terms as ‘criminal acts of violence’ or ‘continuing threat to society’” and assuming that it would do so). Moreover, the statute at issue in Gregg was soon thereafter revisited and found wanting in Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980) (plurality opinion) (finding death sentence unconstitutional where only aggravating factor was that the murder had been found “outrageously or wantonly vile”—which the state’s highest court had construed in a way that was unconstitutionally vague).

For over forty years now, the CCA has refused to construe facially vague terms such as “probability,” “criminal acts of violence,” and “continuing threat to society” in the future dangerousness special issue; it then added the confusing “normative” interpretive methodology to the mix. The CCA routinely rejects requests to find the future dangerousness special issue unconstitutionally vague because jurors’ unbridled discretion in interpreting this special issue, replete with vague terms, has led to arbitrary results. These routine rejections occur without providing any analysis and instead rely on boilerplate, conclusory language.

Consider, for instance, King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), decided soon after Jurek. The CCA’s decision contains no detailed discussion of the challenge based on vagueness or the risk of arbitrary imposition of death sentences arising from the future dangerousness special issue. Instead, in King, the CCA merely cited Article 3.01 of the Texas Code of Criminal Procedure, a provision that states no more than that words in statutes are to be given their plain meaning unless specifically defined. Id. at 107. King then makes a passing reference to Jurek, mischaracterizing the holding in that case. The CCA incorrectly claimed that, in Jurek, “the Supreme Court of the United States concluded that the submission of the issues provided by Art. 37.071, supra, constitutionally guided the jury’s determination of the punishment issues.” Id. at
107. Based on this incorrect understanding of Jurek, the CCA then brushed the issue aside in a single sentence: “No special definitions of the terms of that statute were required.” *Id.*

This conclusory assertion is incorrect—as even the Supreme Court in Jurek recognized: definitions *were and still are needed* to accomplish the mandate of appropriately guiding juror discretion. Instead of doing this important work, the CCA has created a body of law that permits the state to “prove” future dangerousness with any evidence or no evidence at all.

The terse discussion in King has been the extent of the CCA’s analysis ever since. Each time the issue has been raised, the CCA has responded with boilerplate text, citing authorities that, in each instance, lead back to King, and ultimately to Jurek. In Coble, for example, the point of error is dismissed in a single sentence stating that the CCA has repeatedly rejected the vagueness claim, capped by a footnote citing four other cases. *See Coble*, 330 S.W.3d at 297, n.150 (citing Druery v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); Blue v. State, 125 S.W.3d 491, 504-505 (Tex. Crim. App. 2003); Martinez v. State, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996); Earhart v. State, 877 S.W.2d 759, 767 (Tex. Crim. App. 1994)).

If one looks back at Druery, one finds that the CCA dismissed the vagueness claim in the same conclusory fashion, citing Earhart, King, and Jurek.

If one then turns to Earhart hoping for insights, one finds the same conclusory rejection of the argument that the vague terms “probability,” “criminal acts of violence,” and “continuing threat to society” needed to be defined, citing King and Fearance v. State, 771 S.W.2d 486, 513 (Tex. Crim. App. 1988). *See Earhart*, 877 S.W.2d at 767.

If one then runs to Fearance, hoping at last for an analysis, one merely finds that a challenge to a term in a different (now defunct) special issue was likewise rejected in conclusory
fashion, citing King. Fearance, 771 S.W.2d at 513 (refusing to define “deliberately” in a now-defunct special issue).  

Likewise, in Turner v. State, 87 S.W.3d 111, 118 (Tex. Crim. App. 2002), also cited in Coble, the CCA rejected a challenge to undefined vague terms “probability,” “criminal acts of violence,” and “continuing threat to society” in a single sentence, citing Chamberlain v. State, 998 S.W.2d 230, 237-38 (Tex. Crim. App. 1999); looking to Chamberlain, one sees that the same argument about the need to define these same terms was hastily rejected, citing King and Jurek.

Another example of the infinitive regress with respect to this profoundly important issue is on display in a recent decision: Suniga v. State, AP-77,041 at p. 128 (Tex. Crim. App. March 6, 2019) (not designated for publication). In Suniga, the CCA summarily rejected the claim that the trial court erred in denying a motion to hold Article 37.071 unconstitutional for failing to define the terms “personal moral culpability of the defendant,” “probability,” “criminal acts of violence,” “continuing threat,” and “society,” citing Luna v. State, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008) and Murphy v. State, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003). Murphy had summarily rejected the same basic claim, citing Ladd v. State, 3 S.W.3d 547, 572-573 (Tex. Crim. App. 1999); Ladd, meanwhile, had summarily rejected the claim, citing Camacho v. State, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993); Camacho had summarily rejected the claim, citing Rougeau v. State, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993); Rougeau had summarily rejected the claim, citing Heckert v. State, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981), which had summarily rejected the claim citing King and Jurek.

45 The Oregon death-penalty sentencing statute includes a “deliberately” special issue modeled after the one Texas has since abandoned. But unlike the Texas version, the term is defined and jurors instructed accordingly.
In short, all roads lead back to the same point of departure: Jurek. But by simply reading Jurek one sees that the failure to define these vague terms was not something that the Supreme Court had sanctioned; Jurek simply assumed this important task of statutory construction would and should be undertaken by the state courts in the first instance. That kind of deference, as an initial matter, may be a legitimate jurisprudential policy in a federal system in which federal courts are supposed to be courts of limited jurisdiction. But as explained below in Section II, by now, over forty years later, the Supreme Court should have ample evidence that the CCA has never been quick to comply with Supreme Court directives when it comes to ensuring that Texas’s death-penalty sentencing scheme is being interpreted and applied in a manner consistent with constitutional mandates. See also Moore v. Texas, 586 U.S. ___ (2019) (reversing Ex parte Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018) for the CCA’s second failure in the same case to comply with the high court’s directives to apply valid clinical standards in assessing claims of intellectual disability in capital cases). That is, the Supreme Court’s provisional deference in Jurek was decidedly misplaced.

By using the language “has yet to define,” Jurek, 428 U.S. at 272, the Supreme Court expressed an expectation that the CCA would render decisions defining and narrowing the terms “probability,” “criminal acts of violence,” “continuing threat,” and “society” as Georgia’s courts had done with at least some vague terms in the statute challenged in Gregg. Instead, ever since Jurek, the CCA has misapplied Jurek, incorrectly insisting that the case stands for the proposition that construing key terms in the future dangerousness special issue was unnecessary.

No facial challenge to the future dangerousness special issue has ever been entertained, by the CCA or the Supreme Court of the United States, in the wake of the CCA’s failure to address concerns that were first raised obliquely in Jurek. Again and again and again, the CCA has just
created a circular firing squad, shooting down these entreaties, as if they were a matter of settled law. But the foundational cases, starting with *Jurek* itself, expose the fallacy. Meanwhile, the CCA has continuously authorized an ever-broader understanding of the future dangerousness special issue as a vehicle that gives the trial court “wide discretion in admitting evidence, including extraneous offenses, relevant to the jury’s determination of a capital murder defendant’s death-worthiness.” *Guy Len Allen v. State*, No. AP-74,951, 2006 Tex. Crim. App. LEXIS 2545, at *24 (Tex. Crim. App. June 28, 2006) (not designated for publication). The future dangerousness special issue was and remains overbroad and vague. Its patent failure to narrow the class of death-eligible individuals is evident in the CCA’s increasingly laissez-faire view of evidence that is relevant to the inquiry and to its latter-day insistence that this special issue invites jurors to engage in a “normative” assessment, which seems to mean no more than that jurors do not have to be guided by anything, including empirically grounded science. The perception that the future dangerousness special issue has been vetted is false. This false perception is built on citations to precedent that amount to a house of cards.

This core component of Article 37.071, the Texas death-penalty sentencing scheme, invites rank speculation rather than narrowing and channeling jurors’ sentencing discretion. As such, it produces unreliable, arbitrary, and capricious results in violation of the Eighth Amendment requirement of heightened reliability and the Fourteenth Amendment’s guarantee of due process.
II. The Litigation That Spawned the One, Inadequate “Improvement” to the Texas Capital-Sentencing Scheme Exposes Deeply Rooted Hostility to the Very Concept of Mitigation.

At least as recently as 2006, the CCA insisted “the Texas death penalty scheme has not changed substantially since Jurek was decided.” Guy Len Allen v. State, No. AP-74,951, 2006 Tex. Crim. App. LEXIS 2545, at *12 (Tex. Crim. App. June 28, 2006) (not designated for publication). The CCA then begrudgingly alluded to one rather substantial (although inadequate) change since Jurek, suggesting that, “to the extent that Article 37.071 has changed, it has been largely to the benefit of defendants charged with capital murder.” Id. at *13. In a footnote, the CCA then acknowledged the adoption of the mitigation special issue, an event borne of years of contentious litigation: “Since Jurek, the Texas death penalty scheme has been amended to address concerns raised by the Supreme Court. For example, § 2(e) was added to address the issue of mitigating evidence in Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).” Id. at n.24.

Reading this understated footnote, one would never intuit the unprecedent battle between the Texas state judiciary and the federal Supreme Court that was waged to obtain the (still inadequate) amendment to Texas’s capital-sentencing scheme found in section 2(e) of Article 37.071.

The problem with the Texas scheme in terms of mitigation first came up in Jurek itself—during oral argument.46 During the argument, Texas’s Attorney General, John Hill, was asked whether the Texas scheme failed to give guided discretion to the jurors about who would get a death sentence in a given case. In response, the Attorney General suggested that the future

dangerousness special issue had already proven that it could be an effective vehicle for jurors to consider and give effect to mitigation. He told an anecdote about how, in another capital case, jurors had been able to consider mitigating evidence (e.g., the defendant’s age, his lack of a prior record, some evidence that the victim, a white police officer, had “hassled” him) and then the jury had answered the future-dangerousness question “no.” Jurek O.A. Transcript at 49-50. In response, another justice noted that Jerry Lane Jurek had been found to be a future danger based on “nothing more than the offense itself, plus four hearsay statements by local citizens that they did not approve of this man’s reputation” and then wanted to know if the future dangerousness special issue really provided “an escape hatch by which the jury may exercise leniency.” Id. at 52-53. The AG did not answer the question directly but instead began describing the heinousness of Jurek’s crime. Next, the AG assured the Supreme Court that, in terms of the type of evidence that could be presented in the punishment phase, there are “[n]o limits other than the constitutionality of the evidence under the United States Constitution.” Id. at 56-57. Yet still today, highly relevant mitigating evidence is being kept from jurors because of the narrow way Texas’s highest criminal court interprets mitigation generally as well as Texas’s statutory definition of mitigating evidence.

The mitigation special issue is the second key component of the Texas death-penalty sentencing scheme that has, since September 1991, been employed in every capital case in which the State seeks death. See TEX. CODE CRIM. PROC. art. 37.071, sec. 2(e)(1). The specific problems with that special issue are described in Section VI below. Here, Mr. Clark provides the tortured history surrounding this (still unconstitutional) component of the Texas scheme. This history shows long-standing misconceptions about mitigation that render the Texas scheme unconstitutional.
A. The Central Holding of Jurek Was Eventually Struck Down after Scores Had Been Sentenced under an Unconstitutional Scheme.

The jury instructions that were adopted post-Furman and applied in Jurek required juries to answer these two special issues:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

TEX. CODE CRIM. PROC. art. 37.0711, sec. 3(b) (repealed in 1991). The statutory jury instructions and verdict forms made no mention of mitigation. That scheme was eventually struck down after the Supreme Court concluded that Texas had, from the outset of the modern death penalty era, been severely and unconstitutionally limiting jurors’ ability to give effect to mitigating evidence—which was supposed to be wide open. See Woodson v. North Carolina, 472 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 586, 601-605 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). That is, for decades, types of evidence that in other jurisdictions were treated as mitigating, such as evidence of intellectual disability and an extremely abusive background, were, in Texas, treated only as aggravating, that is, as a reason to find a person had a probability of committing criminal acts of violence in the future and thus deserved a death sentence.

Importantly, the Supreme Court in Jurek had provisionally concluded, in a short opinion for the court embraced by only three justices, that Texas’s sentencing scheme was constitutional based on the assumption that every jury asked to consider a death sentence would “have before it all possible relevant information about the individual defendant whose fate it must determine.” Jurek, 428 U.S. at 276. Indeed, the Supreme Court stated that having all relevant evidence was “essential,” id., because “[a] jury must be allowed to consider on the basis of all relevant evidence
not only why a death sentence should be imposed, but also why it should not be imposed.” Id. at 271 (emphasis added). The statute that was provisionally approved in Jurek was repealed in 1991 precisely because the Supreme Court finally acknowledged that the Texas scheme had never done that. And even after Jurek was partially reversed, CCA decisions, again and again, have cited Jurek as a case that affirmed the constitutionality of Texas’s death-penalty sentencing scheme—ignoring both the limits of what Jurek had decided and its subsequent history. As explained at length above, Jurek only provisionally approved the future dangerousness special issue based on assumptions that, in the fullness of time, all proved to be false; Jurek did not address the problem related to mitigation at all because that was not an issue presented in that case. That is, in Jurek, no one had argued that Texas’s capital-sentencing scheme impermissibly constrained jurors’ ability to consider and give effect to mitigating evidence. Instead, the focus of the challenge there had been part of a collective strategy seeking to have the death penalty struck down in all instances under the Eighth Amendment, in five consolidated cases. This strategy left it to a few justices on the Supreme Court to characterize the scheme—with some concluding it was a guided-discretion statute whereas others saw it as a mandatory scheme, demonstrating that there were patent problems with the face of Texas’s scheme from the outset since there was not even a consensus among a handful of justices about how the statute was supposed to operate.

When the scheme first blessed in Jurek was finally declared unconstitutional as applied in Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry I), Texas’s part-time Legislature was not in session. Therefore, it was over two years later, in September 1991, when the current mitigation special issue, which tried to fix the problem at issue in Penry I, took effect. Meanwhile, there were scores of people who had been convicted (and many executed) under a scheme dating back to 1976 that had finally and unambiguously declared unconstitutional. Despite the petitioner’s win in Penry,
Texas, aided by the CCA and the Fifth Circuit Court of Appeals, continued to resist corrective measures and refused to apply the win to anyone other than John Paul Penry himself for nearly two decades.

Ultimately, some executions based on sentences under the unconstitutional scheme were halted because the Supreme Court went to extraordinary lengths to intervene in Texas, issuing five merits decisions between 2004-2007 all addressing the same issue.

This history is described more fully below.

**B. The Supreme Court Finally Recognized Texas’s Mitigation Problem in *Penry I***

Texas should have been on notice that something was quite wrong with the Texas scheme from the time of *Jurek*—which emphasized how “essential” it was for jurors to be able to consider mitigating evidence. 48 U.S. at 276. But certainly by 1988, over a decade after *Jurek*, the specific problem with the lack of a mechanism whereby jurors could consider and give effect to mitigating evidence finally caught the attention of at least one justice on the Supreme Court. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), Justice O’Connor articulated concerns that Texas’s scheme seemed to pose a problem of constitutional proportion because it did not really allow jurors to give effect to evidence suggesting that death should not be imposed, *i.e.*, mitigating evidence. *See id.* at 185 (O’Connor, J., concurring in the judgment).47 Although litigants had been complaining about this problem for some time, by 1988, a higher authority was signaling to Texas courts that the Texas death-penalty scheme had a serious flaw.

The year after Justice O’Connor had shed light on the problem in *Franklin*, the Supreme Court took up another Texas death case: *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). Luckily, 47 In *Franklin*, the issue presented was narrow: whether the Texas special issues had allowed a jury to give constitutionally adequate consideration to a defendant’s evidence of “residual doubt” and good behavior in prison.
Penry’s lawyer had preserved the issue, challenging the inadequacy of Texas’s death-penalty sentencing scheme because it failed to provide a means for jurors to exercise a discretionary grant of mercy based on the existence of mitigating circumstances; Penry’s lawyer had asked for, and been denied, an instruction that would at least have permitted jurors to decide whether aggravating factors were outweighed by mitigating evidence before a death sentence could be imposed. Justice O’Connor, in analyzing the Texas scheme, insisted that the Constitution requires that states ensure that sentencers are permitted to react to mitigating evidence. Permitting jurors to react, Justice O’Connor explained, did not risk inviting an unguided emotional response; instead, “full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ‘reasoned moral response to the defendant’s background, character, and crime.’” 492 U.S. at 328 (quoting Franklin, 48 at 184) (O’Connor, J., concurring).

In Penry I, the Supreme Court held that the Texas capital-sentencing scheme was indeed unconstitutional as applied because neither the “deliberateness” special issue nor the “future dangerousness” special issue that existed at that time gave jurors any means to consider Johnny Paul Penry’s mitigating evidence of intellectual disability and severe childhood abuse. And with Penry I, any conceivable ambiguity about the constitutionality of Texas’s death-penalty sentencing scheme had been eliminated.

But what about all of the people who had been sentenced under the scheme that, as of June 1989, was finally declared unconstitutional as had been applied in every case because jurors had no mechanism to consider and give effect to mitigating evidence and thus choose life over death?

Scores of individuals had already been executed under the old scheme before the Supreme Court intervened; and scores more who had been sentenced under the unconstitutional scheme were executed as the issue continued to be litigated for nearly two more decades. See Jordan
Steiker, “Penry v. Lynaugh: The Hazards of Predicting the Future,” DEATH PENALTY STORIES at 278 (Foundation Press 2009) [hereafter “Steiker Penry”]. And today, because of the text of the mitigation special issue and the way the CCA has interpreted that text, individuals continue to be executed and sentenced to death in cases where the jury was prevented from hearing, let alone giving effect to, all relevant mitigating evidence.

C. Texas’s Interim “Fix” for the Mitigation Problem Created Yet Another Problem.

Texas was forced to repeal and replace its death-penalty sentencing scheme, abandoning the special issue on deliberateness and replacing it with a special issue regarding mitigation.48 But, as noted above, from June 1989 when Penry I was decided, until September 1991, there was no legislative fix of any kind in place; yet during this period, Texas continued to seek death sentences. Most trial courts approached the problem by recourse to an exceedingly odd “nullification” instruction. See Steiker Penry, above, at 303. Jurors were directed to consider all mitigating evidence and, if they found any of that evidence justified a life sentence without the possibility of parole, they were told to answer one of the special issues (about deliberateness or future dangerousness) to make it work out so there would be no death sentence by answering at least one question “no” even if jurors believed the correct answer was “yes.” In other words, the instruction directed the jurors to lie to achieve an effect. Moreover, the verdict form, in most instances, still did not mention the word “mitigation.” Id.

In Johnny Paul Penry’s retrial, the jury was given one of these “nullification” instructions. That instruction became the subject of his next trip to the Supreme Court, with his lawyers arguing

that the bizarre, confusing nullification instruction did not cure the *Penry I* problem. Meanwhile, the State argued that evidence of mental retardation and childhood abuse was not truly mitigating anyway because the defense had not demonstrated how these circumstances explained his violent crimes. As the prosecution put it in closing argument: “There is no connection between child abuse and criminal acts. No connection;” and “We got mental retardation, and how is that a mitigating factor? How does that reduce his blame?” Steiker *Penry*, above, at 304.

Other defendants, sentenced between June 1989 when *Penry I* was decided but before September 1991 when the mitigation special issue was adopted, could only get a life sentence if jurors were willing to lie when filling out the verdict form; meanwhile, prosecutors continued to take advantage of the gaping hole in the Texas capital jury charge. For instance, in the trial of Robert Tennard, who offered evidence he had an IQ of 67, well within range of intellectual disability/mental retardation, this evidence was treated as relevant, if at all, only to the issue of future dangerousness, the exact same issue that had been successfully challenged in *Penry I*. The prosecutor had this to say about Mr. Tennard’s low IQ, which suggested he had undiagnosed mental retardation: “the reasons why he become a danger are not really relevant.” Steiker *Penry*, above, at 307. Despite the unmistakable resonance with the facts of *Penry I*, the CCA was not receptive to Tennard’s protests. Citing *Penry I*, the CCA found no *Penry I* error. The CCA defended this holding by making a distinction without a difference, insisting that Mr. Tennard had failed to prove that his “low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct.” *Ex parte Tennard*, 960 S.W.2d 57, 62 (Tex. Crim. App. 1997).

Initially, the Supreme Court denied petitions for writs of certiorari raising challenges
similar to the one that had prevailed in Penry I. See, e.g., Johnson v. Texas, 509 U.S. 350 (1993) (affirming death sentence even though the jurors were not allowed to give full mitigating effect to the defendant's youth under the Texas death penalty statute). But soon after the CCA had strained for an adverse result in Tennard, the Supreme Court decided Penry v. Johnson, 532 U.S. 782 (2001) aka “Penry II.” In Johnny Paul Penry’s second trip to the Supreme Court, the court found that requiring jurors to answer the special issues dishonestly to give effect to Penry’s mitigation had “made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation.” Penry II, 532 U.S. at 799. That should have been the end of the debate regarding the inadequacy of Texas’s capital-sentencing statute—but it was not.

D. Texas Courts Continued to Resist Clear Directives from the Supreme Court about the Role of Mitigation in Capital Sentencing Even after Penry II.

Despite the clarity of Penry II, courts in Texas continued to resist applying the law so as to give relief to all who had been sentenced to death in cases with no jury instructions about mitigation but only a bizarre nullification instruction. For instance, when Tennard went to the Fifth Circuit, that court did not address Penry II. He was denied a full appeal based on a standard the Fifth Circuit had adopted, inspired by the CCA’s pre-Penry II jurisprudence. The Fifth Circuit held that Tennard’s IQ of 67 was not mitigating because it did not amount to a “uniquely severe condition” and because Mr. Tennard had not established that his crime could be “attributable” to his low IQ. Tennard v. Cockrell, 284 F.3d 591, 596-97 (5th Cir. 2002). The latter became known as the “nexus requirement,” the court-invented rule that mitigating evidence was not really mitigating unless it explained why the crime had occurred.

In erecting this additional barrier, the Fifth Circuit was following the CCA’s lead—adopting the position argued by the prosecutor during Johnny Paul Penry’s second trial. Steiker Penry, above, at 304. By 1994, five years after Penry I, the CCA had adopted interpretive glosses
that ensured most of what it termed “purported Penry claims,” *Earhart v. State*, 877 S.W.2d 759, 764 (Tex. Crim. App. 1994), would be denied. Primarily, such claims failed the CCA-invented “nexus requirement,” under which a defendant claiming Penry error was obligated to show a causal link between his claimed mitigating circumstances and his crime. *Id.* Absent this showing, the CCA decided that mitigating evidence was not really mitigating, and, hence, *Penry I* did not apply. See, *e.g.*, *Richardson v. State*, 879 S.W.2d 874, 884-85 (Tex. Crim. App. 1993) (explaining that “sentencers must be allowed to consider and give effect to proffered evidence of a defendant’s background and character *if*, from the viewpoint of society as a whole, that evidence could reasonably be thought mitigating, *i.e.*, *if* there is a nexus between that evidence and the commission of the offense which tends to excuse the commission of the offense”) (emphasis added).

The CCA also imposed a burden on those entitled to *Penry I* relief to prove the “severity” of their mitigating circumstances. If the CCA felt that the mitigating evidence in question did not match the specific severity of Johnny Paul Penry’s, then the CCA decided that *Penry I* did not require relief. See, *e.g.*, *Trevino v. State*, 815 S.W.2d 592, 622 (Tex. Crim. App. 1991) (“allowing the jury to express its ‘reasoned moral response’ means something more than affording the jury the opportunity to express its ‘sympathy or emotion’ towards the defendant and as such the evidence presented must be the same or of similar character and quality as that found in *Penry.*”).

These “nexus” and “severity” and same-as-in-*Penry* requirements foreclosed virtually all *Penry* claims at that time based on a “no harm no foul” type of analysis. See *Ex parte Gonzales*, 204 S.W.3d 391, 396 (Tex. Crim. App. 2006) (listing cases); see also *Satterwhite v. State*, 858 S.W.2d 412, 425 (Tex. Crim. App. 1993) (declining to address adequacy of nullification instruction because “on this record appellant has not presented any mitigating evidence which has relevance to appellant’s moral culpability beyond the scope of the special issues.”).
The CCA held that the old deliberateness and future dangerousness special issues, in conjunction with the nullification instruction, had been sufficient to protect defendants’ Eighth Amendment right to have a jury consider mitigating evidence even when the Supreme Court had said that they were not. In the CCA’s view, no *Penry* violation could have occurred unless the evidence presented at the punishment phase was beyond the scope of the former special issues *and* met the “nexus,” “severity,” and same-as-in-*Penry* screening requirements—and, in the CCA’s eyes, no mitigation ever satisfied this standard. That is, by recourse to these requirements, invented after-the-fact, the CCA continued to insist that “virtually all evidence, including evidence of childhood trauma, drug addiction, sexual abuse, low intelligence, psychiatric illness, post-traumatic stress disorder, could be adequately addressed via the [future] dangerousness issue despite the fact that such evidence plainly supported rather than undermined a jury’s finding of dangerousness.” Steiker *Penry*, above, at 301.

These additional “nexus,” “severity,” and same-as-in-*Penry* requirements, not found in the Supreme Court’s mitigation jurisprudence, meant that almost all individuals in Texas who were entitled to relief under *Penry I* were being denied relief in federal court too. See, e.g., *Robertson v. Cockrell*, 325 F.3d 243, 253 (5th Cir. 2003) (identifying only one defendant whom the court had concluded satisfied the nexus requirement and thus had been entitled to *Penry* relief). The CCA and the Fifth Circuit dug in their heels even after the Supreme Court, having heard Johnny Paul Penry’s case for a second time, insisted that constitutional error occurs whenever a sentencer is precluded from giving “full consideration and full effect to mitigating circumstances.”” *Penry II*, 532 U.S. at 797 (emphasis retained).

In *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004) (*Smith I-S*), the CCA yet again refused relief to an individual sentenced to death under the mechanism found unconstitutional, as
applied, in *Penry I*. The CCA held that: (1) Smith’s mitigating evidence of learning disabilities, low IQ, participation in special education classes in school, and troubled childhood could have been given effect through the former special issues; and (2) the nullification instruction provided an adequate vehicle for the jury to give effect to mitigating evidence. *Id.* at 412-17. The Supreme Court then took the case and reversed, finding that (1) there was a reasonable likelihood the jury was unable to express its reasoned moral response to Smith’s mitigating evidence through the former special issues; and (2) the nullification instruction given in his trial was not materially different from that given in Johnny Paul Penry’s trial, which had failed to provide the jury an adequate vehicle to express its reasoned moral response to the evidence. *Smith v. Texas*, 543 U.S. 33, 43-48 (2004) (*Smith I*).

On remand, the CCA identified a new obstacle. The CCA held that Mr. Smith had failed to object to the nullification instruction and, on that basis, applied a state law “egregious harm” test to the claim and then determined that Mr. Smith had not satisfied the test. *Ex parte Smith*, 185 S.W.3d 455, 457 (Tex. Crim. App. 2006) (*Smith II-S*). Miraculously, the Supreme Court took notice and again reversed, finding that the CCA had “misunderstood the interplay of *Penry I* and *Penry II*, and it mistook which of Smith’s claims furnished the basis for this Court’s opinion in *Smith I.*” *Smith v. Texas*, 127 S. Ct. 1686, 1698 (2007) (*Smith II*).

While this protracted back-and-forth between the CCA and the Supreme Court was underway, individuals were executed who had been sentenced under the Texas statutory scheme that the Supreme Court had already found to be unconstitutional, as applied, in *Penry I* for reasons that applied equally to all: there had been no place on the verdict form for jurors to give effect to mitigating evidence adduced of childhood abuse, low intellectual functioning, mental illness, or any other facts that might have compelled at least one juror to opt for mercy instead of a death
sentence.

In stark contrast to Texas’s obstreperousness, Oregon, the only other state that had a capital-sentencing scheme identical to Texas’s, had been quick to act following *Penry I*. The Oregon Supreme Court had immediately invalidated the death sentences of all those sentenced under that scheme and then offered commutations or new trials. *See* William R. Long, *A Time to Kill? Reflections on the Oregon Death Penalty*, Or. St. B. Bull., Apr. 2002. But in Texas, resistance remained monolithic up through 2007.

In 2007, the same year that the Supreme Court agreed to hear Mr. Smith’s case for a second time, the court also decided two other Texas death-penalty cases: *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) and *Brewer v. Quarterman*, 550 U.S. 286 (2007). The Supreme Court reversed the CCA in all three. Although it should have been clear since at least 1989 when *Penry I* was decided, the Supreme Court was now categorical that the *Penry* line of cases stood for the proposition that sentencers must be allowed to give effect to all evidence that might incline a juror away from a death sentence and that Texas’s pre-1991, *Jurek*-era special issues did not do so.

With *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 260 (2007), the Supreme Court held that “consideration” of mitigation evidence “would be meaningless unless the jury not only [has] such evidence available to it, but also [is] permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence.” *Id.* (internal quotations omitted). The Supreme Court again explained that each juror is entitled to broad discretion in assessing the import of whatever mitigating evidence the defense proffers; and the State may not limit this evidence to those categories that the *State* deems mitigating. *Abdul-Kabir* also expressly harkened back to Johnny Paul Penry: “[l]ike Penry’s evidence, Cole’s evidence of childhood deprivation and lack of self-

---

49 This article is available at https://www.osbar.org/publications/bulletin/02apr/kill.htm.
control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence.” 550 U.S. at 259.

In Brewer, a companion case to Abdul-Kabir, the Supreme Court underscored that the holdings in these cases were not based on new law but on long-standing principles dating back at least to Lockett, a case decided at the dawn of the modern death-penalty era: “we have long recognized that a sentencing jury must be able to give a ‘reasoned moral response’ to a defendant’s mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death.” Brewer, 550 U.S. at 1709 (citing, inter alia, Lockett v. Ohio, 438 U.S. 586 (1978)). The court then chided the CCA for a holding that “again” “was both ‘contrary to’ and ‘involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” Id. at 1710 (quoting 28 U.S.C. § 2254(d)).

Brewer is striking in its emphasis on how well-settled the issue should have been, seething with irritation about the lower courts’ failure to get with the program. See, e.g.:

- “It may well be true that Brewer’s mitigating evidence was less compelling than Penry’s, but, contrary to the view of the CCA, that difference does not provide an acceptable justification for refusing to apply the reasoning in Penry I to this case.” Id. at 1712.

- “Also unpersuasive in distinguishing the instant case from others to which Penry I applies is the Fifth Circuit’s explanation regarding the lack of expert evidence in Brewer’s case (as compared to that presented by the petitioner in Abdul-Kabir) and its distinction between mental illness and mental retardation. . . . Nowhere in our Penry line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability.” Id.

- “[T]he Court of Appeals mischaracterized the law as demanding only that such evidence be given ‘sufficient mitigating effect,’ and improperly equated ‘sufficient effect’ with ‘full effect.’ This is not consistent with the reasoning of our opinion issued after Penry’s resentencing (and before the Fifth Circuit’s opinion in this case). . . . Like the ‘‘constitutional relevance’’ standard that we rejected in Tennard, a ‘sufficient effect’ standard has ‘no foundation in the decisions of this Court.’” Id. at 1713 (internal citations and footnotes omitted).
Brewer ends with an exclamation mark that should have ended any debate about which entity, in our federalist system, is supposed to be the final arbiter with respect to matters of federal constitutional law: “these conclusions [of the courts below] fail to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death. Accordingly, the judgment of the Court of Appeals is reversed.” Id. at 1714.

Certainly, the volume and vehemence of attention paid to a single issue affecting a single state—five merits decisions between 2004-2007—is likely unprecedented. Steiker, *Penry*, above, at 809 (emphasizing the small number of surviving inmates affected by these decisions because most sentenced under the old scheme had already been excluded). But today, a decade after that flurry of action, the problem persists. As explained in Sections V, VI, and VII below, neither the CCA nor the federal judiciary have seriously considered the challenges that are routinely made to various aspects of the *current* Texas death-penalty sentencing scheme, which continues to cramp jurors’ ability to consider all relevant mitigating evidence that the accused has to offer. Additionally, Texas state courts in their interpretation of what constitutes “relevant” mitigating evidence, have continued to narrow the scope of what defendants may even put before the fact-finder. That is, the problems with the current text and interpretation of the mitigation special issue, which were not at issue in any of the *Penry* jurisprudence, continue to stack the deck against the quest for mercy instead of allowing the wide-open consideration that the Constitution requires.

A fair examination of the history that led the Texas Legislature to adopt the mitigation special issue shows a fundamental hostility to the very concept of mitigation, which has yet to be resolved. Texas’s failure to accept the role of mitigating evidence in rendering a death-penalty
scheme constitutional has left the state with a facially unconstitutional sentencing mechanism.
III. Texas’s Current Capital-Sentencing Statute Does Not Narrow the Class of People Susceptible to Being Killed by the State as Punishment for Their Crimes but Has Instead Expanded the Class of Death-Eligible Individuals in a Manner at Odds with Any Valid Penological Purpose.

The Supreme Court has long sought to make the death penalty less arbitrary by insisting that its use should be restricted to those Justice Souter referred to as “the worst of the worst.” *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J, dissenting). That is, a core component of the Supreme Court’s modern death-penalty jurisprudence is the principle that “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

As noted above, back when *Jurek* was decided, the Supreme Court was under the impression that capital murder in Texas would be defined narrowly, and thus only a small class of murderers would be eligible for death sentences:

The new [circa 1974] 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, 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.

*Jurek*, 428 U.S. at 268 (citing Tex. Penal Code § 19.03 (1974)). Yet since *Jurek* was decided, the number of capital-qualifying offenses has expanded dramatically in multiple ways.

First, Section 19.03 of the Penal Code has nearly doubled since *Jurek* was decided in 1976. Additionally, the “law of parties,” embodied in other provisions in the Penal Code, permits sentencing someone to death who neither killed nor intended to kill. Meanwhile, other amendments
to the Penal Code have expanded death-eligibility to include those who end not just actual but potential life.

Separately and cumulatively, these components of the Texas capital-sentencing scheme exponentially and unconstitutionally expand, rather than narrow, the individuals who can be sentenced to death in Texas. By expanding rather than narrowing, these provisions are contrary to the Supreme Court’s most basic directives under the Eighth and Fourteenth Amendments and otherwise offend the Constitution.

A. An Overinclusive Statute Has Been Amended Repeatedly to Broaden the Categories of Death-Eligible Crimes, Not to Narrow the Class of Death-Eligible Individuals.

Section 19.03 of the Texas Penal Code has nearly doubled from five categories in 1976 to nine today. See TEX. PENAL CODE § 19.03(a). Moreover, several of the nine categories of crimes that involve “intentionally or knowingly caus[ing] the death of an individual” include multiple sub-categories:

(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);

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

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

(5) the person, while incarcerated in a penal institution, murders another:
   (A) who is employed in the operation of the penal institution; or
   (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
(6) the person:
   (A) while incarcerated for an offense under this section or Section 19.02, murders another; or
   (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:
   (A) during the same criminal transaction; or
   (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under 10 years of age;50 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.

Id. § 19.03(a). Most permutations of capital murder focus, not on the savagery of the killing, but on the status of the deceased, for instance, as a police officer, an employee of a penal institution, or a child. Also, subsection (2) of section 19.03 means that every convenience-store-robbery-gone-bad qualifies as capital murder in Texas, even where the facts show that murder was not part of any premeditated plan. See, e.g., Suniga v. State, AP-77,041 (Tex. Crim. App. March 6, 2019) (not designated for publication) (involving imposition of a death sentence for a shooting death that occurred after the two co-defendants had grabbed a tip jar, started to leave a restaurant, and then one defendant fired shots back at an employee only after being startled by the sound of a door banging shut behind them).51

50 A law enacted in the 2019 legislative session, which will go into effect on September, 1, 2019, raises the age to 15.

51 The latter facts, which were not controverted by any witness, suggest the shooting was not planned but was a reaction to being startled by a slammed door. These facts are, however, left out of the CCA’s recitation of the facts in resolving the direct appeal. Troublingly, the CCA’s
Additionally, the often criticized, but still operative, “law of parties” permits the State to seek death against someone who did not kill or intend to kill anyone.\textsuperscript{52} That is, the Texas Penal Code currently permits holding an individual criminally responsible and sentencing that person to death for a murder instigated and committed by another. The statute does not require distinguishing between a “principal” and an “accomplice” in charging or convicting. Instead, the law relies on a tautology: “[a] person is criminally responsible as a party to an offense if the offense is committed . . . by the conduct of another for which he is criminally responsible[.]” TEX. PENAL CODE § 7.01(a).

A person is considered “criminally responsible” for the “conduct of another” if:

1. acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;

2. acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

3. having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

omission creates an entirely different portrait of the events that culminated in the admittedly tragic death of a young man.

\textsuperscript{52} Commentators in the public media have bemoaned Texas’s outlier status among a minority of jurisdictions that permit capital punishment for those convicted of capital offenses as conspirators. See Hooman Hedayati, \textit{Texas “law of parties” needs to be revamped}, \textsc{Houston Chronicle} (July 22, 2016), https://www.houstonchronicle.com/opinion/outlook/article/Hedayati-Texas-law-of-parties-needsto-be-8404266.php (“Texas is not the only state that holds co-conspirators responsible for one another’s criminal acts. However, it is one of few states that applies the death sentence to them.”); \textit{Texas needs to reform its ‘law of parties,’ which allows death penalty for people who haven’t killed anyone}, \textsc{Dallas Morning News} (Feb. 9, 2017), https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-reform-law-parties allows-death-penalty-people-killed-anyone (“To date, 10 people who did not commit the actual killing have been executed in the U.S. under ‘parties’ or similar laws. Half of them have been in Texas. In some cases, the actual killer received a lesser sentence than the accomplice who was put to death.”).
Id. § 7.02(a). Also, the Penal Code makes clear that, if one felony was intended, and then another felony occurs, everyone involved in the conspiracy to commit the first felony can be held liable for whatever results:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Id. § 7.02(b).

The Supreme Court has, in principle, restricted the use of the law-of-parties rule in the death-penalty context. See Enmund v. Florida, 458 U.S. 782 (1982) (holding that sentencing a defendant to death violates the Eighth Amendment when the defendant did not kill, attempt to kill, or intend to kill anyone); but see Tison v. Arizona, 481 U.S. 137 (1987) (permitting reliance on the law of parties to support application of the death penalty for a defendant who did not intend to cause the death, if he or she played a “major” role in the underlying crime and showed “reckless indifference” to human life).

Excluding “contract murders,” which constitute an additional category, the Death Penalty Information Center (“DPIC”) has identified ten cases involving individuals who have been executed under the law of parties during the modern death penalty era, half by the State of Texas:\footnote{Information available at https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim. This collection does not include members of the “Texas seven,” who were all convicted of capital murder and sentenced to death after a prison break that resulted in one of the seven men shooting a security guard while others, for instance, waited elsewhere in a car. See, e.g., Jolie McCullough, \textit{In last-minute ruling, U.S. Supreme Court stops execution of “Texas Seven” prisoner}, \textit{Texas Tribune} (March 28, 2019) (discussing the facts of Patrick Murphy’s crime), available at https://www.texastribune.org/2019/03/28/texas-seven-patrick-murphy-execution-law-of-parties/}
<table>
<thead>
<tr>
<th>Name</th>
<th>State</th>
<th>Execution Date</th>
<th>Description of Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doyle Skillern</td>
<td>TX</td>
<td>1/16/1985</td>
<td>Accomplice in the murder of an undercover narcotics agent. He was waiting in a car nearby when the murder happened. The shooter is serving a life sentence, but eligible for parole. (&quot;Killers’ Fates Diverged; Accomplice Is Executed; Triggerman Faces Parole,&quot; <em>Washington Post</em>, Jan. 16, 1985).</td>
</tr>
<tr>
<td>Beauford White</td>
<td>FL</td>
<td>8/18/1987</td>
<td>Stood guard while two men went into a house looking for drugs and then killed six of the house’s occupants. The two shooters were executed as well. (&quot;Florida Prisoner Executed after 10-Year Fight for Life,” <em>St. Petersburg Times</em>, Aug. 29, 1987).</td>
</tr>
<tr>
<td>G.W. Green</td>
<td>TX</td>
<td>11/12/1991</td>
<td>Participated in a robbery, where one of his accomplices shot the probation officer who owned the home. The shooter was executed on 9/10/87 and another accomplice is serving a life sentence. (“15 Years After Crime, Texas Inmate Is Executed,” <em>New York Times</em>, Nov. 13, 1991).</td>
</tr>
<tr>
<td>Carlos Santana</td>
<td>TX</td>
<td>4/23/1993</td>
<td>Participated in a robbery. During the robbery his accomplice murdered a security guard. His accomplice was executed on December 8, 1998. (Texas Department of Criminal Justice).</td>
</tr>
<tr>
<td>Jessie Gutierrez</td>
<td>TX</td>
<td>9/17/1994</td>
<td>Participated in a robbery with his brother, Jose Gutierrez, who killed the victim. Jessie was apparently present during the murder and even brandished a gun during the robbery. Jose was also executed (in 1999). (Texas Attorney General press release, Nov. 17, 1999).</td>
</tr>
<tr>
<td>Gregory Resnover</td>
<td>IN</td>
<td>12/8/1994</td>
<td>A police officer was killed when trying to arrest Resnover and Tommie J. Smith. Smith and Resnover both fired shots at the police, but Smith was convicted as the one who fired the fatal shot. Smith was executed on 7/18/1996. (“Capital Punishment in Indiana,” <em>Indy Star</em>, June 15, 2007).</td>
</tr>
<tr>
<td>Dennis Skillicorn</td>
<td>MO</td>
<td>5/20/2009</td>
<td>Skillicorn and co-defendants Allen Nicklasson and Tim DeGraffenreid kidnapped Richard Drummond, who had stopped</td>
</tr>
</tbody>
</table>
to help the three with their broken-down car. While Skillicorn and DeGraffenreid waited in the car, Nicklasson led Drummond a 1/4 mile away and shot the victim. (“Missouri is about to execute Dennis Skillicorn. The state’s death penalty may not outlive him very long,” *Kansas City Pitch*, May 12, 2009).

<table>
<thead>
<tr>
<th>Robert Thompson</th>
<th>TX</th>
<th>11/19/2009</th>
</tr>
</thead>
</table>
| Thompson and co-defendant Sammy Butler entered a Seven Eleven convenience store in Houston with intent to rob. Thompson shot one clerk who survived the attack. On the way out, another clerk came out firing shots at the vehicle. Butler shot and killed that clerk. Butler was given a life sentence. The Texas Board of Pardon and Paroles recommended clemency for Thompson, which Texas Governor Rick Perry rejected. ("Killer executed after Perry rejects panel's advice," *Houston Chronicle*, November 20, 2009).

Even in the wake of *Tison v. Arizona*, there are obvious problems with Texas’s instantiation of the law of parties as a theory for obtaining a death sentence, which expressly vitiates the intent requirement that is supposed to be a fundamental element of any capital murder. Texas has, therefore, tried to craft a work-around, in the form of the “parties” special issue found in section 2(2)(b)(2) of Article 37.071 of the Texas Code of Criminal Procedure. In cases in which the guilt-phase jury charge permits the jury to find the defendant guilty as a party under section 7.01 or 7.02 of the Penal Code, the jury is supposed to answer the following additional, convoluted question “yes” or “no”: Did “[t]he defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken[?]” TEX. CODE CRIM. PROC. art. 37.071, sec. (2)(b)(2). If the jury answers “yes” to this question (as well as “yes” to the “future dangerousness” special issue and “no” to the “mitigation” special issue), then a death sentence will be imposed.

Case law suggests that the State can prove beyond a reasonable doubt that someone “anticipated that a human life would be taken” simply through circumstantial evidence that someone waited outside while another person went inside planning to rob a store and then shot
someone in the process. See, e.g., Wood v. State, 18 S.W.3d 642 (Tex. Crim. App. 2000) (involving capital murder conviction based in part on a witness’s description of his memory of what he had seen on a subsequently destroyed videotape of the offense showing the shooter walk into the store with a gun and shoot the store clerk while the death-sentenced appellant was outside of the store waiting by a truck).

As one former member of the CCA has noted, there are currently 91 ways to commit capital murder as a principal actor:

1. murder of a peace officer,
2. murder of a fireman,
3. murder in the course of committing kidnapping,
4. murder in the course of attempt to commit kidnapping,
5. murder in the course of committing burglary,
6. murder in the course of attempt to commit burglary,
7. murder in the course of committing robbery,
8. murder in the course of attempt to commit robbery,
9. murder in the course of committing aggravated sexual assault,
10. murder in the course of attempt to commit aggravated sexual assault,
11. murder in the course of committing arson,
12. murder in the course of attempt to commit arson,
13. murder in the course of committing obstruction,
14. murder in the course of attempt to commit obstruction,
15. murder in the course of committing retaliation,
16. murder in the course of attempt to commit retaliation,
17. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause any type of reaction to his threat by an official organized to deal with emergencies,

18. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause a reaction to his threat by a volunteer agency organized to deal with emergencies,

19. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a building,

20. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a room,

21. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a place of assembly,

22. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the place to which the public has access,

23. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the place of employment or occupation,

24. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the aircraft,

25. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the automobile,

26. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the other form of conveyance,

27. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the public place,
28. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public communications,

29. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public transportation,

30. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public water,

31. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of gas,

32. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of power supply,

33. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of other public service,

34. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to place the public or a substantial group of the public in fear of serious bodily injury,

35. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of the federal government,

36. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of the state,

37. murder in the course of committing a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of a political subdivision of the state,

38. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause a reaction to his threat by an official to deal with emergencies,

38. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to
cause a reaction to his threat by a volunteer agency organized to deal with emergencies,

39. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a building,

40. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a room,

41. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the occupation or use of a place of assembly,

42. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the place to which the public has access,

43. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the place of employment or occupation,

44. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the aircraft,

45. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the automobile,

46. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the other form of conveyance,

47. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to prevent or interrupt the public place,

48. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public communications,

49. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public transportation,
50. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of public water,

51. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of gas,

52. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of power supply,

53. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to cause impairment or interruption of other public service,

54. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to place the public or a substantial group of the public in fear of serious bodily injury,

55. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of the federal government,

56. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of the state,

57. murder in the course of attempting to commit a terroristic threat by threatening to commit any offense involving violence to any person or property with intent to influence the conduct or activities of a branch or agency of a political subdivision of the state,

58. murder for remuneration,

59. murder for the promise of remuneration,

60. murder while escaping from a penal institution,

61. murder while attempting to escape from a penal institution,

62. murder while incarcerated in a penal institution,

63. murder with the intent to establish, maintain, or participate in a combination,
64. murder with the intent to establish, maintain, or participate in the profits of a combination,

65. murder while incarcerated for capital murder,

66. murder while incarcerated for murder,

67. murder while serving a sentence of life imprisonment for aggravated kidnapping,

68. murder while serving a sentence of life imprisonment for aggravated sexual assault,

69. murder while serving a sentence of life imprisonment for aggravated robbery,

70. murder while serving a sentence of ninety-nine years for aggravated kidnapping,

71. murder while serving a sentence of ninety-nine years for aggravated sexual assault,

72. murder while serving a sentence of ninety-nine years for aggravated robbery,

73. murder of more than one person during the same criminal transaction,

74. murder of more than one person pursuant to the same scheme or course of conduct,

75. murder of a person under six years of age,

76. murder of another person in retaliation for the service as justice of the supreme court,

77. murder of another person in retaliation for the service as judge of the court of criminal appeals,

78. murder of another person in retaliation for the service as justice of a court of appeals,

79. murder of another person in retaliation for the service as a judge of a district court,

80. murder of another person in retaliation for the service as a judge of a constitutional county court,
81. murder of another person in retaliation for the service as a judge of a statutory county court,

82. murder of another person in retaliation for the service as a judge of a justice court,

83. murder of another person in retaliation for the service as a judge of a municipal court,

84. murder of another person in retaliation for the status as justice of the supreme court,

85. murder of another person in retaliation for the status as judge of the court of criminal appeals,

86. murder of another person in retaliation for the status as justice of a court of appeals,

87. murder of another person in retaliation for the status as a judge of a district court,

88. murder of another person in retaliation for the status as a judge of a constitutional county court,

89. murder of another person in retaliation for the status as a judge of a statutory county court,

90. murder of another person in retaliation for the status as a judge of a justice court, and

91. murder of another person in retaliation for status as a judge of a municipal court.

Ex Parte Murphy, 495 S.W.3d 282, Appendix A, “Possible Ways of Committing Capital Murder Pursuant to Texas Penal Code Section 19.03,” (Tex. Crim. App. 2016) (Alcala, J., concurring in part and dissenting in part). These 91 ways burgeon to 273 upon factoring in convictions for conspiracy and convictions under the law of parties. Id. at 283. Even the Code of Hammurabi, created in the 18th century BCE, was more circumscribed.

In yet another dissent, former CCA Judge Alcala raised the prospect that imposing a death sentence under the law of parties is contrary to evolving standards of decency, reflected in the fact,
for instance, that “more than thirty jurisdictions (of fifty-two, counting the federal government and Washington, D.C.) have made legislative or judicial decisions disallowing the death penalty for non-triggermen who lacked the intent to kill.” *Ex Parte Joseph C. Garcia*, WR-64,582-03 (Nov. 30, 2018) (Alcala, J., dissenting) (citing Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1400-01 (2011)).

By permitting imposing a death sentence on someone who did not kill, attempt to kill, or intend to kill, Article 27.017, section 2(b)(2) offends contemporary standards of decency.

The death penalty is not reserved for the “worst of the worst” when one jury can give the person who strikes the fatal blow a life sentence, yet another jury can send his get-away driver to the death chamber. This incongruity is possible because the Texas capital murder statute does not narrow but instead expands the class of people eligible to be killed by the State for their crimes.

**B. Another Set of Amendments to the Penal Code Has Expanded Death-Eligibility by Expanding the Definitions of Both Life and Death in a Manner that Violates Multiple Constitutional Provisions.**

The Texas Penal Code defines “person” as “an individual, corporation, or association.” TEX. PENAL CODE § 1.07(a)(38). In 2003, the Texas Legislature amended Texas Penal Code section 1.07 to provide as follows:

---

54 These authorities explain that twenty-one of the thirty jurisdictions have outlawed the death penalty altogether, but thirteen that permit the death penalty disallow that punishment for parties to a capital offense who lacked any intent to kill. The following death-penalty jurisdictions have legislative or judicial decisions against use of the death penalty for non-triggermen who lacked the intent to kill: Alabama, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oregon, Pennsylvania, Virginia, and Wyoming. In addition, the applicant in *Ex parte Joseph Garcia*, noted the following jurisdictions that do not employ the death penalty: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and the District of Columbia.
“Individual” means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

(49) “Death” includes, for an individual who is an unborn child, the failure to be born alive.

Tex. Sess. Law Serv. Ch. 822 (S.B. 319) (hereafter referred to collectively as “Senate Bill 319”).

As a result of Senate Bill 319, under current law, terminating an embryo or fetus at any stage of development qualifies as capital murder.55

In fact, as a result of Senate Bill 319, a person can be held liable for capital murder for the same offense under two different theories.56 First, someone who kills an “an unborn child” at any “stage of gestation from fertilization until birth” by killing the mother commits capital murder because that offense now qualifies as the murder of “more than one person” “in the same criminal transaction.” TEX. PENAL CODE § 1.07(a)(26) & (49); id. § 19.03(7). Additionally, a person who kills an “an unborn child” at any “stage of gestation from fertilization until birth” can be held liable

---

55 The Legislature exempted the following: “(1) conduct committed by the mother of the unborn child; (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure; (3) a lawful medical procedure performed by a physician or other licensed health care provider . . . as defined by Section 160.102, Family Code; or (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.” TEX. PENAL CODE § 19.06. But during the 2019 legislative session, the House passed a bill (H.B. 896) that provided for the death penalty for women who get an abortion. This development made international news. See, e.g., US lawmakers considering death penalty for women who have abortions, My Stateline, available at https://www.mystateline.com/news/texas-lawmakers-consider-death-penalty-for-women-who-get-an-abortion/1912191952; US lawmakers considering death penalty for women who have abortions, Yahoo News (April 9, 2019), available at https://au.news.yahoo.com/us-lawmakers-considering-death-penalty-women-abortions-022944822.html. Ultimately, H.B. 896 did not become law.

56 Mr. Clark was indicted under both of these theories. But because this motion does not involve an “as-applied” challenge to these statutory provisions, the facts of this case are not relevant here. He reserves the right to bring any and all appropriate as-applied challenges should this motion be denied and the case proceed to trial as a death-penalty case.
for capital murder because the “unborn child” is now considered “an individual under 10 years of age.” See Tex. Penal Code § 1.07(a)(26) & (49); id. § 19.03(8).

These amendments further expanding the scope of individuals against whom a death sentence may be sought considerably compound the problems with a statute that was already unconstitutionally broad, adding layers of additional problems of a constitutional dimension. These additional constitutional infirmities, attributable specifically to Senate Bill 319, are outlined in subsections 1-4 below.

1. **Senate Bill 319 is unconstitutional because it violates the Eighth Amendment by arbitrarily expanding the availability of the death penalty for crimes not previously considered to be capital crimes.**

By unduly expanding the scope of capital-qualifying offenses, Senate Bill 319 is at odds with the Supreme Court’s Eighth Amendment jurisprudence. The Supreme Court’s post-Furman jurisprudence has interpreted the Eighth Amendment to prohibit expansion of the death penalty into areas where it has not previously been deemed appropriate. See, e.g., Kennedy v. Louisiana, 128 S. Ct. 2641, 2658 (2008). Previous Texas law treated the loss of an unborn fetus through assault as “serious bodily injury” of the mother. St. Clair v. State, 26 S.W.3d 89, 101 (Tex. Crim. App. 2000). As explained more fully in subsection 2 below, intentionally harming a fetus against the will of the person carrying that fetus, although a disturbing crime, simply was not viewed as a capital offense and should not be now when modern death-penalty jurisprudence requires

57 The constitutional challenges and arguments developed in this section are distinct from those rejected in Lawrence v. State, 240 S.W.3d 912 (Tex. Crim. App. 2007), and Flores v. State, 245 S.W.3d 432 (Tex. Crim. App. 2008). In those cases, the CCA rejected 14th-Amendment vagueness, due process, and Establishment Clause challenges. Mr. Clark raises challenges under those constitutional provisions but also presents new analyses and thus those decisions do not control.
narrowing, not expanding, capital-qualifying crimes. *Kennedy*, 128 S. Ct. 2641 (finding unconstitutional statute expanding capital offenses to include the crime of child rape).

The redefinition of “individual” allows a jury to impose a death sentence even where neither the defendant nor the woman knew that she was pregnant and even if the defendant did not know his actions would terminate the embryo or fetus. *See Lawrence*, 240 S.W.3d 912, 919 (Tex. Crim. App. 2007) (Johnson, J., concurring) (noting constitutional concerns created by this problem).

Further, before viability, there is no way to determine whether any embryo or fetus will develop to a stage whereby it could live independently from the woman. Thus, in all such circumstances, deciding whether the accused “caused” the death of any particular embryo or non-viable fetus would involve pronounced guesswork. Ultimately, whether an accused “caused” the “death” of an embryo or non-viable fetus that may have matured to become a living person is a matter of moral philosophy and personal opinion and proves far too vague an inquiry to satisfy the rigorous demands of the Eighth Amendment in the capital context.

As already noted, a fundamental precept in the Supreme Court’s Eighth Amendment death-penalty jurisprudence is that states’ approach to sentencing must narrow the class of death-eligible individuals in a non-arbitrary fashion. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that death-penalty states must identify “aggravating factors” that properly channel the fact-finders’ discretion and narrow the pool of death-eligible murders, with the goal of Reserving this most severe punishment for only the “worst of the worst”); *see also* Ben Steiner, *Still Arbitrary: Capital Sentencing in the Post-Furman Era*, 10 CRIM. JUST. POL’Y REV. 85 (1999). By protecting what some religions consider human life but what medical authorities agree is not, Senate Bill 319 is overbroad and thus adds to the problem of expanding rather than narrowing the
pool of death-eligible individuals against whom the death penalty can be pursued. That is, Senate Bill 319 increases the risk of arbitrary application of the death penalty.

2. **Senate Bill 319 is unconstitutional because it violates the Due Process Clause by defining fertilized eggs, embryos, and fetuses as persons.**

   Certainly, the desire to protect potential life is laudable as a matter of personal morality. But Texas’s statutory elevation in the Penal Code of fertilized eggs, embryos, and fetuses to the status of “individuals” who are “persons” violates both the Due Process and Supremacy Clauses of the United States Constitution, as illuminated by deeply rooted principles of justice stretching back for centuries. Accordingly, Senate Bill 319 is unconstitutional for these reasons as well.

   Decades ago, the Supreme Court recognized that it has a responsibility under the Due Process Clause to exercise “judgment upon the whole course of the [criminal] proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses[.]” *Rochin v. California*, 342 U.S. 165, 169 (1952). Part of ensuring the decency and fairness required by the federal Constitution means that some limitations are imposed on states in crafting criminal law.

   A state is not, for instance, free to define the elements of a crime in a manner that offends deeply rooted principles of justice. *See Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975) (finding Due Process Clause was offended where state statute violated important doctrine stretching back to the “inception of the common law of homicide”). By defining fertilized eggs, embryos, and fetuses as individuals with full-blown personhood—and their destruction as capital murder—Senate Bill 319 violates the Due Process Clause because this perception of personhood is at odds with how the issues had “historically been treated ‘in the Anglo-American legal tradition.’” *McMillan v. Pennsylvania*, 477 U.S. 79, 90
(1986); see also Mullaney, 421 U.S. at 696 (looking to the “inception of the common law of homicide”).

Until the relatively recent wave of legislation that included Senate Bill 319, the nation’s common law did not recognize the killing of a non-quickened fetus as a crime of any kind, much less murder. Keeler v. Superior Court, 470 P.2d 617, 620 n.6, n.7 (Ca. 1970) (exhaustively tracing development of common law and finding history of crimes only for quickened fetuses); see also Roe v. Wade, 410 U.S. 113, 132-33 (1973) (same with respect to abortion of non-quickened fetus), 136 n.27 (collecting cases establishing this point). In the early seventeenth century, Lord Coke’s “born alive” rule captured the common law understanding of “quickened” fetuses; that rule states:

If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

Comm. v. Morris, 142 S.W.3d 654, 656-57 (Ky. 2004) (quoting Sir Edward Coke, 3d Inst. 50-51 (1644)). Under Lord Coke’s rule, intentional acts against a quickened fetus resulting in the death after the child had been born alive constituted murder, but acts resulting in a stillbirth constituted

---

58 See Douglas S. Curran, Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws, 58 DUKES L.J. 1107, 1119 (2009) (explaining that these laws arose from public outcry following the murder of Laci Peterson, while pregnant, by her husband Scott Peterson).
a lesser crime.\textsuperscript{59} The born-alive rule was applied in the United States as early as 1791\textsuperscript{60} and was almost universally applied until recent legislative amendments.\textsuperscript{61}

In the nineteenth century, abortion laws proliferated, but the abortion of non-quickened fetuses was punished leniently, if at all. \textit{Roe}, 410 U.S. at 138-39. In the latter part of the nineteenth century, abortion statutes began to punish abortion more severely, and the distinction between quickened and non-quickened fetuses vanished. \textit{Id.} at 139. But the abortion of a fetus, whether or not quickened, was not treated as murder. \textit{Keeler}, 470 P.2d at 621-23 (recounting history of these laws); \textit{Roe}, 410 U.S. at 139 (noting that the laws became most severe in the 1950s), 117-18 n.1 (noting that a Texas statute was then similar to that “in a majority of the states,” setting forth punishment for abortion as 2-5 years, and double that for non-consensual abortion, and 5 years to life for the killing of an infant during childbirth).


\begin{itemize}
  \item \textsuperscript{59} Blackstone identified the killing of a quickened child (not born alive) as a “heinous misdemeanor.” \textit{Keeler}, 470 P.2d at 620 n.6 (quoting 1 Blackstone, Commentaries 129-30 (1765)).
  \item \textsuperscript{61} \textit{See Comm. v. Booth}, 766 A.2d 843, 849 (Pa. 2001) (collecting cases); \textit{People v. Guthrie}, 293 N.W.2d 775, 778, n.1 (Mich. App. 1980) (finding “[n]o appellate court of the United States or England has ever, as a matter of common law definition, treated a fetus as a person for the purposes of criminal law”).
\end{itemize}
But only in and around the turn of the twenty-first century did laws proliferate classifying feticide as murder or, in Texas, as capital murder.\textsuperscript{62}

Under these new state laws, fetuses are now considered “persons.” Texas’s statute, however, would violate due process even if viability had always been the touchstone.\textsuperscript{63} Texas law extends capital murder liability for the killing of the unborn back to before viability, before quickening, all the way to fertilization. As such, Texas has run roughshod over deeply-rooted criminal-law principles and broken with well-established foundations of Anglo-American law. Our nation and its forbearers, for centuries, only punished leniently, if at all, for ending the potential life in an embryo or a non-quickened, non-viable fetus. The law has never treated such acts as murder, let alone capital murder, until Texas and a minority of state legislatures recently changed their long-standing laws.\textsuperscript{64}


\textsuperscript{63} The Supreme Court, in interpreting the United States Constitution, has drawn distinctions between viable and nonviable fetuses. \textit{See Roe}, 410 U.S. 113; \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833 (1992). Viability is somewhere in the six-month range. Nonviable fetuses are accorded much less protection than viable fetuses in terminating pregnancy. Thus, Texas Penal Code § 1.07(26), upon which Mr. Clark’s indictment hinges, is facially unconstitutional because it defines a fetus as a person for purposes of the homicide statutes without regard to viability. Even if the fetus in this case was in fact viable, the definition of “individual” upon which the indictment relies is unconstitutional because the statute merely requires that the entity be post-conception to be included in the definition of “person.”

\textsuperscript{64} \textit{See} note 62, \textit{supra}. Thirty-four states have no such laws.
Protecting human life by criminally punishing a third party for terminating an embryo or fetus is one thing; but ratcheting the crime up to capital murder is quite another. See *Mullaney*, 421 U.S. at 697-98 (noting that “criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly”). Such a punishment violates due process, because Texas is not authorized to effect a wholesale change to our nation’s foundational criminal law. Under the Fourteenth Amendment’s Due Process Clause, this expansion of death-eligibility is unconstitutional.

3. **Senate Bill 319 is unconstitutional because it violates the Supremacy Clause by defining fertilized eggs, embryos, and fetuses as persons.**

This expansion of death-eligibility also violates the Supremacy Clause of the U.S. Constitution. In *Roe*, the State of Texas argued that a “fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.” 410 U.S. at 156-57. But the Supreme Court roundly rejected that claim. Id. at 156 (noting “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”). The Supreme Court did so after surveying the multiple uses of “person” in the Constitution and found that “the use of the word is such that it has application only postnatally.” Id. at 157 (emphasis added).

The Supreme Court in *Roe* also reasoned that “throughout the major portion of the nineteenth century [when the Fourteenth Amendment was ratified] prevailing legal abortion practices were far freer than they are today,” establishing that the Constitution’s framers did not mean for “persons” to include embryos or fetuses. Id. at 158.

---

65 The U.S. Constitution is “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.
When Senate Bill 319 was enacted, *Roe* was (and remains) the settled law of the land. And *Roe* should control this issue. Similarly, the CCA had no authority to decide *Lawrence v. State* as it did because that decision is also contrary to *Roe*. In *Lawrence*, the CCA stated, “in the absence of a due process interest triggering the constitutional protections of [privacy and liberty women enjoy under] *Roe*, the Legislature is free to protect the lives of those whom it considers to be human beings.” 240 S.W.3d at 917-18; *see also id.* at 918 n.24 (collecting similar decisions). But the Supreme Court had already decided that an embryo or fetus does not possess full-blown personhood, irrespective of the relationship between the embryo or fetus and the rights of the woman carrying it. *Roe*, 410 U.S. at 157-59. In addition, *Lawrence* ignores the Supreme Court’s explicit observation that, if Texas’s fetal-personhood argument were accepted, it would not only impact abortion, but would also call into question the State’s homicide law—creating the very conflict that is now explicit in Texas Penal Code section 1.07. *Roe*, 410 U.S. at 157 n.54. The Texas Legislature had no authority to pass a law directly at odds with the Supreme Court’s constitutional ruling in *Roe* holding that an embryo or fetus is not a person.

Under the Supremacy Cause to the U.S. Constitution, Senate Bill 319 is unconstitutional.

---

66 Contrary to any attempts to cabin *Roe*’s decision on personhood to the context of a state’s interest in human life in relation to women’s liberty interests, courts have applied this aspect of the *Roe* holding in other contexts. *See*, e.g., *Walker v. Firelands City Hosp.*, 869 N.E.2d 66, 73 (Ohio Ct. App. 2007) (finding that the trial court, as a matter of law, properly referred to *Roe* in determining the meaning of “person” in state statute forbidding unlawful possession of the body of a deceased person); *In re Guardianship of J.D.S.*, 864 So.2d 534 (Fla. Dist. Ct. App. 2004) (finding that “no Florida statute or case law that has determined a fetus to be a person,” and citing *Roe* to show the “opposite is true”); *Matter of D.K.*, 497 A.2d 1298, 1302 (N.J. Super. Ct. Ch. Div. 1985) (similar to *In re J.D.S.*); *Roe v. Casey*, 464 F. Supp. 483, 487 (E.D. Pa. 1978) (same); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App.1st Dist. 1997) (same). *See also Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 312 n.9 (11th Cir. 1989) (holding that an “unborn fetus is not a ‘person’ or a ‘citizen’” for purposes of civil rights law).
4. Senate Bill 319 is unconstitutional because it violates the Establishment Clause by defining life as beginning at fertilization.

By defining life as including “an unborn child at every stage of gestation from fertilization until birth,” the Texas Legislature defined life in a manner that can only be justified on religious grounds and thus violates the Establishment Clause of the First Amendment to the United States Constitution and the Freedom of Worship Clause of the Texas Constitution. U.S. Const. amend. I; Tex. Const. art. 1, § 6.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court set out a three-pronged test to determine whether a statute violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” Id. at 612-13. Senate Bill 319’s definitions of “individual” and “death” fail this test and thus violate the Establishment Clause.

Senate Bill 319 lacks a secular purpose and thus fails the Lemon test’s first prong. The clearest signal that this statute is driven by a religious, not a secular, purpose is that it fixes the beginning of life at fertilization. Many of the witnesses who testified before the State Senate and House during the hearings on Senate Bill 319 in support of the new definition belonged to religiously affiliated anti-abortion groups; and the focus of their testimony was the question of when “life” begins. Such questions have been debated throughout much of recorded history,

---

67 See also Proposed Amendment 1 to SB 319 (May 28, 2003), available at https://capitol.texas.gov/BillLookup/History.aspx?LegSess=78R&Bill=SB319 (proposing to amend statute to use viability rather than fertility); Rep. Farrar, House Session, May 28, 2003 (presenting the failed amendment and noting that SB 319 “is about legislating when life begins and when personhood begins. . . . We would essentially be adopting one religious position as the law for the rest of the state.”).
generally grounded in philosophical or religious beliefs rather than scientific fact.\textsuperscript{68} This is not surprising, given that science is incapable of providing a definitive answer and can only explain the process of reproduction as scientific understanding evolves. Science cannot tell us, for instance:

- What a “soul” is and whether an embryo or fetus has one;
- When the products of conception become an individual;
- Whether a zygote should or would have human rights;
- How to resolve conflicts between the human rights of the mother and rights afforded any fetus she may carry within her body.

Yet many of these questions were argued during the hearings in support of the new definition of “individual” whereby Senate Bill 319 amended the long-standing legal understanding of personhood.

The resulting law contrasts sharply, for example, with the medical consensus that pregnancy begins days after fertilization at implantation:

\textit{[T]he American Medical Association (AMA) defines pregnancy as beginning with implantation rather than fertilization. The American College of Obstetricians and Gynecologists’ Committee on Ethics similarly defines pregnancy as beginning with implantation, not fertilization. Indeed, the Committee defines pregnancy as occurring in the implantation stage because the embryo at the time of fertilization through implantation lacks a clear “biologic individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype.}\textsuperscript{69}

\textsuperscript{68} Aristotle (384-322 BCE), for example, postulated the male embryo developed a soul at about 40 days after conception, whereas the female embryo acquired a soul at about 90 days. Aristotle “History of Animals,” Book VII, Chapter 3, 583b.

Texas’s statute is consonant with the beliefs of some, but by no means all, Christian faiths. Indeed, well before Texas Penal Code, section 1.07 was amended, Supreme Court Justice John Paul Stevens had explained that a similar Missouri statute, in which the legislature found that life begins at conception, was unconstitutional as “an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths” that “serves no identifiable secular purpose.” *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 566-67 (1989) (Stevens, J., concurring in part and dissenting in part).\(^{70}\) As Justice Stevens noted in *Webster*, there can be no secular reason for identifying fertilization rather than implantation or viability as the beginning of life; only certain religious groups, and not the medical community, believe that life begins as early as fertilization. *Id.* at 563-71. Through this law, with its declaration that life begins at fertilization, the State is furthering a particular religious belief and purpose and thus violating the Establishment Clause.\(^{71}\)

Because Senate Bill 319 lacks a secular purpose, it is a per se violation of the Establishment Clause. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.”).

But even if it were necessary to consider the other two prongs of the *Lemon* test, the statute at issue fails those prongs as well. The statute has the effect of advancing religion. As described above, the belief that life begins at fertilization is the belief of only some faiths (and is a belief at odds with modern science). The question of when life begins is a difficult and controversial issue, and by enshrining the creed of some faiths, the statute advances the religious agenda of some groups and becomes excessively entangled with those religious groups. Especially given that this

\(^{70}\) *See also* Kubasek, et al., at 247-48 (noting that many Christian faiths preach that life begins at conception, a belief that other faiths do not share).

\(^{71}\) *See*, e.g., comments by Rep. Farrar, Senate Session, May 28, 2003 (noting that right to life organizations and the Christian Coalition made the Texas bill at issue their “top priority”).
law has no secular purpose, the Legislature’s decision to adopt the belief of some faiths as the law of the land can only be seen as the state advancing those religions and their views at the expense of others. Every time this law is used to indict, as occurred here, that act elevates the belief of some faiths over others as well as over the beliefs of secularists, thereby violating the Establishment Cause.

5. **Senate Bill 319 is unconstitutional because it violates the Fourteenth Amendment’s Equal Protection and Due Process Clauses by elevating potential life over actual life in furtherance of no valid penological purpose.**

Senate Bill 319 also violates the Fourteenth Amendment’s Equal Protection Clause because it constitutes an irrational exercise of governmental power. Senate Bill 319 is not “necessary to the accomplishment of some permissible state objective.” *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also Cleveland B. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974) (same). By allowing the death penalty for the “killing” of a non-implanted fertilized egg that medical authorities agree is not “human life,” this criminal statute’s classification is not furthering Texas’s interest in protecting human life but is instead furthering the concerns of a handful of religious sects by expanding the state’s power to take life in a manner at odds with long-standing tenets of criminal law.

The Supreme Court has not yet reviewed a capital case arising under Senate Bill 319. But the Supreme Court has already addressed the inherent inconsistencies between Texas’s claim that an embryo or fetus is a person and a number of other statutory provisions. In *Roe*, the Supreme Court pointed out that Texas did not treat the pregnant woman as a principal or accomplice to illegal abortions and asked: “If the fetus is a person, why is the woman not a principal or an accomplice?” 410 U.S. at 157 n.54. Noting that Texas law allowed abortions to save the woman’s life, the Supreme Court asked, “if the fetus is a person who is not to be deprived of due process of law, and if the mother’s condition is the sole determinant, does not the Texas exception appear out
of line with the Amendment’s command?” Id. at 157 n.54. The Supreme Court also asked how abortion and murder penalties could coherently be different if a fetus were a person. Id. Texas resurrected and expanded these inconsistencies in enacting Senate Bill 319.

Even if Roe v. Wade were overturned, it would be on the grounds that a woman has no affirmative constitutional right to pursue an abortion, not on the grounds that a fetus has a recognized right to life whose termination should be characterized as capital murder. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (articulating the position that would prevail were Roe to be reversed: “The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so.”). Yet here, in the interest of expanding the rights of a fetus and the potentiality of life that it represents, the State, in the death-penalty context, has expanded the right to take life—an irresolvable marriage of concepts.

As already noted in Roe, “the fetus, at most, represents only the potentiality of life.” 410 U.S. at 162 (emphasis added). While that potentiality is to be celebrated and cherished, it is not synonymous with a life that has actually been realized. The existence of a fetus does not guarantee that life will follow. See Erwin Chemerinsky & Michele Goodwin, Abortion: A Woman’s Private Choice, 95 Tex. L. Rev. 1189, 1229 (2017) (“[T]here may be a reasonable chance—but clearly no more than that—that there will be a baby but for an abortion.”). Women miscarry.72 Human infants

---

72 Mayo Clinic, Miscarriage, https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298 (“About 10 to 20 percent of known pregnancies end in miscarriage. But the actual number is likely higher because many miscarriages occur so early in pregnancy that a woman doesn’t realize she’s pregnant.”)
are stillborn. By contrast, implementing the death penalty requires taking a life that is, without ambiguity, existing at the moment when the State carries out the penalty.

Since the dawn of the modern death-penalty era, the arc has been moving toward narrowing death-eligibility and eliminating the death penalty altogether based, in part, on compelling right-to-life positions. For instance, the international movement away from the death penalty as a form of state-sanctioned punishment is animated by the conviction that human life has inherent value, a precept that aligns with the perspective of U.S. jurists who found the death penalty to be the ultimate humiliation, as it treats people not as “human being[s] possessed of common human dignity,” but “as nonhumans, as objects to be toyed with and discarded.” Furman, 408 U.S. at 273 (Brennan, J., concurring). The fact that Texas, to please members of a subset of religious sects, has

---

73 CDC, *Pregnancy and Infant Loss*, https://www.cdc.gov/features/pregnancy-infant-loss-day/index.html (“About 1 pregnancy in 100 at 20 weeks of pregnancy and later is affected by stillbirth, and each year about 24,000 babies are stillborn in the United States.”)

74 CDC, *Infant Mortality*, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (“In 2016, the infant mortality rate in the United States was 5.9 deaths per 1,000 live births.”).

75 Under international human rights laws, the death penalty has been declared unlawful under the ban on cruel and unusual punishment and the fundamental right to life. See Roger Hood & Carolyn Hoyle, *The Death Penalty, A Worldwide Perspective* 17 (5th ed. 2015). In 2003, the Council of Europe abolished the death penalty “in all circumstances” on grounds that “the right to life is a basic value in a democratic society and . . . the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.” *Id.* at 28 (quoting Protocol No. 13 of the European Convention on Human Rights); see also Chapter I, Article 2 of the Charter of Fundamental Rights of the European Union (“1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed.”), available at https://fra.europa.eu/en/charterpedia/article/2-right-life. To date, 142 countries have abandoned or explicitly banned the practice. *Id.* Other than the United States, only 7 countries use the death penalty with any frequency: China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, and Somalia. See DPIC, *The Death Penalty: An International Perspective*, available at https://deathpenaltyinfo.org/death-penalty-international-perspective.
extended protections afforded to potential life by expanding the State’s right to take actual life is fundamentally incoherent.

The death penalty is only constitutional as long as it is deemed to serve a valid penological purpose. See Roper v. Simmons, 543 U.S. 551, 571 (2005) (noting that two possible penological justifications for the death penalty are “retribution and deterrence of capital crimes by prospective offenders”); see also Gregory, 2018 WL 4925588, at *10 (Wash. 2018) (“Given our conclusion that the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve penological goals.”). Senate Bill 319 furthers no valid penological purpose.

There is no evidence that Senate Bill 319 deters a particular kind of murder (of unborn embryos and fetuses) since there has yet to be any sound evidence demonstrating that the death penalty deters murders of any kind. See, e.g., Gregg v. Georgia, 428 U.S. 153, 185 (1976) (“there is no convincing empirical evidence either supporting or refuting th[e] view” that the death penalty “may not function as a significantly greater deterrent than lesser penalties . . . .”); Glossip, 135 S. Ct. at 2768 (Breyer, J., dissenting) (discussing recent reports finding “profound uncertainty” and “insufficient evidence” regarding the death penalty’s deterrent effect). As Justice Marshall emphasized over 46 years ago, “[n]o one can ever know how many people have refrained from murder because of the fear of being hanged.” Furman, 408 U.S. at 347 (Marshall, J., concurring) (citation omitted). The one extant blue-ribbon review of 30 years of empirical data found no evidence to establish a deterrent effect attributable to the death penalty. See Nat’l Research Council, DETERRENCE AND THE DEATH PENALTY (D. Nagin & J. Pepper, eds. 2012).
Moreover, the availability of incarceration without the possibility of parole has long been a viable alternative to execution. Other factors, such as the growing awareness that the costs associated with death sentences far exceed the costs of life imprisonment, has sparked recognition that capital punishment is, as a practical matter, an ineffective response to crime. See DPIC, Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis, National Poll of Police Chiefs Puts Capital Punishment at Bottom of Law Enforcement Priorities (2009). This report, published a decade ago, also shows that, for a single death penalty trial, a state may pay $1 million more than for a non-death penalty trial; yet, statistically, only 1 in every 3 capital trials results in a death sentence, making $3 million the true cost of a single death sentence (above and beyond the costs of a trial where death is not sought). Id. The DPIC report also illustrates that only 1 in 10 death sentences actually culminates in an execution, making the cost to a state to realize even 1 execution more like $30 million. Id. And because the variables that affect costs from state to state are quite complicated, the DPIC report emphasizes that $30 million per execution is “a very conservative estimate.” Id.

Because the death penalty does not deter and is not necessary as a matter of public safety, the only valid penological purpose that it could serve is that of retribution. Retribution is a moralistic justification that insists that the “ultimate punishment” is the only sufficient societal response to certain heinous murders. This particular theory of punishment is rooted in the notion that the moral universe needs to be set right by requiring the offender to atone with his or her life

76 Further, it is now demonstrably clear that the modern death penalty persists in the United States primarily only in states most closely associated with a tradition of enslaving, subordinating, and lynching people of color. See Carol Steiker & Jordan Steiker, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (Belknap Press 2016).


While there is certainly dignity in the potential life embodied in an embryo or fetus, there is a competing and, at least arguably superior dignity in a living woman’s choice not to carry a fetus to term—especially when her own health is at stake. There are no such directly competing dignity interests in the context of the death penalty; arguably, the State’s “dignity” is only diminished by intentionally taking life as a punishment meant to compensate for another’s death. Moreover, when the system of exacting punishments is demonstrably flawed, the State risks a demoralizing effect on the rule of law generally. See, e.g., Sister Helen Prejean, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (Vintage Books 2005); Robert Perkinson, *Texas Tough: The Rise of America’s Prison Empire* (Metropolitan Books 2010).

Texas’s Senate Bill 319, with its numerous unique constitutional infirmities, compounds the glaring contradiction inherent in the State killing someone to express moral outrage about a killing. By redefining “individual” to include “an unborn child at every stage of gestation from fertilization until birth,” and defining the intentional termination of “an unborn child” at any stage of gestation “from fertilization until birth” so that it qualifies as capital murder, Senate Bill 319 simultaneously expands protections afforded to potential life while expanding the State’s ability to take life. That contradiction completely undermines the notion that these statutory amendments
further the State’s compelling interest in protecting human life. Senate Bill 319 violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment by privileging potential live over actual life and failing to serve a valid penological purpose.

Because Texas’s death-penalty sentencing scheme has expanded so that virtually any murder—even those committed by others—can qualify as capital murder, and, additionally, because Texas law has expanded to make the termination of what is merely potential life a capital crime, the statute is unconstitutional on its face.

---

78 Senate Bill 319 specifically and the death penalty generally are, arguably, at odds with the fundamental right to life suggested by the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law").
IV. Texas Provides No Statutory Directive Guiding the Exercise of Prosecutorial Discretion at the County-Level, Resulting in Intolerable Arbitrariness.

As key actors within Texas’s criminal justice system, prosecutors exercise considerable discretion. Partly as a consequence of this discretion, a small minority of Texas’s counties are responsible for an overwhelming majority of the death sentences that have been assessed in the past forty years. In addition to this geographic disparity—a disparity that cannot be explained merely by reference to county populations—Texas’s system of administering the death penalty reflects disparities based on race and ethnicity. Although death sentences are supposed to be reserved only for the most egregious offenses, in Texas this determination is, to a degree both substantial and improper, an arbitrary one, rendering the administration of the penalty in Texas, in all circumstances, unconstitutional.

A. Prosecutors in Texas Are Afforded Virtually Unlimited Discretion with Respect to the Decision to Seek the Death Penalty.

The death penalty is imposed, on average, in only 250 of the approximately 20,000 homicides that occur each year in the United States, and in only a handful of states. See DPIC, Murder Rates Nationally and by State.79 Thus, death sentences are imposed in a relatively few cases that are similar to thousands of cases in which death is not imposed. The Supreme Court has held that the death penalty is supposed to be reserved for a “narrow category” of the most culpable offenders. Atkins v. Virginia, 536 U.S. 304, 319 (2002). Moreover, the Supreme Court long ago held that mandatory death sentences are unconstitutional. See Woodson v. North Carolina, 428 U.S. 280 (1976) (striking down Post-Furman mandatory death-penalty scheme). A state’s capital sentencing statute is, therefore, supposed to serve a gatekeeping function, preventing juries from

79 This information is available at https://deathpenaltyinfo.org/murder-rates-nationally-and-state.
“wantonly and freakishly impos[ing]” death sentences. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). But neither the Texas Penal Code nor Article 37.071 of the Texas Code of Criminal Procedure provides a method whereby prosecutors determine against whom the death penalty will be sought in light of the many potentially death-qualifying murders. This failure allows the exercise of virtually unbridled discretion on the part of individual prosecutors presuming to act on behalf of the entire State. *Crutsinger v. State*, 206 S.W.3d 607, 612–13 (Tex. Crim. App. 2006) (acknowledging that prosecutors have “broad discretion . . . when deciding whether to pursue the death penalty” and may choose “to seek or not to seek the death penalty” in any capital murder case).

The decision as to which defendant is to be subjected to a costly death-penalty prosecution is made solely at the county level in Texas. As a result, there are likely 254 different methods (or no method at all) used to determine which cases will be prosecuted as death-penalty cases—a different system for each county. Studies suggest that the decision can turn on the county’s willingness to fund the defense, the race or status of the defendant, or the age, sex, race, or status of the victim in the community—entirely arbitrary considerations. See DPIC, *Studies of Arbitrariness in Application of the Death Penalty*. See also Fair Punishment Project, *Too Broken to Fix: Part II: An In-Depth Look at America’s Outlier Death Penalty Counties* (Sept. 2016).

No clear guidelines or published factors shaped the exercise of discretion when the Bastrop County District Attorney opted to seek the death penalty on the State’s behalf in this particular case. Public records indicate that, in the modern death-penalty era that began in 1976 when the

80 This information is available at https://deathpenaltyinfo.org/arbitrariness.

death penalty was reinstated after being temporarily declared unconstitutional, Bastrop County has sent only one person to death row: Rodney Reed in 1998. The only obvious commonalities between Mr. Reed’s case and Mr. Clark’s are that, in both instances, the accused is black, the victim was female, and the underlying investigations of the crime are marred by irregularities. Concluding that the charging decision in this precise case was arbitrary or capricious is not, however, necessary to address the arguments presented in this Memorandum of Law. Here Mr. Clark attacks Texas’s failure to impose any meaningful restraint on prosecutorial discretion in the context of decades of evidence that prosecutors are all too human—and thus vulnerable to abusing unbridled discretion.

B. The Likelihood of Receiving the Death Penalty in Texas Depends on Entirely Arbitrary Vagaries of Geography.

The fact of extreme geographical disparities is one of several aspects of the current application of the death penalty in America today that prompted Justice Breyer, joined by Justice Ginsburg, to urge their colleagues to reconsider the constitutionality of the penalty. See Glossip, 135 S. Ct. at 2761 (Breyer, J. dissenting) (emphasizing that “within a death penalty state, the imposition of the death penalty heavily depends on the county in which the defendant is tried”) (citing Smith, The Geography of the Death Penalty and its Ramifications, 92 B.U. L. Rev. 227, 231–232 (2012)) (emphasis retained). Justice Breyer’s dissent reflects increasing dissatisfaction with the penalty on constitutional grounds.

In Gregg and Jurek, the Supreme Court had considered whether impermissible arbitrariness in capital sentencing resulted from prosecutorial discretion to choose those cases in which a death sentence would be sought. Gregg, 428 U.S. at 199; Jurek, 428 U.S. at 274. At that

---

82 Mr. Clark reserves the right to bring an as-applied challenge based on the standardless discretion exercised by the Bastrop County District Attorney’s Office in seeking the death penalty in this particular case.
time, the Supreme Court determined that this decision-making served to remove defendants from the risk of death and did not violate the U.S. Constitution, provided the “decision to impose [a death sentence was] guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.” Gregg, 428 U.S. at 199. Justice White, in his concurrence, optimistically suggested that the decision of prosecutors would likely reflect that of juries and be rooted in the seriousness of the offense:

Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.

Id. at 225 (White, J., concurring).

The experience of the last forty years has shown that the practical consequence of prosecutorial discretion has not been to narrow the field of death-eligible persons convicted of capital murder to the most serious and heinous cases. Since 1976, over 560 individuals have been sentenced to death in Texas. Collectively, fewer than half of Texas’s 254 counties account for these sentences. Four counties—Harris, Dallas, Bexar, and Tarrant—account for over 50% of these sentences, as well as about 50% of the State’s executions. In the past forty years, about 90% of Texas’s 254 counties have sentenced someone to death three times or fewer—or not at all. TEX. DEP’T CRIM. JUSTICE, Total Number of Offenders Sentenced to Death from Each County.\(^8\)

It strains credulity to believe that Texas’s four most populous counties have had as many heinous crimes within their geographical limits as have Texas’s 250 remaining counties combined. Far more likely, factors such as ideology, experience litigating capital cases, and resource

\(^8\) Available at http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html.
availability explain the extreme disparity. See Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 Vand. L. Rev. 307, 318-23 (2010) (noting several instances in which prosecutors have declined to pursue the death penalty based on resource limitations). Indeed, a recent report demonstrates that a mere handful of peculiarly zealous prosecutors have been responsible for a substantial majority of death sentences in this country. 84

Texas leads the nation in executions, with 563 executions since 1976, over 37% of a total of 1500 executions in the nation. (Virginia is a distant second with 113.) See DPIC, *Facts About the Death Penalty*. With 228 inmates on death row, Texas is third nationwide, behind only California and Florida. See id.

Texas is not alone in sponsoring arbitrariness, however. Multiple studies conducted throughout the country have identified intra-state geographic discrepancies in the imposition of the death penalty. See, e.g., Fair Punishment Project, *Too Broken to Fix: an In-Depth Look at*. 88


85 This figure is not stable as the State has already executed 3 individuals in 2019 and, as of June, has already scheduled 7 additional executions for this year. See https://www.tdcj.texas.gov/death_row/dr_scheduled_executions.html.

86 This information is available at http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

87 This figure too is unstable, as Texas is continuously adding to and subtracting from its death-row population. For instance, on June 26, Gary Green back the first person sentenced to death in Texas in 2019 and thus will soon be sent to TDCJ’s Polunsky Unit to join the death row populations. Meanwhile, Texas has, as of the date of filing, already scheduled six executions to take place between August 15 - October 16, 2019. See TDC Death Row Information, available at https://www.tdcj.texas.gov/death_row/dr_scheduled_executions.html.

88 These observations are, of course, distinct from the *inter*-state geographic discrepancies in the imposition of the death penalty. See Jeffrey Kirchheimer, *Aggravating and Mitigating* 121
America’s Outlier Death Penalty Counties (finding “outlier counties” in Texas, California, Arizona, Florida, Alabama, and Louisiana plagued by persistent problems of overzealous prosecutors, ineffective defense lawyers, and racial bias), Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 Temple Pol. & CIV. RTS. L. Rev. 389 (2010) (discussing studies in Arizona, Missouri, Pennsylvania, and South Carolina); Gershowitz, above, at 318-23. In one study, researchers found that, over a four-year period in Missouri, 76% of cases charged as either first-degree murder, second-degree murder, or involuntary manslaughter met that state’s statutory definition to be eligible for the death penalty. Katherine Barnes, et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 309-11 (2009). However, only 5% of those cases occasioned a death-penalty trial. Id. at 309. As a result, prosecutors throughout the state made the decision not to seek death in 95% of death-eligible cases. Id. This discretion was not spread evenly, however, as prosecutors in the City of St. Louis and Jackson County (where Kansas City is located) charged capital cases far less frequently (6.5%) than prosecutors in the rest of the state (20%).

The influence of these factors within Texas’s capital punishment system has undermined

Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 386-87 (1998) (“Because each jurisdiction creates its own death penalty statute, each statute is unique. The result is that—not only does punishment differ between death penalty jurisdictions and jurisdictions without the death penalty—significant discrepancies exist among the death penalty jurisdictions.”).


A commission created to examine the fairness of New Jersey’s capital punishment system likewise noted its concerns regarding “the existence of variability among counties in the application of the death penalty.” N.J. Death Penalty Study Comm., *New Jersey Death Penalty Commission Report 43* (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf. Since then, New Jersey has since repealed its death penalty.
the Supreme Court’s expectations, voiced in *Jurek*, that this system would be “evenhanded, rational, and consistent.” *Jurek*, 428 U.S. at 276. Thirteen years after *Jurek*, the Court began to recognize the error in its assumption that Texas’s system would, in practice, answer several concerns expressed by a majority of the justices in *Furman*. Compare *Jurek*, 428 U.S. at 272 (expressing confidence that the Texas Court of Criminal Appeals would “interpret [the statutory special issue] so as to allow a defendant to bring to the jury’s attention whatever mitigating circumstances he may be able to show”), with *Penry I*, 492 U.S. at 318 (finding inadequate and therefore unconstitutional the statutory special issues as applied to virtually everyone sentenced under the scheme approved in *Jurek* because jurors had no adequate means to consider or give effect to whatever mitigating circumstances he may be able to show). The geographic disparities in imposing the death penalty in Texas offer equally compelling grounds to abandon the assumption that prosecutorial discretion would produce a consistent application of the law; it has not.

**C. The Likelihood of Receiving a Death Sentence in Texas Depends on Entirely Arbitrary Factors of Race.**

In addition to geography, studies continue to show that race is a motivating factor behind jury verdicts in capital cases. *See, e.g.*, David Baldus, et al., *Race and Proportionality Since McCleskey v. Kemp* (1987): *Different Actors with Mixed Strategies of Denial and Avoidance*, 39 *COLUM. HUM. RTS. L. REV.* 143 (2007); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 *MICH. J. RACE & L.* 135 (2009) (finding that prosecutors were more likely to pursue capital cases for white victims than black victims); *see also* Katherine Beckett, *The Role of Race in Washington State Capital Sentencing, 1981-2014* (report relied on by the Washington Supreme Court in finding the state’s death penalty unconstitutional in *State v. Gregory*, No. 88086-

---

91 Available at https://deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf

92 One notable exception, proving the rule, are the death sentences imposed and executed on white males John King and Lawrence Brewer, two of the three men charged with the modern-day lynching of James Byrd, a 49 year-old black male, who was killed while being dragged over country roads while tied to the back of a pick-up truck outside of Jasper, Texas.
Recent research shows that racial discrimination continues to infect death-penalty sentencing procedures. In a study that used a controlled experiment to examine the subtle influence of race on juror decision-making, researchers at the University of California at Berkeley found that members of a random sample of 276 adults were more inclined, after reviewing a file summary of a triple-murder case and being told that the maximum punishment was death, to find a defendant guilty based on the evidence provided if the defendant had a name traditionally associated with minorities (e.g., Darnel, Lamar, Terrell) than if he had a more race-neutral name (e.g., Andrew, Frank, Peter). Glaser, et al., Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants 5-6 (June 24, 2009). By contrast, other members of that same random sample were no more likely, after reviewing that same file and being told that the maximum punishment was life without possibility of parole, to find a defendant guilty if his name happened to be one traditionally associated with minorities. Id.

Although the precise causal mechanism at work could only be hypothesized, the researchers nevertheless postulated that “a more severe penalty raises the juror’s estimated ‘cost’ of a wrongful conviction.” Id. (citing N. Kerr, Severity of Prescribed Penalty and Mock Jurors’ Verdicts, 36 J. PERSONALITY & SOC. PSYCH. 1431 (1978)). Or, perhaps, “for participants with Black defendants, wrongful conviction was a lesser concern, and instead the death penalty reinforced the brutality of the crime.” Id. at 6. Still more perverse, “capital punishment may feel more appropriate for Black defendants, given that they are overrepresented on death row, and [] research has indicat[ed] that convicted capital defendants who look more stereotypically Black are

more likely to be given a death sentence.” Id. (citing Jennifer L. Eberhardt, et al., Looking Deathworthy, 17 PSYCH. SCI. 383 (2006)).

Whatever the participants’ motivation, the conclusion compelled by these studies is inescapable: Race continues to influence the imposition of the death penalty, regardless of whether that influence is conscious or unconscious. When a law is applied in such a way that it becomes more directed at a “particular class of persons”—particularly when that class of persons is distinguished by race—the application of that law violates an individual’s right to equal protection under the law. See Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).94

D. Few Safeguards Exist to Counter the Deleterious Result of Prosecutorial Overreach

Capital charging practices based on geography, race, or nothing at all mean that death sentences are, inevitably, arbitrarily imposed. A prosecutor’s discretion is supposed to be constrained by the Due Process Clause of the Fifth Amendment, which requires that the decision whether to prosecute not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). But if, in practice, a prosecutor may pursue, or not pursue, a death sentence based on no more than whim, the system itself is intolerably arbitrary. Prosecutors are, after all, only human. As such, they are subject to the same unfortunate human tendencies to indulge in bias, prejudice, and misconduct as other humans—despite their obligation to protect the rights of the accused, not just play to win. Berger v. United States, 295 U.S. 78, 88 (1935) (“it is

94 In their recent account of the history of the American death penalty, two leading scholars of capital punishment, in tracing the Supreme Court’s elaborate efforts to regulate capital punishment under the Constitution, also expose the inextricable connection between the death penalty and southern racial oppression. See generally Carol Steiker and Jordan Steiker, Courting Death: The Supreme Court and Capital Punishment (Belknap Press 2016).
as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”). See also Georgia v. McCollum, 505 U.S. 42, 68 (1992) (noting that in criminal trials “we have held the prosecution to uniquely high standards of conduct”); Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”).

As one judge noted, when a prosecutor, “with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice.” In re Doe, 801 F. Supp. 478, 480 (D. N.M. 1992) (finding that prosecutor was not entitled to prosecutorial immunity in state bar disciplinary action). Yet, regrettably, the evidence is overwhelming that assuming the role of prosecutor does not inoculate individuals from misconduct. See, e.g., Steve Weinberg, Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?, Ctr. for Public Integrity, June 26, 2003) (inventorying rampant problems of prosecutorial error and misconduct that pose a threat to the criminal justice system); see also Jeffrey Kirchmeier, et al., Vigilante Justice: Prosecutor Misconduct in Capital Cases.95 Instances of prosecutorial misconduct have occurred in capital cases around the country. See, e.g., Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851, 890 (1995) (“Prosecutor misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions. Case after case demonstrates the persistent reoccurrence of

95 This publication is available at http://www.publicintegrity.org/2003/06/26/5517/breaking-rules.
misconduct, such as forensic misconduct and prosecutorial disclosure violations.”). Numerous Texas capital cases have been plagued with prosecutorial misconduct. For instance, at Randall Adams’ trial, the prosecutor suppressed information about a secret deal made with a witness, as well as that witness’s lengthy criminal record. Ultimately, that witness proved to be the actual murderer. The prosecutor also withheld exculpatory information about two other witnesses. See Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 436-37 (1992). In *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003), late-stage litigation exposed that a manual, created and used by the Dallas County District Attorney’s office, directed prosecutors to strike “Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury” to enhance the likelihood of obtaining a conviction. More recently, the CCA granted a stay of execution to Paul Storey based on evidence that the prosecutor had lied to the jury in 2008 about the victim’s family’s interest in seeing Mr. Storey sentenced to death—a fact that was not exposed for nearly ten years when he was on the verge of execution. *See Ex parte Paul David Storey*, No. WR-75,828-02 (Tex. Crim. App. April 7, 2017) (not designated for publication). Similarly, Tilon Carter was on the brink of execution in 2017 when he received a stay based on newly discovered evidence showing that the prosecution had knowingly relied on false testimony from a medical examiner during Mr. Carter’s 2006 trial. *See Ex parte Tilon Lashon Carter*, WR-70,722-03 (Tex. Crim. App. May 12, 2017) (not designated for publication). In other words, the lessons of *Brady* and, more recently, the widespread publication surrounding the wrongful conviction of Michael Morton, have not eliminated problems with prosecutorial misconduct or the random fortuities that end up exposing some misconduct in Texas death-penalty cases.

The exceedingly limited means for holding “bad egg” prosecutors accountable is part of the problem. For instance, ADA Dan Rizzo of Harris County was found to have engaged in
misconduct in a capital case, including withholding exculpatory evidence that confirmed the defendant’s alibi; that misconduct led to the wrongful conviction of Alfred Dwayne Brown, who spent nearly ten years on death row for a crime he did not commit. However, the State Bar of Texas, which was asked by the current Harris County District Attorney’s office to sanction Rizzo for his role in this miscarriage of justice, closed its probe, finding no just cause to proceed with disciplinary sanctions against attorney Dan Rizzo. The State Bar’s decision was made before release of a scathing report by a special prosecutor, revealing that Rizzo had known about the concealed exculpatory evidence that he claimed he had not known about at the time.

Moreover, when prosecutorial misconduct is revealed late in the process, there is virtually no safety valve, such as a robust clemency process, to obtain relief. The clemency process itself is insulated from virtually any review arising from abuses of process. See Faulder v. Texas Board of Pardons & Parole, 78 F.3d 343 (5th Cir. 1999) (discussing “low threshold of judicial reviewability” in clemency proceedings because “pardon and commutation decisions are not traditionally the business of courts and that they are subject to the ultimate discretion of the executive power”); see also Garcia v. Jones, 910 F.3d 188, 191 (5th Cir. 2018) (reaffirming Faulder and holding that argument that the Board’s composition violated Texas law was not “akin


to the flip of a coin or a complete denial of access to the clemency process”) (citing Tamayo v. Perry, 553 F. App’x 395, 402 (5th Cir. 2014) (holding no procedural due process violation where Board members allegedly communicated with interested parties in violation of the Board’s own rules).

In some instances, misconduct is only given serious attention long after it is too late to benefit the primary victim of the misconduct. Years after Cameron Todd Willingham was executed, the Innocence Project unearthed letters between a prosecution witness and the district attorney who had obtained Willingham’s conviction suggesting an undisclosed deal in exchange for fabricated testimony that Willingham had “confessed” to a jailhouse acquaintance. The State Bar ultimately accused DA Jackson of violating several sections of the Texas Disciplinary Rules of Professional Conduct that prohibit making false statements to a judge as well as obstructing justice, but the State Bar was unsuccessful at trial against Jackson.98

The Texas death-penalty sentencing scheme is unconstitutional for failing to channel and guide unbridled prosecutorial discretion. Proof abounds that this discretion is often exercised in an arbitrary fashion. When “[t]here is no principled way to distinguish [a] case, in which the death penalty was [sought], from the many cases in which it was not,” it cannot be maintained that the imposition of a death sentence was “based on reason rather than caprice or emotion.” See Godfrey v. Georgia, 446 U.S. 420, 433 (1980). This unbridled (and too often abused) discretion is yet another reason, severally and cumulatively, why Texas’s death-penalty sentencing scheme is unconstitutional on its face.

V. In Multiple Ways, the Future Dangerousness Special Issue Is Unconstitutionally Vague and Fails to Narrow the Class of Death-Eligible Defendants.

In Texas, after a jury has convicted someone of capital murder in a case in which the State has exercised its discretion to seek a death sentence, the same jury hears evidence in a punishment-phase trial. After the close of the evidence, mandatory jury instructions require, *inter alia*, that the jury answer this question first: “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]” *TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1)* (the future dangerousness special issue). The State bears the burden of obtaining an affirmative answer to this special issue “beyond a reasonable doubt.” *Id., sec. 2(c).* Because proving this special issue is part of the State’s burden, in principle, the special issue is supposed to function as an aggravator, narrowing who among those who have been convicted of capital murder will actually be sentenced to death. In reality, Article 37.071, section 2(b)(1) is unconstitutionally vague and only serves to broaden vulnerability to a death sentence.

Well-established Supreme Court law makes clear that the statutory aggravating factors that are used to enable imposing a death sentence cannot be facially vague because vagueness risks arbitrary application. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 972 (1994). A death-penalty statute avoids arbitrary application by restricting sentencing discretion through (1) “clear and objective standards”; (2) “specific and detailed guidance”; and (3) an opportunity for rational review of the “process for imposing a sentence of death.” *Godfrey v. Georgia*, 446 U.S. 420, 428

One way states have sought to comply with this mandate is through clearly defined aggravating factors that “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 876-78 (1982); *see also Lewis v. Jeffers*, 497 U.S. 764, 776-78 (1990) (holding that aggravating circumstances must provide a principled basis for distinguishing those sentenced to death from those imprisoned for murder).

At the end of this Supreme Court term, on June 24, 2019, the Court issued an opinion that hinges entirely on the premise that vague laws are unconstitutional. *See United States v. Davis*, 588 U.S. __ (2019). As Justice Gorsuch explained for the Court, “[v]ague laws contravene the ‘first essential of due process of law’ that statutes must give people ‘of common intelligence’ fair notice of what the law demands of them.” *Id.* at *5 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). *Davis* also notes that, if courts are not to be in the business of rewriting statutes to eliminate vague terms, than the vague law must be treated as “no law at all” and be struck down. *Id.* at *5, *1.

As discussed at length in Section I above, the future dangerousness special issue has never served a narrowing function. The argument below explains precisely how Article 37.071 fails to provide jurors with clear and objective standards for deciding the future dangerousness special issue because none of the numerous vague terms contained therein are defined so as to channel sentencing discretion. Additionally, under current state law, the special issue does no more than give the State wide latitude to introduce an array of evidence to support its allegation that a death sentence is warranted. Moreover, under current state law, the *absence* of evidence of future dangerousness does not preclude *upholding* a jury’s future-dangerousness finding, depriving those sentenced to death of an opportunity for rational review of their sentences.
A. The Vague Text Does Not Guide Jurors Who Are Ill-Equipped to Make the Prediction Called for by the Special Issue.

Because the Legislature failed to define key terms in Texas’s first special issue, the CCA has insisted that these terms are to be interpreted according to their “ordinary meaning.” See, e.g., Druery v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007). This conclusion suggests that the CCA’s hands have somehow been tied—that it, as a court, has had no power to define terms to avoid overbroad construction. Yet the task of defining the terms in the Texas death-penalty sentencing statute is precisely what the Supreme Court in Jurek assumed the CCA was poised to do. After all, that is a primary function of a judiciary: construing statutory text.

Under Texas law, statutory construction is supposed to begin with ascertaining the Legislature’s intent, whenever possible, from the plain language of the text. See State v. Daugherty, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (“In divining legislative intent, we look first to the language of the statute[,]” and “[w]hen the meaning is plain, we look no further.”). But even the CCA itself has recognized that, when those words are ambiguous or would lead to absurd results, courts should resort to rules of construction or extrinsic aids. See Boykin v. State, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991).100 When those words are unconstitutionally vague or absurd, those results cannot stand.

In the non-death-penalty context, the CCA recently found a statute unconstitutionally vague on its face. See Doyal, -- S.W.3d --, 2019 WL 944022. The statute in question is a portion of Texas’s Open Meetings Act, section 551.143, which is meant to promote transparency in

100 The CCA has adopted a more rigid approach to statutory construction than the approach actually mandated by the state legislature. See TEX. GOV’T CODE § 312.005 (outlining the canons of statutory construction that are to apply in interpreting state statutory law). Of course, in the context of death-penalty litigation, any statutory text must give way to the demands of the U.S. Constitution, the supreme law of the land. In a federalist system, it is not sufficient to say “the state statute says x, so that is what the law is.”
government. In *Doyal* the CCA declares that “more clarity is required of a criminal law when that
law implicates First Amendment freedoms” (such as the right for elected officials to meet behind
closed doors without a quorum). *Id.* at *3. For some reason, the CCA has not believed that such
clarity is necessary when the issue is whether an individual should be sentenced to death.

The CCA’s ongoing refusal to define and narrow vague terms in the Texas future
dangerousness special issue rests on the insistence that jurors will understand the terms without
instruction: “The trial court need not define such terms, because the jury is presumed to understand
them without instruction.” *Murphy*, 112 S.W.3d at 606; *Ladd v. State*, 3 S.W.3d 547, 572-573
(Tex. Crim. App. 1999). This presumption is, however, untenable.

Empirical evidence has established that jurors are routinely confused by capital-sentencing
instructions. For instance, juror data demonstrate that jurors do not know what “burdens” are or
whether they must agree on certain key sentencing concepts. See Luginbough & Howe, *Discretion
in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169 (1995) (finding
that jurors’ do not understand the lengthy and confusing sentencing phase instructions). When
jurors do not understand the instructions, they are more likely to vote for death. See Richard
Weiner, *Comprehensibility of Approved Jury Instruction in Capital Murder Cases*, 80 JOURNAL
OF APPLIED PSYCHOLOGY 455, 463 (1995) (determining that the less jurors were confused about
the jury instruction, the less likely they were to sentence the defendant to death.); *see also* Shari
79 JUDICATURE 224, 231 (1996) (finding that jurors who received more comprehensible sentencing
instructions were less likely to lean towards death than jurors who received the pattern
instructions).
Studies of the Capital Jury Project (CJP) have corroborated this conclusion. In terms of the future-dangerousness inquiry in particular, CJP data show that 32% of jurors believed that the law required them to impose the death penalty if they believed that the defendant would be dangerous in the future, regardless of any mitigating evidence. John Blume, Theodore Eisenberg, Stephen P. Garvey, Lessons from the Capital Jury Project, Ch. 5 in BEYOND REPAIR? AMERICA’S DEATH PENALTY 144-77 (Duke Univ. Press 2003). Although amassing empirical data to test hypotheses is always useful, this particular result should not have come as a surprise. The Supreme Court noted over forty years ago in Gregg: “Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given.” 428 U.S. at 192.

Members of the Supreme Court and distinguished legal organizations such as the American Bar Association (ABA) have long recognized that sentencing juries are ill-equipped to make reliable predictions about future dangerousness. See, e.g., Barefoot v. Estelle, 463 U.S. 880, 930 (1983) (Blackmun, J., dissenting); ABA STANDARDS FOR CRIMINAL JUSTICE, Sentencing Alternatives and Procedures § 1.1(b), Commentary pp. 46–47 (Approved Draft 1968); ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 18–1.1, Commentary at 18–16, 18–24 to 18–25 (1980). As described above, there is now ample empirical evidence that jurors do an abysmal job of making accurate predictions of this nature (and no scientific evidence suggesting that such predictions are ever reliable). Therefore, in 2013, the ABA released The Texas Capital Punishment Assessment Report, calling on Texas to “abandon altogether the use of the ‘future dangerousness’ special issue” as it and other aspects of the Texas sentencing scheme “place limits on a juror’s ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.” ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, EVALUATING FAIRNESS AND
Among the ABA’s concerns with the Texas scheme is that the key terms of the first special issue are irremediably vague and undefined. See ABA Texas Assessment Report at 308. By leaving jurors to interpret the statutory terms according to their “ordinary meaning,” jurors are left to surmise the meaning from their life experiences. Druery, 225 S.W.3d at 509. But those life experiences do not include predicting whether someone they have found guilty of capital murder had a “probability” of committing criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(a)(2)(b)(1). By being left to their own devices, jurors interpret these terms “so broadly that a death sentence would be deemed warranted in virtually every capital murder case.” ABA Texas Assessment Report at viii.

In dicta, the Supreme Court recently acknowledged the idiosyncratic task that Texas imposes on the sentencer through the future dangerousness special issue: to “render a predictive judgment inevitably entailing a degree of speculation.” Buck v. Davis, 137 S. Ct. 759, 776 (2017). This “speculation” that jurors are asked to indulge in is so unbridled as to guarantee overbroad and arbitrary results.

**B. The CCA’s Failure to Define, and Thereby Narrow, Key Terms in the Future Dangerousness Special Issue Is Without Justification.**

By refusing to define the unconstitutionally vague terms “probability,” “criminal acts of violence,” “continuing threat,” and “society,” the CCA has left jurors with too much discretion.

---

101 The same report notes that juries must unanimously find a probability that a defendant will commit future acts of violence before reaching the question of mitigation, thus placing the first special issue “at the center of the jury’s punishment decision[,]” thereby undermining the mitigation inquiry. ABA Texas Assessment Report at 307. This distinct problem is discussed in Section VI.E below.
This broad discretion fails to narrow the class of persons eligible for the death penalty and ignores the requirement of heightened reliability in the adjudicative process leading to a death sentence. See Gregg, 428 U.S. at 189 (citing Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (“Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”)); see also Godfrey, 446 U.S. at 428-29 (holding that a state’s aggravating factors must not be defined in such a way that people of ordinary sensibilities could find that nearly every murder met the stated criteria).

At least four terms/phrases within the single sentence that constitutes the future dangerousness special issue are patently and unconstitutionally vague.

1. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.

Before the Supreme Court took up Jurek, a slim majority of the CCA concluded that, absent a statutory definition provided by the Legislature, the term “probability” need not be defined. Or more accurately: a slim majority implicitly concluded that no terms needed to be defined by rejecting that appellant’s contention that Article 37.071(b) was “too vague to provide adequate guidance to the jury.” Jurek v. State, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975). The rationale offered for this conclusion was the judges’ belief “that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula.” Id. In other words, the CCA Jurek majority admitted that the statutory provision lacked guidance but deemed guidance unnecessary. The majority’s terse discussion of the topic does not mention, let alone analyze, any of the specific vagueness arguments the appellant and the dissenters had raised.
The dissent in *Jurek*, urged by two CCA judges, emphasized the Legislature’s failure to define the word “probability.” It is noteworthy that a dissent by two judges means that the split was a bare three-to-two decision because, back in 1975, the CCA consisted of only five judges. The two *Jurek* dissenter took the three-judge majority to task for failing to address the glaring problem with the vague term “probability”:

Having mistaken vagueness for discretion, the majority naturally have failed to recognize the vagueness inherent in Art. 37.071(b)(2). The word “probability” is not examined by the majority. This concept is at the core of the issue submitted under this subsection, yet the majority seek neither to define it nor to discuss its meaning. The essential indefiniteness of the word “probability” is ignored.

*Id.* at 944-45 (Odom, J., concurring and dissenting) (emphasis added).

The CCA *Jurek* dissent is not subtle. It calls out the Legislature for its irresponsible approach to statutory drafting and argues at length that such vagueness in the context of assessing whether a person should live or die is unacceptable as a matter of constitutional law:

What did the Legislature mean when it provided that a man’s life or death shall rest upon whether there exists a “probability” that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, a probability, and no one would say it is no probability or not a probability. It has been written: “It is probable that many things will happen contrary to probability,” and “A thousand probabilities do not make one fact.” The statute does not require a particular degree of probability but only directs that some probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

---

102 A constitutional amendment in 1966 grew the court from three judges to five, and in 1977, another amendment increased the court’s membership to nine. See Lindsay Stafford Mader, *The Court of Criminal Appeals Turns 125*, available at https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=34349.
Id. at 945.

The CCA *Jurek* dissent also recognizes that the default interpretation of the vague term “probability” guaranteed a broad application, thus defeating any pretext that the future dangerousness special issue served to narrow the class of people eligible to be killed by the State for their crimes:

... a probability is simply a chance—however large or small—as measured and defined in mathematical or statistical terms. ... Certainly, this clear definition of probability, though without vagueness in the meaning of the term itself, leaves much vagueness in the issue submitted under Article 37.071(b)(2), because even with this definition the question would by its terms, be answered in the affirmative for all individuals, no matter how saintly. That is, there is beyond any doubt some mathematical chance that all persons “would commit criminal acts of violence that would constitute a continuing threat to society.”

Id. at 948 (emphasis added).

Regrettably, when *Jurek* went up to the Supreme Court, that court did not address the pointed dissenting opinion signed by two of the CCA’s five judges. Instead, the case was decided based on the assumption that the CCA was going to take responsibility for defining statutory terms so as to ensure compliance with constitutional mandates as soon as it had the opportunity to do so. *See Jurek*, 428 U.S. at 272. As discussed in Section I.B above, that confidence in the CCA proved to be misplaced; frankly, that confidence made little sense in light of the CCA dissent, which had already made it quite clear in *Jurek* itself that there was a fundamental problem with the language that the Legislature had cavalierly used in formulating the future dangerousness special issue and had chided the majority for failing to “define” the word “probability” or even discuss the dissenters’ concerns.103 *Jurek*, 522 S.W.2d at 944-45. That is, before *Jurek* was appealed to the

---

103 The Supreme Court wrote that the CCA “has yet to define precisely the meanings of such terms as ‘criminal acts of violence’ or ‘continuing threat to society,’” implying that there was no reason to doubt that the court would soon do so. *Jurek*, 428 U.S. at 272-73. The only way that the Supreme Court plurality who signed *Jurek* could have made this assertion with a straight face
Supreme Court, the CCA three-judge majority had already punted with respect to the two-judge dissent, insisting that the vague and exceedingly broad term “probability” did not need to be defined. *Id.* at 939.

Over the years, the CCA has periodically glossed the vague term “probability” using a variety of (inconsistent) phrases. Here are some examples of how the CCA has described “probability” (usually in addressing complaints about how the phrase was explained during capital voir dire):

- some “likelihood of the occurrence of any particular form of an event;” *Granviel v. State*, 552 S.W.2d 107, 117 n.6 (Tex. Crim. App. 1976);

- “something between potential and more likely than not;” *Cuevas v. State*, 742 S.W.2d 331, 346–47 (Tex. Crim. App. 1987);

- “more than a bare chance of future violence;” *Smith v. State*, 779 S.W.2d 417, 421 (Tex. Crim. App. 1989);

- “proof of more than a bare chance of future violence;” *Ellason v. State*, 815 S.W.2d 656, 659 (Tex. Crim. App. 1991);

- “more than a ‘possibility;’” *Hughes v. State*, 878 S.W.2d 142, 148 (Tex. Crim. App. 1992);

- “more likely than not;” *Robison v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994);


is if the justices had failed to read the dissent that accompanied the CCA’s majority opinion. Because *Jurek* was one of five cases considered and decided together during the Supreme Court’s 1975-1976 term, and because the petitioners had focused their attention on arguing that the death penalty was unconstitutional under all circumstances regardless of textual specificity, it is certainly conceivable that the Supreme Court plurality in *Jurek* was not aware of the dissent below or of the CCA majority’s failure to address the dissenter’s vagueness argument. Indisputably, neither the majority opinion issued by the CCA nor the plurality opinion issued by the Supreme Court in *Jurek* contains any textual analysis of the future dangerousness special issue although the CCA dissenters had loudly sounded the alarm about the statute’s vagueness.
That the highest criminal court in Texas has inconsistently construed the word “probability,” found in a single statutory sentence, underscores precisely why the term was and remains unconstitutionally vague.

More recently, in dicta found in a concurring opinion, one former member of the CCA aptly described the fundamental problem with asking jurors to make a prediction about a specific individual based on the notion of “probability.” See Guy Len Allen v. State, No. AP-74,951, 2006 Tex. Crim. App. LEXIS 2545, at *27 (Tex. Crim. App. June 28, 2006) (Johnson, J., concurring in the court’s judgment that the appellant had failed to preserve a particular attack on the State’s expert testimony on future dangerousness that was raised on appeal). Judge Johnson’s concurrence notes the difference between the term “probability” and a mere “possibility,” conceding “the common mistake of conflating” the two. Id. She observed that “[p]robability does not exist without large numbers of observation of a defined reference group. However, almost anything that does not violate the laws of physics is at least theoretically possible.” Id. at *30 n.1. As examples of “reference groups” used to make reasonable probabilistic predictions Judge Johnson offered the following: “For instance, after many observations are made and analyzed, we can say with some certainty that one out of two marriages will fail or that seven of ten professional football players will retire because of injury.” Id. at *27. Judge Johnson then went on to observe, again quite correctly, that “[w]hat we cannot say with any certainty is which marriages will fail or which football players will suffer career-ending injuries.” Id. Probabilistic predictions are, ineluctably, limited in this way.

When Texas jurors are asked to answer the future dangerousness special issue, they are not given any “defined reference group” to calibrate their guess about the future. They are invited to use their own personal hunch about what “probability” means and are free to assume that the term
means no more than a mere “possibility.” Worse still, in the context of sentencing someone to death, they are required to make a prediction about a specific individual based on a hunch about a probability that could, at best, apply only to some reference group of individuals with characteristics and history similar to the defendant, which the jurors have not been provided:

the only probability that can be accurately and truthfully stated must assume a person who is like the members of the reference group on which the estimate of probability is based. By its very nature, probability cannot, and does not, exist based on one observation of a group of one, nor can it be used to predict the behavior of a given individual. It is misleading to purport to be able to state a probability that a given individual will act in a given way in the future. Therein lies the difficulty with asking witnesses to testify about the probability that a given defendant will be a danger in the future.

Id. at *28-*29. As Judge Johnson, who has since resigned from the CCA, had concluded by at least 2006: “A probability that a single individual will engage in a given behavior does not exist.” Id. at *29. Yet in each punishment-phase of trials in which Texas seeks a death sentence, jurors are asked to make this unreasonable and unreliable prediction.104

The probability that any given person will engage in a criminal act of violence in the future is indisputably above zero. Professionals are unable to completely rule out the prospect of any person committing future acts of violence, much less a person that was just convicted of a violent crime. See Michael L. Radelet & James W. Marquart, Assessing Nondangerousness During Penalty Phases of Capital Trials, 54 ALB. L. REV. 845, 849 (1989-1990) (“Predictions of violent behavior are difficult because the probabilities considered in the prediction are conditional. That

104 In her concurrence, Judge Johnson focused on the impossibility of a witness making a reliable prediction about the specific defendant’s future conduct based on a probability; the concurrence does not state the obvious corollary to her thesis: that because making such predictions are inherently unreliable, asking the jury to do so as a requisite to imposing a death sentence is an arbitrary and capricious practice and thus is unconstitutional.
is, each of us, given certain circumstances, might engage in violent behavior in the future; thus, each of us has a non-zero probability of killing another.”).

Even when predictions are based on actuarial data, a defendant’s risk of committing future acts of criminal violence must be phrased in terms of non-zero probabilities. See, e.g., Laura S. Guy, et al., Assessing Risk of Violence Using Structured Professional Judgment Guidelines, J. FORENSIC PSYCHOL. PRAC., May 2012, at 272 (“[Mental Health Professionals] are encouraged to communicate level of risk using categorical levels of low, moderate, and high.”). Thus, there is at least some probability that every single person might engage in an act of violence in the future. The fact that every person has a non-zero probability of committing future acts of violence shows that the first special issue fails to narrow the class of death-eligible defendants. But see Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (finding death penalty statute for failing to narrow the class of death-eligible murderers).

2. **“Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.**

The phrase “criminal acts of violence” is also vague and undefined. The phrase could reasonably range from capital murder all the way down to simple assault. See Christopher Slobogin, Capital Punishment and Dangerousness, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY AND COMPETENCE 119, 121, 125 (Robert F. Schopp, et al. eds., 2009) (questioning what qualifies as “dangerousness” and “criminal acts of violence”). Essentially, Texas capital juries are asked to determine whether there is any likelihood that the person whom they have just found guilty of a capital-qualifying crime might commit any act of violence in the future.

Recently, the Supreme Court struck down similar language in 18 U.S.C. § 924(e)(2)(B)(ii), the residual clause of the Armed Career Criminal Act (“ACCA”), as unconstitutionally vague. See
Because the constitutional challenge to the language in the ACCA that was at issue in Johnson is similar to the terminology Mr. Clark challenges in this subsection, the facts of Johnson merit some discussion.

The ACCA was a part of the Comprehensive Crime Control Act of 1984, enacted to impose tougher sentences on defendants in illegal firearms cases. The legislation targeted those who had previously been convicted three or more times for “violent” felonies by creating a mechanism to enhance a sentence for the current offense. In 18 U.S.C. § 924(e)(2)(B), a “violent felony” was defined as an act that threatens “use of physical force against the person of another,” “is burglary, arson, or extortion,” “involves use of explosives,” or “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The last phrase, known as the “residual clause,” was the statutory text challenged in Johnson.

Mr. Johnson had a prior conviction for possession of a short-barreled firearm, a felony. The question presented was whether that felony conviction qualified as “conduct that presented a serious potential risk of physical injury to another” or was that language unconstitutionally vague. Id. The Supreme Court found the statutory language to be unconstitutionally vague. Johnson, 135 S. Ct. at 2557-58.

Most of section 924(e)(2)(B) of the ACCA directs the sentencer to specific enumerated offenses, some by name and others by legal elements; if prior convictions qualified, then the enhancement could be applied. Yet the Supreme Court found the key statutory text—“conduct that presented a serious potential risk of physical injury to another”—to be too vague.

As noted above, even more recently, the Supreme Court, in United States v. Davis, 588 U.S. __ (2019), struck down another provision, 18 U.S.C. § 924(c), as unconstitutionally vague, relying heavily on Johnson while more explicitly explaining the constitutional principles that require striking down vague laws. In Davis, the Court asserts: “In our constitutional order, a vague law is no law at all.” Id. at *1.
In contrast to the ACCA, Article 37.071(b)(1) of the Texas Code of Criminal Procedure does not define the similar phrase—“criminal acts of violence”—at all. Jurors, unlike judges, do not have special knowledge as to what constitutes “criminal” conduct. The statute does not assist jurors in understanding what acts are “criminal” versus rule violations or conduct that would, at most, be considered a civil tort. Because the statute requires a speculative, predictive judgment, Texas capital jurors are freer than federal judges to decide how evidence of any kind of misconduct, without any reference to real-world criminal law or statutory elements, might suggest a proclivity to commit hypothetical “criminal acts of violence” in the future. Because there is no statutory limitation on what constitutes a “criminal act of violence,” Texas capital jurors could consider acts that do not result in physical harm, such as assault by contact or assault by threat or masturbation in a jail cell to be “criminal acts of violence.” Consequently, the statute leaves open the possibility that a jury might make the leap from a sentence of life without parole to a death sentence on the basis of evidence of trifling rule violations or a Class C misdemeanor that would be, at most, punishable only by a fine of up to $500.00.

If “conduct that presented a serious potential risk of physical injury to another” is a statutory definition of “violent felony” that is too vague for federal judges to use in making a sentencing determination (under the ACCA), then the undefined statutory language “criminal acts of violence” is too vague for jurors to use in answering the future dangerousness special issue that is a requisite to a death sentence. Oddly, the CCA recently relied heavily on the Supreme Court’s decision in Johnson in finding a provision of the Texas Open Meetings Act unconstitutionally vague. See Doyal, -- S.W.3d --, 2019 WL 944022, *4-*6. Here, where the statutory language in question is far more analogous to the text at issue in Johnson, consistency requires finding that the phrase “criminal acts of violence” is too vague.
3. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.

The phrase “continuing threat” is inherently vague. A threat of any kind is, by definition, a hypothetical, no more than a risk. There is a threat on any given day that the stock market will decline; therefore, there is a “continuing threat” that investments in the stock market can lose money on any given day. The “continuing threat” terminology does nothing to narrow the future-dangerousness inquiry, but rather permits an affirmative answer to the special issue with respect to virtually anyone. The one exception might be a defendant who was so severely incapacitated by the time of trial that he was a mere vegetable.\textsuperscript{106} Case law indicates that even those defendants who have no significant disciplinary history during an extended period of incarceration and who are physically debilitated can still be conceived as a “continuing threat” under Texas law.

Consider the example of Vietnam veteran Billie Wayne Coble. After he was granted a punishment-phase retrial, the State searched for evidence that he had engaged in violent conduct during the eighteen-year interval between his first and second trials. Finding nothing relevant to carrying its burden, the State was reduced to pointing to alleged “evil glances” that one member of the victim’s family felt she saw during the trial and actions that predated his capital offense. By the time of his retrial, Coble was a 60-year-old in poor health with a history of heart attacks, under treatment for high blood pressure, hypertension, and high cholesterol. Dr. Mark Cunningham, a forensic psychologist nationally recognized for his research into factors that predict violence in prison, opined that Coble “was in the group least likely to commit acts of violence in the future.” \textit{Coble v. Davis}, 728 F. App’x 297, 300 (5th Cir. 2018).

\textsuperscript{106} Such a hypothetical defendant would, presumably, not be competent to stand trial. Therefore, this circumstance does nothing to narrow the application.
Even the CCA noted testimony that Coble “was well-liked by everyone; he was always even-tempered and had the ability to ‘talk sense’ into some of the more violent inmates...[he] organized a sports league...helped inmates write letters and would read them their letters from family members...he was always helpful and upbeat...would take people ‘under his wing’ and help the ‘agitated’ ones...was like a trustee, and would often walk around with female officers...was generous and gave commissary items to other inmates...helped mentally-retarded inmates and was known for his respect for the law and God.” Coble, 330 S.W.3d at 265. The CCA even admitted “[t]here is no denying [Coble’s] impressive history of nonviolence in prison.” Id. at 269. But notwithstanding all the evidence demonstrating that Mr. Coble had proven to be no future danger, the CCA held that a “threat” can, in theory, always be found where the defendant has been convicted of a capital crime. See id. Utilizing the CCA’s own logic, there is no conceivable argument that this aspect of the future dangerousness special issue serves any narrowing function. Instead, it impermissibly shifts the burden to the defendant to get himself out from under a death sentence. The “continuing threat” statutory language enables this burden-shifting and is unconstitutionally vague.

4. “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.

The special issue refers to an amorphous “society” toward which there is a probability that the defendant will constitute a continuing threat. The only “society” that should matter is the “prison society” where the convicted defendant will thereafter spend the rest of his life because, if a juror does not answer the future dangerousness special issue affirmatively, Texas law requires that the defendant be automatically sentenced to life in prison without the possibility of parole. See TEX. CODE CRIM. PROC. art. 37.071, sec. 2(a)(1) (“If a defendant is tried for a capital offense 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.”). Yet the CCA has agreed with the State that, “society” can mean whatever the jurors want it to mean—“whether in or out of prison.” *Lucio v. State*, 361 S.W.3d 878, 903 (Tex. Crim. App. 2011).

The CCA’s view is that the future dangerousness special issue asks “whether a defendant would be a continuing threat ‘whether in or out of prison’ without regard to how long the defendant would actually spend in prison if sentenced to life.” *Martinez v. State*, 327 S.W.3d 727, 735 (Tex. Crim. App. 2010). This view broadens the statute’s application even beyond the vague statutory text. This interpretation broadens improperly because there is no sound basis for the jury to consider the prospect of the defendant, who has just been found guilty of capital murder, being a threat “out of prison.” *Lucio*, 361 S.W.3d at 903. The CCA’s view that it is permissible for jurors to speculate about whether a guilty defendant might be dangerous “out of prison” is to invite speculation about a false hypothetical. The only reason to invite such speculation on the jurors’ part is to make it even more likely that jurors would be disposed toward a “yes” answer to this special issue as a requisite to a death sentence.

*****

Separately and cumulatively, the vague terms “probability,” “criminal acts of violence,” “continuing threat,” and “society” in the future dangerousness special issue improperly broaden juror discretion to impose the death penalty in an arbitrary, unreliable, and thus unconstitutional fashion.
C. The CCA’s Approach to Reviewing Future Dangerousness Has Eviscerated the Right to a Fair Trial in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The CCA’s refusal to define the patently vague terms in the future dangerousness special issue has resulted in chronically overbroad application. Additionally, the CCA, relying at least in part on another component of the statute, has developed a body of case law that permits a virtual free-for-all in terms of evidence deemed relevant to the future-dangerousness inquiry. The CCA has continuously authorized an ever-broader understanding of the future dangerousness special issue as a vehicle that gives the trial court “wide discretion in admitting evidence, including extraneous offenses, relevant to the jury’s determination of a capital murder defendant’s death-worthiness.” *Guy Len Allen v. State*, No. AP-74,951, 2006 Tex. Crim. App. LEXIS 2545, at *24 (Tex. Crim. App. June 28, 2006) (not designated for publication).

The statute explicitly requires trial courts in death-penalty cases to charge the jury that “in deliberating on the issues” of future dangerousness (and, where applicable, the parties special issue), that the jury “shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant’s background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.” *Tex. Code Crim. Proc.* art. 37.071, sec. 2(d)(1) (emphasis added). In other words, the plain text of the statute encourages a wide-open consideration of backward-looking evidence—with a particular emphasis on “the circumstances of the offense” by harkening back to the guilt stage of trial. *Id.* This statutory text, combined with the CCA’s insistence since *Coble* that the future-dangerousness assessment is supposed to be “normative” (whatever that may mean), has resulted in the State being virtually unconstrained in the evidence upon which it may rely.

The only constraints found in the statutory text are as follows:
First, that statute notes that “[t]his subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas.” Id. § 2(a)(1). The face of this provision suggests only that, to the extent that the trial court finds that any evidence was obtained in violation of the Fourth Amendment, that evidence must be suppressed in the punishment phase as well. Considering how riddled Fourth Amendment jurisprudence is with exceptions and the trial court’s pronounced discretion in ruling on suppression motions, this caveat is decidedly modest. See, e.g., Villarreal v. State, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (explaining that a trial court’s ruling on a suppression motion lies within the sound discretion of that court); Balentine v. State, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002) (explaining that a trial court’s ruling on a motion to suppress is reviewed for abuse of discretion, giving almost total deference to the trial court’s determination of historical facts). But see Riley v. California, 134 S. Ct. 2473 (2014) (discussing some limits on the search-incident-to-arrest exception arising from modern cell phone technology).

Second, the statute notes that “[t]he introduction of evidence of extraneous conduct is governed by the notice requirements of Section 3(g), Article 37.07.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(a)(1). That is, the State, if asked, must disclose before trial what evidence of extraneous conduct it intends to put before the jury. This requirement is merely a procedural limitation that gives the defense a means to insist on notice.

Third, the statute now includes one concrete substantive limitation. This limitation was adopted after a great deal of litigation over the State’s reliance, in numerous death cases, on expert testimony that defendants who are black or Hispanic are more likely to commit acts of criminal violence in the future because of their race/ethnicity. See, e.g., Buck, 137 S. Ct. at 776-77 (explaining the history of this practice in Texas and finding that “when a jury hears expert
testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.”). To prevent future violations of the Fourteenth Amendment’s Equal Protection Clause along these lines, the statute now states: “evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(a)(2).

These modest limitations do little to curtail a wildly permissive interpretation of what constitutes evidence relevant to the future-dangerousness inquiry.

By permitting the State to put on evidence of past extraneous offenses, including ones that were never adjudicated or, in many cases, even charged, ostensibly to prove a probability that the defendant will commit a criminal act of violence in the future, the statute allows an end-run around several core principles of criminal law. Specifically:

- The Constitution’s guarantee of a presumption of innocence is eviscerated because the jury is not instructed that the defendant must be presumed innocent of the extraneous offenses;

- The Constitution’s guarantee of a fundamentally fair trial is entirely undermined by the State’s ability to present evidence constituting hearsay, rumor, innuendo regarding allegations that, in many instances, are many years old and/or are presented without the defendant having the right to confront the actual accuser;

- The Constitution’s guarantee of a trial before an impartial tribunal is imperiled by a scheme that requires the same jury who just convicted the defendant of capital murder to decide the issue of the defendant’s future dangerousness; and

- The Constitution’s guarantee against self-incrimination, which means the burden of proof is supposed to rest on the State, is turned on its head in the sentencing phase where, under current CCA law, the State can carry its “burden” of proving future dangerousness based on the facts of the offense alone.

The extreme (and unconstitutional) latitude given to the State under the auspices of permitting it to carry its burden under the future dangerousness special issue is illustrated by Bell
v. State, 938 S.W.2d 35 (Tex. Crim. App. 1996). In Bell, the CCA held that a prison guard’s generalized testimony that he had seen unnamed death row inmates suddenly snap and become unexpectedly violent after long periods of good behavior was “at least marginally relevant” to the future-dangerousness issue. Id. at 49. Likewise, the CCA has found that testimony regarding the violent nature of Texas prisons and behavior perpetrated by third parties not before the jury are somehow relevant to assessing the future dangerousness of the individual before them. For instance, in Lucero v. State, 246 S.W.3d 86, 97-98 (Tex. Crim. App. 2008), the CCA emphasized previous cases in which it had found no barrier to evidence admitted during death-penalty cases, of unrelated third parties’ misconduct in prison: Threadgill v. State, 146 S.W.3d 654, 670-71 (Tex. Crim. App. 2004) (finding trial court did not abuse its discretion by admitting photographs of bombs and weapons made by other inmates in the Texas prison system because “evidence regarding weapons made by prison inmates was at least marginally relevant to the testimony concerning inmate violence within various classifications of prison society”); Canales v. State, 98 S.W.3d 690, 699 (Tex. Crim. App. 2003) (condoning testimony regarding inmates’ ability to defeat locking mechanisms on prison cell doors relevant to future dangerousness special issue).

Quite recently, the CCA was asked to decide if it was error for a trial court in the punishment phase of a death-penalty case to permit testimony (and pictures) illustrating how an inmate in some random TDCJ unit had put a pencil through the eye of a guard where it lodged four inches into the man’s brain. See James Calvert v. State, AP-77,063 (case submitted Sept. 19, 2018). It was undisputed that the defendant, James Calvert, had nothing to do with this incident; but the trial court, interpreting Texas’s death-penalty sentencing scheme, found that this highly inflammatory testimony was nevertheless relevant to the question of whether the State should sentence a totally unrelated individual to death and deemed the evidence admissible. Id.
Ironically, in *Coble* itself, the trial court had granted the defendant’s motion in limine precluding the State from mentioning any specific instances of misconduct by other inmates. 330 S.W.3d at 287. But since *Coble*, the CCA has blown passed even that modest restraint. The CCA’s exceedingly broad interpretation of “relevance” in the context of future dangerousness has eviscerated the State’s burden to prove what is couched as an additional element that is supposed to be proven beyond a reasonable doubt.

Worse still, the CCA continues to insist, as a matter of law, that the facts of the offense can be sufficient to satisfy the State’s burden to prove future dangerousness. For instance, *Allridge v. State*, 850 S.W.2d 471, 488 (Tex. Crim. App. 1991) (includes a string cite of cases dating back to 1979 to support the proposition that: “This Court has held that the facts of the crime alone as proven during the first stage of the trial can be sufficient to support affirmative findings to the special issues at the punishment stage of a capital murder trial.”). *See also Fuller v. State*, 253 S.W.3d 220, 231-32 (Tex. Cim. App. 2008) (same); *Steven Wayne Thomas v. State*, AP-77,047, 2018 WL 6332526 (Tex. Cim. App. Dec. 5, 2018) (not designated for publication) (citing *Fuller* favorably for this same proposition). In Steven Thomas’s recent appeal, his points of error arising from the future-dangerousness issue were all rejected. Thomas, whom a Texas jury has now twice found would be a future danger, had been on death row for over twenty-seven years with a record of only minor infractions. Additionally, Dallas County jailers testified during his second punishment-phase trial that he had been quiet and well-mannered during the four years he had spent awaiting his retrial. Even so, the CCA insisted in 2018 that “[t]he facts of the offense”—committed in 1987—“alone may be sufficient to sustain the jury’s finding of future dangerousness.” *Id.* at *20.
In Thomas’s case and many others, the CCA’s legal conclusion that the facts of the offense can be sufficient is supported only by a recitation of the facts of the crime and evidence of the offender’s behavior leading up to and immediately after the crime. That is, the CCA’s “review” of this punishment-phase issue amounts to no more than rubber-stamping the guilt-phase verdict.

The CCA has also adopted the position that it is impossible to “reweigh” evidence related to future dangerousness and thus it must affirm the jury’s finding as long as the prediction was at least “rational,” a decidedly low bar. *Hunter*, 243 S.W.3d at 673; see also *McGinn v. State*, 961 S.W.2d 161, 168-69 (Tex. Crim. App. 1998) (stating that once the rationality of the future-dangerousness prediction is established, it is impossible to determine whether the prediction was nevertheless wrong or unjust because of counter-veiling evidence). There is, of course, a rather obvious way to determine if a prediction was in fact wrong: by looking at the evidence of how the convicted inmate comported himself in prison over the course of an extended period.

The CCA’s insistence that such reweighing is not possible is like suggesting that one cannot, with the benefit of hindsight, assess the accuracy of predictions made by fortune-tellers or psychics by comparing their predictions to what actually occurred thereafter. There is no impossibility, simply a refusal to revisit these “predictions.” Indeed, it is unreasonable, as a matter of law, to refuse to vacate predictions of future dangerousness in the face of substantial evidence that such predictions had proven to be flat wrong. Deeply troubling is the refusal to even reconsider the jury’s future-dangerousness predictions in the limited circumstances where (1) a new punishment-phase trial was later awarded; and (2) during that new trial, the defendant adduced evidence that exposed the spurious nature of the initial prediction. The CCA’s legal position, contrary as it is to constitutional mandates, seems driven by a reluctance to open the writhing can of worms that has been the future dangerousness special issue from the outset.
Because the CCA long ago concluded that, as a matter of law, evidence of a positive adjustment to incarceration, no matter how voluminous and credible, “does not preclude a finding of future dangerousness,” that means that this issue is insulated from review; the State will always win. Id. at *21 (citing Hunter v. State, 243 S.W.3d 664, 673 (Tex. Crim. App. 2007); Bible v. State, 162 S.W.3d 234, 245 (Tex. Crim. App. 2005)). But this legal position begs the question: since all capital-qualifying crimes are, in principle, horrible crimes, if the facts of the offense alone are sufficient to support a future-dangerousness finding, what is the point of the special issue?

**D. The Future Dangerous Special Issue, as Drafted and as Interpreted by the CCA, Unconstitutionally Places the Burden on Defendants to Prove a Death Sentence Should Not Be Imposed.**

Although the future dangerousness special issue is purportedly part of the State’s burden, Texas’s approach ultimately places the burden on the convicted capital defendant to prove that he or she is not a future danger—and then makes it virtually impossible to carry this burden. This improper burden-shifting is evident by the fact that the conviction alone is enough for the State to prevail. Under current CCA case law, the State would not have to do anything in the sentencing phase other than argue and be able to sustain a “yes” response to the special issue.

In other jurisdictions, this approach has been seen as improper “double counting” of the capital offense per se as an aggravating circumstance—a circumstance that has long been recognized as injecting arbitrariness into the process. See, e.g., United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996) (noting that such double counting “has a tendency to skew” the process and create “the risk that the death sentence will be imposed arbitrarily”).

Indeed, clearly established federal constitutional law makes clear that the facts of the capital crime, no matter how horrific, are not a basis for short-circuiting a legal analysis of punishment-phase issues. See, e.g., Williams v. Taylor, 529 U.S. 362 (2000) (showing that even
defendants who committed exceptionally aggravated crimes can be prejudiced by ineffective
counsel and granting relief to petitioner who had “brutally assaulted an elderly woman” before
killing her).\textsuperscript{107} The CCA once recognized this principle in the context of prosecutor misconduct
crime, no matter how senseless or heinous, is not the criteria. Law enforcement officers are not
free to choose under what circumstances they will remain true to the mandates of the Federal and
State Constitutions.”). If the future-dangerousness finding is insulated from review whenever there
has been a conviction for a capital murder, then the special issue serves no purpose (since the jury
would never be asked to answer the special issue absent a conviction). Having the jury answer the
special issue only makes sense if it is supposed to further narrow the category of people who are
eligible for such a severe and costly penalty as a State-conducted execution. Otherwise, it is just a
vehicle for the State to be able to inject unfairly prejudicial and inflammatory evidence into the
record to make a life verdict virtually impossible.

\textsuperscript{107} Examples abound of cases that stand for the proposition that the severity of the crime is
IAC relief to petitioner who had committed a “brutal crime”; victim was stabbed 16 times, beaten
with a blunt object, gashed in the face with beer bottle shards, and set on fire); \textit{Wiggins v. Smith},
539 U.S. 510, 553 n.4 (2003) (granting IAC relief to petitioner who had committed a “bizarre
crime” in which 77-year-old woman was found drowned in her bathtub, missing her underwear,
and sprayed with insecticide); \textit{Silva v. Woodford}, 279 F.3d 825 (9th Cir. 2002) (granting IAC relief
to petitioner who had kidnapped, raped, tortured, and mutilated two victims and left human
remains in a trash can); \textit{Mason v. Mitchell}, 320 F.3d 604 (6th Cir. 2003) (granting IAC relief to
petitioner who had sexually assaulted a nineteen-year-old, beaten her to death with a piece of wood
with nails sticking out of it, then left her half-naked in an abandoned building); \textit{Jermyn v. Horn},
266 F.3d 257 (3d Cir. 2001) (granting IAC relief to petitioner who had beaten his mother until she
was unconscious, placed her on the bed, and then set the bed on fire because she had cut him out
of her will); \textit{Hooks v. Workman}, 689 F.3d 1148 (10th Cir. 2012) (granting IAC relief to petitioner
who had beaten his pregnant girlfriend to death in front of their one-year-old daughter and the
beating was such that the fetus suffered a ruptured liver and severe injuries to its head and chest
and died in utero).
The low standard of proof imposed on the State and its ability to rely on constitutionally insufficient evidence mean that the defendant must, if there is any hope of getting out from a preordained death sentence, come forward with affirmative evidence that he or she is not a future danger. Yet we all know that proving a negative is, as a matter of basic logic, impossible. Additionally, even when the defendant does come forward with significant evidence that he will not be a future danger—such as evidence of decades of good behavior in prison—he will find the deck stacked entirely against him. See Coble, 330 S.W.3d 253.

An honest analysis of the text of the future dangerousness special issue and the way that text has been interpreted by the CCA reveals that this special issue serves only to broaden the scope of individuals who are susceptible to the death penalty. Granting jurors unbridled discretion in considering the future-dangerousness issue and the State an unbridled license in terms of the evidence it can put on does quite the opposite of narrowing the class of legally eligible individuals vulnerable to a death sentence.

*****

The CCA has failed, for decades now, to ensure that the Texas scheme complies with the constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious application of the death penalty. An interpretation of a vague statute that weights the dice in favor of imposing a death sentence cannot conceivably be perceived as a statute that non-arbitrarily narrows the class of death-eligible offenders. See Godfrey, 446 U.S. at 328 (re-enforcing the states’ responsibility to obviate “‘standardless [sentencing] discretion’” by channeling “‘the sentencer’s discretion by ‘clear and objective’ standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”).
In each of the ways described above, Article 37.071, section 2(b)(1) was and remains unconstitutional on its face and as interpreted by the CCA.
VI. In Multiple Ways, the Texas Approach to Mitigation Remains Unconstitutional.

In Texas, only after a jury has answered the future dangerousness special issue unanimously and, in some circumstances, after it has also answered the parties special issue unanimously, is the jury directed to consider the issue of mitigation through the following mandatory instructions:

[I]f 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. art. 37.071, sec. 2(e)(1) (the mitigation special issue).

While jurors are instructed that they “need not agree on what particular evidence supports an affirmative finding” on the mitigation special issue, they are also told that they “shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness.” Id. sec. 2(f)(3) & (4) (emphasis added). These instructions are unconstitutional for each of the following distinct reasons:

• on their face, they improperly narrow the scope of what jurors may consider in making a decision about what constitutes mitigating evidence;

• the CCA’s interpretation of this facially unconstitutional text has further narrowed the scope of what is considered “relevant” mitigating evidence by ignoring the Supreme Court’s mitigation jurisprudence in violation of the Supremacy Clause;

• the sequence of the special issues, with mitigation considered only after the overbroad future dangerousness special issue, impairs fair consideration of whatever mitigating evidence was presented, making a death sentence the default option that must be overcome; and

• the statutory text and structure utilize known cognitive heuristics—techniques that the human mind uses to solve problems by exploiting unconscious biases—that laboratory studies have exposed as producing unreliable results.
Separately and cumulatively, these flaws render the mitigation instructions in Article 37.071, sections 2(e) and (f) unconstitutional.

A. The Supreme Court Has Been Clear That Capital-Sentencing Schemes Cannot Unduly Burden the Consideration of Mitigating Evidence.

The legal proposition is clearly established that states that wish to have a death penalty cannot adopt statutes that unduly burden sentencers’ ability to consider mitigating evidence that might warrant a sentence less than death. See, e.g., Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).

In Mills, the Supreme Court considered a capital-sentencing scheme that required jurors to agree unanimously on mitigating factors. The Maryland scheme consisted of a verdict form in three sections: in Section I, the jury was asked whether it found unanimously one or more aggravating factors (out of ten aggravating factors listed), Mills, 486 U.S. at 385-86; in Section II, the jury was asked whether it found unanimously one or more mitigating factors, id. at 386-88; in Section III, the jury was asked to balance the aggravating factor(s) it found against the mitigating factor(s) it found, id. at 388-89. To proceed to Section II, the jury had to find unanimously one or more aggravating factors; if not, a life sentence would result. Id. at 386-88. To proceed to Section III, upon completing Section II, the jury had to find unanimously one or more mitigating factors; if not, a death sentence would result. Id. at 389. Because a reasonable juror could have interpreted the instruction and accompanying verdict form as requiring unanimous agreement respecting each mitigating circumstance, the Supreme Court found this scheme unconstitutional. Id. at 384 (“Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.”). Indeed, the Maryland scheme bore the additional risk that, even if all twelve jurors believed some mitigating circumstance existed, the jury would be
prevented from giving effect to any such circumstance unless they unanimously agreed on which circumstance(s) existed.

In *McKoy*, the Supreme Court confronted yet another sentencing scheme that unduly burdened the jury’s ability to reach a life sentence. The North Carolina sentencing scheme—more so than Maryland’s—explicitly required the jury to find unanimously the presence of a mitigating factor. 494 U.S. at 435. This unanimity “requirement prevent[ed] the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find.” *Id.* Thus the Supreme Court concluded that the statute violated the Eighth and Fourteenth Amendments “by preventing the sentencer from considering all mitigating evidence.” *Id.* (emphasis added).

Together, *Mills* and *McKoy* underscore and represent clearly established federal constitutional law, dating back decades, that jurors must not be constrained in making a personal, individual decision about what constitutes mitigating evidence and whether that evidence compels them to extend mercy.

**B. Texas’s Statutory Definition of “Mitigating Evidence” Is Unconstitutional Because It Limits the Wide-Open Concept of “Mitigation” as Defined in the Supreme Court’s Eighth Amendment Jurisprudence.**

The Eighth Amendment requires that the sentencer be able to consider and give effect to a capital defendant’s mitigating evidence—any and all of it. The Supreme Court has not been subtle about this legal principle: “virtually no limits are place on relevant mitigating evidence a capital defendant may introduce[.]” *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (holding that reversal is required when there is a “reasonable likelihood” that the jury misunderstood an instruction so as to improperly limit consideration of mitigating evidence). For over forty years, the Supreme Court has emphasized and, if anything,
expanded the key role that mitigating evidence must play in a capital sentencing scheme. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (“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.”); Penry v. Lynaugh, 558 U.S. 30, 41 (1989) (evidence of “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”); Tennard v. Dretke, 542 U.S. 274, 285 (2004) (emphasizing the “low threshold for relevance” generally and the even more permissive standard that must apply to mitigating evidence in the punishment phase of a capital case).

As described in Section II above, Texas’s long-standing parsimony with respect to giving mitigating evidence a proper place in the sentencing scheme drew the Supreme Court’s ire, which responded emphatically that it had long characterized the relevance standard in the mitigation context “in the most expansive terms.” Id. at 284 (invoking McKoy v. North Carolina). The Supreme Court made this pronouncement while reminding that the basic relevance standard, under both federal and state rules of evidence, is exceedingly broad to begin with. That standard requires only that proffered evidence has “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.” Id. at 285.

To be relevant, mitigating evidence need “‘not relate specifically to petitioner’s culpability for the crime he committed,’” and may even be forward-looking, inviting consideration of the “‘defendant’s disposition to make a well-behaved and peaceful adjustment to life in prison.’” Tennard, 542 U.S. at 285 (quoting Lockett, 438 U.S. at 604). The Supreme Court has, for instance,
held that evidence of good behavior during pretrial incarceration is admissible as mitigating evidence. See Skipper v. South Carolina, 476 U.S. 1 (1986). The Supreme Court has even held that evidence that a capital defendant had won a prize for dance choreography while in prison had mitigating value, a fact that has nothing to do with moral blameworthiness. See Boyde, 494 U.S. at 382 n.5.

Moreover, in discussing the scope of mitigating evidence, the Supreme Court has repeatedly pointed to the ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as “guides to determining what is reasonable in the defense of a capital cases[.]” Wiggins v. Smith, 539 U.S. 510, 537 (2003). The ABA Guidelines outline in great detail the wide-ranging investigation that is relevant to building the mitigation case, which includes an “understanding of the client’s extended, multigenerational history” and evidence of “the client’s complete social history from before conception and to the present.” Commentary to ABA Guideline 10.11.

In short, any evidence that “might” move a single juror to vote for a life instead of a death sentence is relevant and admissible. Wiggins, 539 U.S. at 537. Additionally, courts are not to exclude any such evidence by “rote application” of hearsay rules. Sears v. Upton, 561 U.S. 945, 950 (2010).

Texas cannot permissibly preclude the sentencer from considering any relevant evidence that the defendant proffers in support of a sentence less than death. Yet Article 37.071, section 2(e)(1) of the Texas Code of Criminal Procedure defines “mitigating” evidence so as to narrow the scope of what Texas jurors are permitted to consider. There is no way to read the plain text of Article 37.071, sections 2(e)(1) and 2(f) and miss the fact that these statutorily mandated instructions confine, rather than expand, the concept of mitigating evidence by requiring jurors to
“consider mitigating evidence to be” only evidence “that a juror might regard as reducing the defendant’s moral blameworthiness.” Tex. Code Crim. Proc. art. 37.071, sec. 2(f)(3) & (4). As such, the statutory definition of mitigating evidence is unconstitutional under the Eighth Amendment.

C. The CCA’s Interpretation of the Statutory Definition of “Mitigating Evidence” Is Unconstitutional Because, by Operating in Contravention to the Supreme Court’s Eighth Amendment Jurisprudence, It Violates the Supremacy Clause.

Mr. Clark is aware that the CCA has, on numerous occasions, rejected Eighth Amendment challenges to Texas’s statutory definition of mitigation. But the CCA, in rejecting these challenges, has consistently cited cases that are off point, in part, because they were decided before the Supreme Court decided Tennard v. Dretke in 2004. Although Tennard focused on the way Texas courts had reviewed challenges how the pre-1991 statute ignored mitigation, Article 37.071, section 2(f)(4) is incompatible with Tennard’s holding—and the entire body of Supreme Court law on the nature of mitigation that was reaffirmed in Tennard. See Tennard, 542 U.S. 274 (finding that the way Texas had been handling mitigation under the pre-1991 statute, initially affirmed in Jurek, was unconstitutional). Ignoring this body of law violates the Supremacy Clause of the U.S. Constitution.

In Tennard, in the context of deciding that a death-sentenced individual was entitled to a certificate of appealability, the Supreme Court emphatically reaffirmed that the relevance standard applicable to mitigating evidence in capital cases is quite broad, embracing any evidence that might serve as a basis for a sentence less than death, regardless of whether the defendant was able to establish a nexus between the mitigating evidence and the commission of the crime. Id. at 287.

Since Tennard, the CCA, in rejecting challenges to the constrained definition of mitigating evidence found in Article 37.071, has repeatedly invoked Penry v. Johnson, 532 U.S. 782, 803
(2001), a case that pre-dates *Tennard* by three years. But *Penry I* did not consider or speak to the Legislature’s attempt to confine mitigating evidence to only that which reduces the defendant’s “moral blameworthiness” for the offense—because that statutory language had not been used in charging Penry’s jury because the Legislature had not yet enacted this text into law. Because the text of the Texas statutory definition of mitigation was not an issue in *Penry I*, that case cannot cogently be deemed an authority supporting the proposition that Texas’s current definition of mitigating evidence is constitutional.

Similarly inapposite are the CCA’s citations to and in *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010). Those authorities do not justify findings that the definition in Article 37.071, section 2(f)(3) is constitutional. If one follows the cases backwards, from citation to citation, all roads lead back to a pre-*Tennard* case. Specifically in *Coble*, the defendant’s challenge was denied by recourse to *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007). But in *Roberts*, the CCA had brushed aside the defendant’s argument that the statutory definition unconstitutionally narrowed the definition of mitigation (to evidence that reduced the defendant’s moral blameworthiness) by stating that this issue had already been addressed in *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004). But in *Perry*, although the defendant complained that the statutory definition instructed the “jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness,” the CCA held that the same challenge had already been rejected in *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App. 1997). *Id.* (quotation marks omitted).

---

It is correct that, in *Cantu*, the appellant had argued that the definition of mitigating evidence rendered Texas’s death-penalty statute unconstitutional because it limited mitigating evidence to that which a juror might regard as reducing the defendant’s moral blameworthiness. But the CCA did not join issue with Cantu on this subject. In response to his challenge, the CCA held: “Because the considering and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury’s discretion to factors concerning only moral blameworthiness as appellant alleges.” *Id.* at 649.109 This holding ducked the issue by failing to explain how jurors were supposed to know that their determination was “open-ended” in light of the restrictive definition that the trial court was and is required to give jurors pursuant to the statute. See *Tex. Code Crim. Proc.* art. 37.071, sec. 2(f)(3) & (4). *Cantu* is where the train slipped off the track. And the CCA never revisited its holding in light of *Tennard*, decided a decade later. Yet the holding in *Cantu*, which reflects the CCA’s boilerplate responses to what it has, ever since, treated as boilerplate challenges, is incompatible with the holding in *Tennard*.

Of course, well before *Tennard*, the Supreme Court had made it clear that a sentencer must be allowed to give full consideration and full effect to mitigating circumstances. See *Woodson*, 428 U.S. at 304. But as explained in Section II above, in *Tennard*, in 2004, the Supreme Court was forced to again make clear in no uncertain terms that the approach to mitigation taken specifically in Texas death-penalty cases had been unduly constrained by an invented notion that mitigating

evidence is only “relevant” if there is a nexus between the mitigating evidence and the offense so that the former partially explains the latter.

Tennard reminds that the Eighth Amendment prohibits narrowing the jurors’ discretion to consider whatever mitigating evidence resonates with them. More specifically, the case reminds that jurors are not to be limited to considering only evidence that would tend to lessen a defendant’s moral blameworthiness for the offense. Tennard expressly rejected the “nexus” test that the CCA and the Fifth Circuit had been using to restrict what was seen as relevant or “sufficient” mitigating evidence. Yet the restriction lives on in the statutory definition given to all juries in Texas death-penalty cases. That statutory definition plainly implies a nexus requirement. See TEX. CODE CRIM. PROC. art. 37.071, sec. 2(f)(4) (requiring instructing jurors that they “shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness.”).

Under clearly established federal constitutional law, each individual juror must have the opportunity to give full consideration and full effect to mitigating circumstances so as to express an individual, reasoned moral judgment in rendering a verdict. Yet every member of the jury takes an oath to follow the law as given to them in the court’s charge. The trial court instructs the jury using the statutory definition of mitigating evidence, which they are then bound by their oaths to follow. Since it is generally presumed that jurors follow their instructions, see, e.g., Richardson v. Marsh, 481 U.S. 200, 211 (1987) (cited in Penry v. Johnson, 532 U.S at 799-800), there is no way for jurors in a Texas death-penalty case to follow the jury charge and also follow the higher law of the Constitution as interpreted by the Supreme Court. Under the Supremacy Clause, the Texas statutory definition must give way.
D. In Violation of the Eighth and Fourteenth Amendments, the CCA’s Interpretation of “Relevant” Mitigating Evidence Further Constrains the Scope of Mitigation that Juries Are Even Allowed to Hear.

The whole point of mitigating evidence is to support an appeal for mercy, guilt notwithstanding: “the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained.” *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). A few decades ago, the CCA at least acknowledged that the point of mitigation was to enable the defense to ask for mercy. *See McFarland v. State*, 928 S.W.2d 482, 520 (Tex. Crim. App. 1996) (noting that the defendant is entitled to ask for mercy based on mitigating evidence in the record); *see also Mosley v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998) (holding that the special issue on mitigating circumstances is a vehicle by which the jury may dispense mercy). Yet the CCA has disregarded the Supreme Court’s directives that the quality of mercy is not to be strained.

For instance, the CCA has rejected the notion that the right to an open presentation of mitigating evidence comports with a presumption in favor of a life sentence. *See Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009) (dismissing the concept as “a non-existent, non-statutory presumption” not found in state or federal law.). But this presumption—that a jury should be allowed to consider any evidence that argues for a sentence other than death—is central to the Supreme Court’s *Penry/Tennard/Abdu-Kabir/Brewer* jurisprudence. *See* Section III, above; *see also Tennard*, 542 U.S. at 287 (holding that a defendant must be allowed to present evidence that “might serve as a basis for a sentence less than death”). Indeed, that is the basic holding of *Lockett v. Ohio*, decided in 1978:

A statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.
When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. U.S. 586, 605-06 (1978) (emphasis added). As Justice Marshall put it succinctly in his concurrence: “Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon.” Id. at 620 (Marshall, J., concurring). In short, the CCA seems unaware that the Supreme Court, in applying the Eighth and Fourteenth Amendment, has indeed insisted on a “presumption” that a life sentence must at least be given full and fair consideration; that consideration is hindered when death is treated as the default sentence and the mitigating evidence that might trump that default is narrowly conceived.

Because of the narrowing (and thus unconstitutional) statutory definition of mitigating evidence, prosecutors representing the State in death cases routinely ask trial courts to keep out mitigating evidence on relevance grounds. And the CCA has affirmed trial courts’ decision to grant relevance objections, for instance, to keep out evidence of sexual abuse of a sibling and of extensive alcohol and drug abuse and violence in the extended family. See, e.g., Suniga v. State, AP-77,041 (March 6, 2019) (rejecting point of error that trial court abused its discretion by excluding such evidence on “relevance” grounds).

The CCA’s decision in Suniga tracks the position the Court adopted in Shuffield v. State, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006), holding that the trial court had not abused its discretion by excluding evidence that one of the defendant’s family members had been sexually abused. But a trial court plainly abuses its discretion where its evidentiary rulings flagrantly contradict clearly established federal constitutional law. Again, Tennard reemphasized that any evidence that might compel a juror to conclude that a sentence other than death was warranted is relevant and cannot be excluded as there must be a “low threshold for relevance” in the punishment phase of a death-penalty case. Tennard, 542 U.S. at 284-85.
The evidence of multi-generational dysfunction in a defendant’s family, which was excluded by the trial court in *Suniga* with the CCA’s blessing, has been recognized as relevant and admissible mitigating evidence in numerous other jurisdictions, state and federal. Indeed, the decision to keep it out or the failure to find it has repeatedly been deemed a worthy basis for punishment-phase relief on appeal. See, e.g., *State v. Santiago*, 305 Conn. 101, 231-41 (Conn. 2012) (noting that the mitigation inquiry “is not confined to the defendant and his experiences” and thus finding failure to disclose evidence of abuse of sibling, which defendant had not witnessed, was reversible error); *Stankewitz v. Wong*, 698 F.3d 1163, 1169 (9th Cir. 2012) (finding that even unremembered childhood trauma might have had catastrophic effects on those who survive it); *People v. Jennings*, 50 Cal.4th 616, 637 (Cal. 2010) (observing mitigating evidence included testimony that “individuals are ‘children of [their] parents’ and parents will shape the lives of their children absent outside intervention, which did not occur in defendant’s case”); *Hamilton v. Ayers*, 583 F.3d 1100, 1129 (9th Cir. 2009) (noting “abundance of classic mitigating evidence that was available” including expert testimony of “environment of intergenerational alcoholism, child abuse, and domestic violence”); *State v. Bocharski*, 218 Ariz. 476, 495 (Ariz. 2008) (finding strong mitigation, including “dysfunctional family of origin including multigenerational violence, criminality, and substance, sexual, emotional, and physical abuse” warranted reversing death sentence); *Harman v. Bagley*, 492 F.3d 347, 374 (6th Cir. 2007) (recognizing importance of multi-generational mitigation investigation); *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003) (establishing prejudice where sentencing counsel failed to present multigenerational history of addiction); *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) (granting penalty-phase relief because counsel failed to present mitigating evidence including family’s history of alcohol abuse); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (citing
defense testimony that “psychosis and alcoholism are genetically passed from parents to children . . . [and] children raised in profoundly dysfunctional environments . . . are prone to develop severe psychiatric disturbances”); *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) (granting penalty-phase relief for failure to present mitigating evidence that grandmother had a history of psychosis that required hospitalization). The holdings and analyses in these cases reflect the fundamental directive set out in *Lockett*: that broad consideration of the defendant’s background and character is indispensable in a case in which the State seeks a death sentence. 438 U.S. at 604 (striking down Ohio’s capital-sentencing scheme for limiting the range of mitigating factors that the sentence could consider). These cases also reflect a basic understanding that a person is a product of a larger context, including a multi-generational family history, about which that individual may know very little but which nonetheless shaped him or her.

Of course, there are some instances of evidentiary exclusions that are reasonable even with the “low threshold of relevance” that applies to mitigation. *Tennard*, 542 U.S. at 285. For instance, the Supreme Court, in *Tennard*, agreed that the frequency of an inmate’s showers at issue in *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984) was irrelevant to the sentencing determination. But the CCA has, for years now, been sanctioning evidentiary exclusions that misapprehend the basic nature of mitigation and a capital defendant’s right to make a sweeping presentation of anything relevant to a defendant’s background and character. The CCA’s rationale for doing so is tethered to the pinched definition of mitigation found in the current statutory definition of mitigation that is unconstitutional on its face and as interpreted by the CCA. Both the plain text and the CCA’s interpretation of what is “relevant” mitigating evidence under the statute violate the Eighth and Fourteenth Amendments and the U.S. Constitution’s Supremacy Clause.
E. The Sequence and Wording of the Special Issues Impair Consideration of Mitigation and Privilege Death over Life.

The Texas death-penalty sentencing scheme requires that, before jurors consider whether any mitigating evidence moves them to choose a life sentence instead of death, they must first find, beyond a reasonable doubt, “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1). This mandated sequence has raised concerns in multiple corners because it impairs jurors’ ability to consider mitigating evidence, as Supreme Court law requires. For instance, the ABA has noted that, because juries must unanimously find the defendant to be a future danger before reaching the question of mitigation, this places the first special issue “at the center of the jury’s punishment decision” at the expense of the mitigation inquiry. ABA Texas Assessment Report at 307.

By foregrounding the future-dangerousness determination in the statutory text, in addition to (1) the unconstitutionally broad language in the future dangerousness special issue and the (2) unconstitutionally narrow wording of the mitigation special issue as described above, Texas exploits cognitive biases to enhance the likelihood of a death verdict. Elizabeth S. Vartkessian, Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation Evidence, 29 QUINNIPIAC L. REV. 237, 246 (2011). Impairing jurors’ ability to impose a sentence other than death is yet another way the statute is unconstitutional. See Tennard, 542 U.S. at 278 (“It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence.”).

1. The Texas capital-sentencing scheme exploits cognitive biases to privilege death over life.
A cognitive bias is a mistake in reasoning, analysis, memory, or other cognitive process that occurs as a result of holding onto preferences or beliefs regardless of contrary information. Cognitive biases are phenomena identified and studied by cognitive psychologists through controlled laboratory studies that focus on attention, perception, memory, and reasoning. See generally Kendra Cherry, How Cognitive Biases Influence How You Think and Act (Nov. 6, 2018).110 By studying such phenomena, researchers’ findings reveal how faulty intuitions shape decision-making through “everyday illusions” that do not align with actual reality. See, e.g., Christopher Chabris & Daniel Simons, The Invisible Gorilla: How Our Intuitions Deceive Us (Random House 2010) (explaining the results of scientific studies revealing the fallibility of human memory, perception, knowledge, and reasoning processes and highlighting the problems these illusions cause, including in the justice system).

Studies have shown that, in the specific context of capital sentencing, it is demonstrably difficult for jurors, charged with making a group decision, to move from the guilt- to the punishment-phase of the trial; thus, they are statistically inclined to remain fixated on the issue of guilt and aggravation and ignore mitigating evidence. See Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 BROOK. L. REV. 1011, 1056, 1072 (2001) (describing process of jurors’ fixating on guilt and evidence showing that Texas jurors are more primed to discount mitigating evidence and see death as the mandatory sentence likely because of the statute’s emphasis on future dangerousness). In fact, the Capital Jury Project findings show that many jurors begin “taking a stand on what the defendant’s punishment should be well before they [are] exposed to the statutory guidelines for making this decision” and then believe a death sentence is mandatory.

110 Available at https://www.verywellmind.com/what-is-a-cognitive-bias-2794963.
in most circumstances. William J. Bowers, The Capital Jury: Is It Tilted Toward Death?, 79 JUDICATURE 220, 221–22 (1996) (“Four out of 10 capital jurors wrongly believed that they were ‘required’ to impose the death penalty if they found that the crime was heinous, vile, or depraved, and nearly as many mistakenly thought the death penalty was ‘required’ if they found that the defendant would be dangerous in the future.”). This general problem is exacerbated by a scheme that foregrounds the issue of future dangerousness as Texas’s statute does. Bentele & Bowers, above, at 1032 (“Not surprisingly, in light of the structure of its statute, the perception that death was the mandatory sentence under certain circumstances, particularly if jurors thought the defendant would be dangerous in the future, was most prominent under the directed statute in Texas.”).

With the deck stacked against the defendant in this way too, the format and language of the Texas statute then exploit two well-established cognitive heuristics to further increase the inevitability of a death sentence. These cognitive heuristics, the “representativeness” heuristic and the “anchoring-and-adjustment” heuristic, capitalize on hardwired cognitive biases that operate in us all. These heuristics increase the likelihood that any given jury will return a death sentence. See Brittany Fowler, A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury’s Cognitive Heuristics in Favor of Death, 96 TEX. L. REV. 379, 391-392 (2017).

2. The Texas capital-sentencing statute exploits the representativeness heuristic that predisposes jurors toward a death sentence.

The “representativeness” heuristic is captured in this formulation: “What is the probability that object A belongs to class B?” Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124, 1124 (1974). When individuals rely on the representativeness heuristic, they assess the degree to which object A is “representative of, or similar to, the stereotype of a” member of class B. Id. Tversky and Kahneman provide the
following example: “Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail.” Id. Having been provided with this cursory description, individuals are then asked the probability that Steve is engaged in a particular profession: farmer, salesman, airline pilot, librarian, or physician. The representativeness heuristic promotes deciding that Steve is probably a librarian based only on the degree to which he fits the stereotype of a librarian. Id.

Cognitive science has demonstrated that this method of categorizing objects and people “leads to serious errors, because similarity, or representativeness, is not influenced by several factors that should affect judgments of probability.” Id. Put another way: relying on representativeness/stereotypes is problematic because “humans simply cannot assign optimal weights to variables, and they are not consistent in applying their own weights.” William M. Grove & Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical–Statistical Controversy, 2 PSYCHOL., PUB. POL’Y & L.293, 315 (1996). That is, the human mind is inclined to make snap judgments by relying on facile stereotypes, not reasoned analysis.

The future dangerousness special issue precisely mimics the representativeness heuristic—asking jurors to decide whether a person they have just found guilty of capital murder belongs in the class of people with a probability of committing “criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1). But this mode of decision-making based on stereotypes is “likely to be inaccurate and contain many attributes that are not linked to future violence”—such as implicit biases based on race, ethnicity, class, gender. Daniel A. Krauss & Bruce D. Sales, The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing, 7 PSYCHOL., PUB. POL’Y & L. 267, 280 (2001).
Clinicians are susceptible to the representativeness bias, just as lay jurors are. See, e.g., id. (explaining that the representativeness bias “causes the clinicians to compare the individuals they are assessing for dangerousness with their stereotypical conceptualization of a dangerous individual and construct a prediction on the basis of similarity.”); Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobgin, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 301 (3d ed. 2007) (arguing that “[c]linicians’ judgments may also be affected by cognitive heuristics that influence the selection and weighting given to particular predictor variables”). This inclination toward representativeness bias is why, decades ago, the American Psychiatric Association took the position that “[p]sychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case.” Amicus Brief of American Psychiatric Ass’n for Petitioner at *3, BAREFOOT V. ESTELLE, 463 U.S. 880 (1983) (No. 82-6080).111

Yet the plain text of Texas’s death-penalty sentencing statute requires that jurors answer a representativeness question, the future-dangerousness inquiry, which is inextricably intertwined with the guilt determination: “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(1) (emphasis added). That is, the Texas scheme requires jurors to ask whether object A—a defendant whom the same jury just convicted of capital murder—belongs in class B—a class of defendants who “would commit criminal acts of violence.” Cognitive psychology demonstrates that it would actually be incongruent for jurors to find that any given

---

111 As discussed in Section I.B.5 above, empirical studies have long exposed that experts’ predictions have proven to be wrong in the vast majority of cases. See also DPIC, Future Dangerousness Predictions Wrong 95% of the Time: New Study on Capital Trials Exposes Widespread Unreliable Testimony (2004), available at https://deathpenaltyinfo.org/node/1099.
convicted capital murderer is not a member of the class of people who “would commit criminal acts of violence.” Our minds are wired to make assumptions of this nature, even though the results of such reasoning are often fallacious. In the context of a capital-sentencing determination, this exploitation of bias is unacceptable.

3. The Texas capital-sentencing statute exploits the anchoring-and-adjustment heuristic that predisposes jurors toward a death sentence.

A second cognitive shortcut that affects jurors’ assessment of a defendant’s future dangerousness is the anchoring-and-adjustment heuristic. This heuristic relies on the hypothesis that “people make estimates by starting from an initial value that is adjusted to yield the final answer.” Tversky & Kahneman, above, at 1128. Typically, this heuristic is triggered when a numeric value is in play; the initial value, known as the anchor, is a number that is adjusted upward or downward based on a set of variables. See id. (“The initial value, or starting point, may be suggested by the formulation of the problem, or it may be the result of a partial computation. . . . [D]ifferent starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring.”).

Evidence suggests that the anchoring-and-adjustment heuristic can be triggered by phenomena other than numeric figures, such as the order and format in which information is presented. Research suggests that the initial information presented can create an “anchor” that constrains individuals’ adjustments in response. See, e.g., Yana Weinstein & Henry L. Roediger III, The Effect of Question Order on Evaluations of Test Performance: How Does This Bias Evolve?, 40 MEMORY & COGNITION 727, 728 (2012). For example, some researchers have shown that the order in which information is presented on an exam affects students’ evaluation of their performance on the entire exam. Id. at 727–28. That is, the degree of difficulty of questions at the beginning of the test influences how students evaluate their performance throughout the remainder
of the test. The initial questions create an anchor, and the students unconsciously adjust their perception of their own performance based on that anchor, regardless of the actual difficulty of the remainder of the test. *Id.* If the same information is presented in a different order, then a different self-evaluation results. *Id.* This phenomenon is known as “belief persistence.” Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *Judgment Under Uncertainty: Heuristics and Biases* 144 (D. Kahneman, P. Slovic & A. Tversky eds., 1982).

In the legal context, scholars have shown how the anchoring-and-adjustment heuristic plays a role, for instance, in plea-bargain discussions, damage awards, and divorce negotiations. See Stephanie Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 Harv. L. Rev. 2463, 2515–17 (2004) (“Anchoring also helps to explain the course of negotiation. Bargainers who lack inside information about an opponent’s payoff matrix are more influenced by the opponent’s initial offer than by later concessions.”); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. Rev. 1667 (2013) (noting that “[i]n the majority of [plea bargains], the prosecutor makes the initial plea offer, which is typically high” and proposing that judges be involved in plea discussions to reduce this anchoring effect); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 Ind. L.J. 695, 706 (2015) (“Anchoring can influence a wide variety of judgments in legal contexts, especially civil damage awards and criminal sentences.”); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Dynamics of Divorce Bargaining*, 26 Law & Ineq. 109, 127 (2008).
For multiple reasons, reliance on an anchor makes for problematic decision-making. First, an anchor is often selected based on unconscious bias and self-interest rather than its legitimacy. See Bibas, above, at 2516 (“Because assessments of fairness are self-serving, each side may choose a different anchor.”). Second, anchoring “depends not so much on relevance as on recency,” and “[e]xperiment subjects are most influenced by information that they receive just before they make judgments, even if that information is obviously useless.” Id. Third, and perhaps most importantly, “people usually do not adjust away from their anchors enough,” leading to skewed decision-making. Id.

The structure of the Texas death-penalty sentencing instructions encourages reliance on an anchor—namely, the anchor of future dangerousness, in deciding whether to dispense mercy. To see how an anchor operates in the Texas death-penalty sentencing scheme, one need merely look at the standard jury instructions:

You are instructed that a sentence of imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life imprisonment without parole, or a sentence of death is mandatory upon conviction of capital murder. In order for the Court to assess the proper punishment, certain special issues are submitted to you. . . .

SPECIAL ISSUE NUMBER 1:
Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?
ANSWER “YES” OR “NO” in the space provided. . . .

SPECIAL ISSUE NUMBER 3:
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, do you find from the evidence that 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? ANSWER “YES” OR “NO” in the space provided.

The instructions create this effect not only by placing future dangerousness first, as an anchor, but also by giving jurors a specific concept (i.e., future dangerousness) to which they refer back during their deliberations. The mitigation special issue, by contrast, is much more cryptic and thus deprives jurors of a second anchor. “Due to the statute’s focus on the defendant’s future dangerousness and the ambiguity of the mitigation instruction, legal actors”—that is, prosecutors—are able to exploit “the sentencing scheme in a way which advances the dismissal of much mitigating evidence.” Vartkessian, above, at 240. In other words, Texas’s mandatory jury instructions render jurors anchored to the future dangerousness special issue and disinclined to consider mitigating evidence.

Working together, the sequence and text of the special issues indulge well-recognized cognitive biases, privileging death over life and making a death sentence essentially inevitable where a defendant has been convicted of capital murder in Texas and the State seeks death. This phenomenon, evident from the face of the statutory text, is yet another reason why Article 37.071, section 2 is unconstitutional.

*****

For each of these distinct reasons, the approach to mitigation reflected in Article 37.071, section 2 is unconstitutional in all circumstances under the Eighth and Fourteenth Amendments and the U.S. Constitution’s Supremacy Clause. Because the statutory definition of “mitigating evidence” limits the concept of “mitigation” as defined in the Supreme Court’s Eighth Amendment
jurisprudence, because the CCA’s interpretation of the statutory definition of “mitigating evidence” operates in contravention to the Supreme Court’s Eighth Amendment jurisprudence, violating the Supremacy Clause and further constraining the scope of mitigation that juries are even allowed to hear, and because the sequence and wording of the special issues impair consideration of mitigation and privilege death over life, Texas’s death-penalty sentencing scheme should be struck down as unconstitutionally burdening juries’ ability to consider mitigating evidence.
VII. The Texas Death-Penalty Sentencing Instructions Are Crafted to Deceive Jurors Thereby Impairing Their Ability to Make a “Reasoned Moral Response” to Sentencing as the Constitution Requires.

The Texas death-penalty sentencing scheme is also unconstitutional because, by affirmatively deceiving jurors about the relationship between their answers to the special issues and the ultimate sentence, it prevents jurors from making a reasoned moral response to the evidence before them, guaranteeing unreliable sentences. This process violates both the Eighth Amendment and the Fourteenth Amendment’s Due Process Clause.

A. Juries Engaged in Capital Sentencing Must Be Able to Make a Reasoned Moral Response about the Propriety of the Sentences Their Decisions Effect.

In *Penry v. Lynaugh*, the Supreme Court emphasized that, “rather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ‘reasoned moral response’ to the defendant’s background, character, and crime.’” 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor J., concurring) (emphasis added); see also *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007) (“[W]e have long recognized that a sentencing jury must be able to give a ‘reasoned moral response’ to a defendant’s mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death.”) (citations omitted, emphasis added).

Can a juror give a “reasoned moral response” to the question of whether life or death is the appropriate sentence when given instructions that are calculated to deceive?

No.

Texas statutory law mandates jury instructions for the punishment phase of a death-penalty case. These mandatory jury instructions include material misrepresentations and omissions about the relationship between the jurors’ decision-making and the resulting sentence. Those mandatory
instructions and the CCA’s interpretation of those instructions, separately and jointly, prevent jurors from making a reasoned moral response to the question of appropriate sentence as the law requires.

As the Supreme Court explained over a decade ago in assessing Texas’s failure to provide a vehicle for considering mitigation, a capital-sentencing process is “fatally flawed” when it does not permit the jury “to give meaningful effect or a ‘reasoned moral response’” to the evidence presented “because it is forbidden from doing so by statute or a judicial interpretation of a statute.” Abdul-Kabir v. Quarterman, 550 U.S. 233, 257 (2007). See also Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (holding a jury cannot be “affirmatively misled regarding its role in the sentencing process”); Beck v. Alabama, 447 U.S. 625, 643 (1980) (holding that jury instructions “introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.”); Gregg v. Georgia, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasizing that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die”). These core principles require striking down sections 2(a)(1), 2(d)(2), and 2(f)(2) of Article 37.071 at long last.

B. Texas’s Mandatory Jury Instructions Deceive in Two Critical Ways.

Texas’s mandatory jury instructions in death-penalty cases are deceptive in at least two distinct ways:

(1) The mandatory instructions include what is commonly referred to as the “10-12 rule,” which materially deceives jurors about the results of a non-unanimous vote on each special issue that the jury is asked to answer; and

(2) The mandatory jury instructions omit material information regarding the effect of answers to the special issues and in fact impose a gag rule that prevents telling jurors the truth about the effect of their responses to the special issues.
1. Texas’s mandatory jury instructions deceive regarding how many jurors must agree on the answers to the special issues.

First, the statute requires the trial judge to instruct a capital-sentencing jury in a death-penalty case that it “may not answer” the future dangerousness special issue “‘yes’ unless it agrees unanimously and may not answer the issue ‘no’ unless 10 or more jurors agree” and, conversely, the jury “may not answer” the mitigation special issue “‘no’ unless it agrees unanimously and may not answer the issue ‘yes’ unless 10 or more jurors agree.” TEX. CODE CRIM. PROC. art. 37.071, sec. 2(d)(2) & (f)(2). These statutory instructions are commonly presented to the jury as follows:

While the jury may not answer “no” to future dangerousness unless ten jurors or more agree, the statute also prohibits the jury from answering “yes” to mitigation unless ten or more jurors agree. See, e.g., Court’s Charge on Punishment at 2, State v. Storey, No. 1042204D (Crim. Dist. Ct. 3, Tarrant Cty, Tex. Sept. 11, 2008), 2008 WL 8188280, at *1 (providing typical capital-sentencing jury instructions). The obvious implication of these instructions is that the law requires a consensus of ten or more jurors to effect a life sentence; that is, the jurors are expressly told that they “may not” answer the issues in any way that would avoid a death sentence unless ten or more jurors agree. But this instruction is at odds with the law. Under Texas law, the effect of a single holdout juror is the same as a consensus of ten jurors:

If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole. TEX. CODE CRIM. PROC. art. 37.071, sec. (2)(g) (emphasis added). As the Fifth Circuit has acknowledged, “[a] single juror thus has the power to prevent a death sentence based on his personal view of the mitigation evidence.” Allen v. Stephens, 805 F.3d 617, 631 (5th Cir. 2015).
Yet the mandatory jury instructions lead jurors who favor a life sentence to believe that they must convince nine other jurors to vote a certain way to avoid sentencing the defendant to death or to avoid a mistrial. These beliefs, prompted by the deceptive text, are contrary to law.

2. **Texas’s mandatory jury instructions deceive through a material omission about the effect of their answers.**

Texas jurors are never explicitly instructed to consider whether the defendant should be given a death sentence or a sentence of life in prison without the possibility of parole; they are only asked to answer a series of “yes” or “no” questions. TEX. CODE CRIM. PROC. art. 37.071, sec. 2(c), 2(d)(2), 2(f)(1). The statute explains the effect of the jurors’ answers: “If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.” *Id.*, sec. 2(g). But jurors are not given this information. Nor are jurors told that being “unable to answer” includes the option of being unable to reach a unanimous verdict because of a single holdout.

Instead of giving jurors the information they need to be able to understand what they are being asked to decide and the effect of any deadlock, the death-penalty sentencing statute expressly precludes anyone involved in the proceeding from telling the jury the truth about the consequences of a failure to achieve unanimity: “The court, the attorney representing the state, the defendant, or the defendant’s counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) [the special issues].” *Id.*, sec. 2(a)(1). That is, the statute imposes a “gag rule” that prevents jurors from having critical information relevant to making their own “reasoned moral response” in determining an appropriate sentence.
C. The Material Misrepresentations and Omissions in Texas’s Mandatory Jury Instructions Are Anathema to Reliable Sentencing and Thus Violate the Eighth Amendment.

The CCA has acknowledged that there is a requirement of reliability in capital sentencing and that that requirement is undermined when jurors are misled: the “reliability of the decision to impose death is reduced impossibly when, among other reasons, jurors are misled into believing that their decision may be less momentous than it really is.” *Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992). In that same case, the CCA also recognized that “the danger that jurors, unaware of the operation of the law, might mistakenly think a sentence other than death to be impossible unless ten of them agree” was constitutionally suspect. *Id.* In *Draughon*, the CCA even admitted that it was “past serious dispute” that the 10-12 rule is “uncommonly enigmatic” because the failure of even one juror to agree with the group would result, not in a hung jury, but in an automatic sentence of life without parole. *Id.* at 337. The CCA further admitted that Texas capital “jurors don’t know this.” *Id.*

Yet despite all of these admissions, the CCA in *Draughon* ultimately insisted that, despite the “shortcomings of the Texas capital sentencing procedure,” that procedure really just encourages jurors “to reach agreement through continued deliberation rather than abandon hope of consensus prematurely.” *Id.* The CCA then convinced itself that “at worst” jurors would just “not know the consequences of failing to agree.” *Id.* at 338. The CCA then claimed that juror ignorance related to sentencing was different from actively misleading them into believing that “the ultimate responsibility for the verdict rests elsewhere.” *Id.* That is, despite recognizing that the plain language of the statutory instructions is deceptive, the CCA concluded that “no juror would be misled” into thinking a vote for death should be given unless ten or more jurors agreed to a life sentence. *Id.*
This conclusion was indefensible in 1992 when *Draughon* was decided, as the CCA’s own contorted reasoning reveals. But building on *Draughon*, the CCA has repeatedly and summarily rejected challenges to the “10-12” rule and the gag rule, lumping them together as complaints about “failing to instruct jurors on the effects of their answers.” *Allen v. State*, 2006 WL 1751227, *8 (Tex. Crim. App. Nov. 12, 2006) (not designated for published) (citing the following as examples of its routine rejection of challenges to these deceptive instructions: *Johnson v. State*, 68 S.W.3d 644, 656 (Tex. Crim. App. 2002); *Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000)); see also *Sorto v. State*, 173 S.W.3d 469, 492 (Tex. Crim. App. 2005) (noting that the court has “repeatedly upheld the constitutionality of Article 37.071, Section 2(a)(1), which prohibits informing jurors of the effects of their failure to agree on the special issues.”).

Instead of merely objecting to the absence of a certain kind of instruction, Mr. Clark’s challenge, like that of many before him, is to a sentencing procedure that systematically and intentionally misleads and prohibits any attempt by court or counsel to clarify by providing jurors with the truth: that unanimity is not required; that only 1, not 10, votes, are required to avoid a death sentence; and that a failure to agree will not result in a mistrial but in a sentence of life without the possibility of parole.

Nearly thirty years since *Draughon*, its conclusion, built on contradictions, has never been revisited. That indefensible conclusion, that “no juror would be misled” by misleading jury instructions, has since been exposed by both empirical and anecdotal evidence.

Empirical studies have demonstrated that jurors in death-penalty cases cannot and do not intuit that the result of a failure to agree will be an automatic sentence of life in prison without the possibility of parole, the result in many states, including Texas. See, e.g., William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices*

Additionally, powerful anecdotal evidence supports the conclusion that deceptive jury instructions have in fact deceived; some reports from the horse’s mouth have even made headlines. See Jolie McCullough, Texas death penalty juror hopes to change law as execution looms, Texas Tribune (March 28, 2017). Sven Berger, who served as a juror in a 2008 capital murder trial, recently spoke out when the person he had helped sentenced to death was facing execution. Berger explained how he had taken the jury instructions at face value and believed that he had no choice. Id. Berger had not wanted to sentence the defendant to death because of his impression that the defendant would not be “a future danger to society.” Id. But because a majority of the other jurors had wanted to vote for death, he had acquiesced. Id. Believing that he could not sway the other


jurors to change their votes, Berger reluctantly assented. Because of the language in the jury
instructions, he did not realize that his vote alone could have blocked imposition of a death
sentence and resulted instead in a sentence of life in prison without the possibility of parole. Id.
Berger described being haunted by his experience with the Texas death-penalty statute; and,
ultimately, he was inspired to speak out.

This one juror’s outreach prompted three Texas legislators to file a bill in the 2017
Legislative Session to change the statute that keeps this critical information from jurors. See H.B.
No. 3054 (proposing, among other things, that the following language be excised from Article
37.071: “The court, the attorney representing the state, the defendant, or the defendant’s counsel
may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues
submitted under Subsection (c) or (e).”). The bill was reported out of committee but died waiting
to be placed on the calendar. The committee had voted 6 in favor and only 1 against, a noteworthy
result from a predominantly conservative, Republican committee. This bill would have removed
the 10-12 lie and allowed for capital-sentencing juries to be told the effect of any failure to agree
on answers to the special issues.

A similar bill was promulgated in the 2019 Legislative Session in both houses. See HB
1030 and SB 716. The House bill passed with overwhelming support, but the Senate bill was never
taken up after it was referred to a committee. This legislative attention, if ineffectual action, shows
that numerous members of the legislative body believe the instructions need to be amended.

No evidence suggests that juror confusion has abated in the intervening years since Juror
Berger was deceived. Jurors impaneled in capital murder trials not only reasonably presume that
at least ten jurors must agree on any given answer; they presume that a mistrial will result if they
fail to reach a decision supported by at least ten jurors.
In sanctioning the gag rule, the CCA has seemingly hung its hat on the Supreme Court holding in *Jones v. United States*, 527 U.S. 373, 381–82 (1999), which held that the failure to instruct jurors on the consequences of their deadlock did not violate the Eighth Amendment. That case, involving a challenge under the federal death-penalty statute, is distinguishable, however. In *Jones*, the jurors were not actively deceived about a need to recruit 10 or more jurors to be able to effect a life-without-parole option. *Jones* and other Supreme Court precedent have made clear that “a jury cannot be ‘affirmatively misled regarding its role in the sentencing process.’” *Id.* at 381 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). In *Jones*, the Supreme Court found that the jury had “[i]n no way” been affirmatively misled, *id.* at 382; yet in Texas, every jury charged with sentencing someone to death is affirmatively misled by the mandatory jury instructions. See Tex. Code Crim. Proc. art. 37.071, sec. 2(d)(2) & (f)(2). Both the federal death-penalty statute and Texas’s article 37.071 allow for only two options as a matter of law: a death sentence or life without parole; and as a matter of law, both allow for the latter in the event of a deadlock. But only the Texas scheme requires affirmatively deceiving jurors, which the Supreme Court has expressly disallowed. Moreover, the Supreme Court in other death-penalty cases has emphasized that where the State argues that the defendant will be a future danger, the defendant is entitled to put before the jury the truth about the sentence that will result should the jury fail to unanimously agree that a death sentence is warranted. See *Simmons v. North Carolina*, 512 U.S. 154 (1994) (establishing entitlement, under Due Process Clause, to instruction that “life” sentence means life without parole in capital cases in which the State has argued that a defendant will be a future danger).114

114 While the holding in *Simmons* is based on the Fourteenth Amendment’s Due Process Clause, a practice that violates the right to due process will, necessarily, also result in unreliable sentencing, a phenomenon contrary to the requirements of the Eighth Amendment. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining why heightened reliability is critical to ensuring compliance with the Eighth Amendment).
The CCA’s holdings sanctioning the Texas gag rule are also incompatible with other decisions holding that jurors are not to be misled about their roles in the capital-sentencing process, which is supposed to involve heightened reliability. See Caldwell v. Mississippi, 472 U.S. 320 (1985) (vacating a jury-imposed death sentence because the prosecutor had told the jury in closing argument that the ultimate responsibility for determining the appropriateness of the sentence rested with the appellate court, not with the jury, which constituted an inaccurate statement of Mississippi law and diminished the jury’s sense of sentencing responsibility); see also Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (holding that Eighth Amendment requires specificity and clarity in guiding juror discretion).

D. The Material Misrepresentations and Omissions in Texas’s Mandatory Jury Instructions Also Violate the Defendant’s Right to Due Process Guaranteed by the Fourteenth Amendment.

A death-penalty sentencing scheme that encourages misinformation and fosters jurors’ misunderstanding of their role in the process violates not only the Eighth Amendment but also the Fourteenth Amendment’s Due Process Clause. See Simmons, 512 U.S. 154; see also Robert Clary, Texas’s Capital-Sentencing Procedure Has a Simmons Problem: Its Gag Statute and 12-10 Rule Distort the Jury’s Assessment of the Defendant’s “Future Dangerousness,” 54 AM. CRIM. L. REV. 57, 110–11 (2016) (“[T]he fact that the defendant will automatically receive a sentence of life in prison without possibility of parole if a Texas capital jury fails to achieve the consensus required by the 12-10 Rule is directly relevant to the jury’s assessment of the defendant’s future dangerousness.”).

adversarial system is the defendant’s ability to respond to the State’s case against him. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

In *Simmons*, the Supreme Court was asked to decide whether the defendant’s due process rights had been violated when the trial court refused to instruct the jury in the penalty phase of a capital trial that “under state law the defendant was ineligible for parole.” *Simmons*, 512 U.S. at 156. The Supreme Court held that, “where the defendant’s future dangerousness is at issue”—as it is in every Texas death-penalty case—and where “state law prohibits the defendant’s release on parole”—as is true in every current Texas death-penalty case—then “due process requires that the sentencing jury be informed that the defendant is parole ineligible.” *Id.* The Supreme Court’s rationale for this holding was based in part on the understanding that most jurors would not appreciate that “life imprisonment” precludes parole since, “[f]or much of our country’s history, parole was a mainstay of state and federal sentencing regimes[.]” *Id.* at 169. Thus, failing to tell jurors explicitly that life imprisonment precluded parole had deprived the jurors of highly relevant information. *Id.* at 169-71. The Supreme Court also recognized that fears of parole would likely influence jurors to base their sentencing decision on something extraneous to the actual evidence. *Id.* Yet, somehow, this highly applicable holding in *Simmons* has never been applied in Texas.

The Due Process Clause does not allow a person to be executed where he has had “no opportunity to deny or explain” critical information to the sentencing jury. *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *see also Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding state trial court violated defendant’s due process rights by refusing to admit evidence during penalty phase of capital trial). Yet Texas’s statute expressly forbids permitting the defendant to explain that one holdout juror can result, not in a hung jury, but in an automatic sentence of life without the possibility of parole. The statutory barrier to providing jurors with critical information about
the effect of their responses to the special issues, while also encouraging a grievous misconception about the failure to achieve unanimity, is unconscionable—and unconstitutional.

Jurors are instructed that they must reach a unanimous or at least ten-person vote to answer the special issues in the sentencing phase. Yet, unlike any other trials that a juror might be generally familiar with, under Texas law, a verdict nevertheless will be reached even if the jury fails to answer the special issues at all. Therefore, the statute’s presumptive purpose of encouraging a unanimous (or ten-person) verdict to ensure a valid result is at odds with the fact that a hung jury will not hinder imposition of a sentence—just not a death sentence. In other words, under Texas law, a mistrial is not an option in a capital case after a guilty verdict has been reached. See Tex. Code Crim. Proc. art. 37.071, sec. (2)(g) (instructing that “the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole” if the jury fails to reach a unanimous response on the requisite special issues).

Instead of operating as an intended incentive to reach a verdict, the 10-12 Rule convinces jurors that, if they cannot secure ten of twelve votes for “no” on future dangerousness or “yes” on mitigation, they will have to vote for a death sentence to avoid a mistrial.

Mistrials are an inevitable cost associated with the American judicial system. Arizona v. Washington, 434 U.S. 497, 509 (1978); Downum v. United States, 372 U.S. 734, 736 (1963). But the prospect of a mistrial is seen as so onerous that federal criminal law has long permitted the use of instructions directing jurors to continue to deliberate in good faith in the face of the impasse. Allen v. United States, 164 U.S. 492, 501 (1896) (a non-capital case). Without a clarifying instruction to counter the deceptive “unless 10 or more jurors agree” statutorily mandated instruction, reasonable jurors can and do believe that failing to come to a unanimous verdict will
result in a mistrial, which reasonable individuals see as a heavy cost for all concerned. As such, the 10-12 rule injects an impermissible extraneous influence into jury deliberations.

In a capital case, the Constitution’s procedural safeguards create an atmosphere in which most every juror is keenly aware of the expense, care, and time involved. Additionally, once a jury reaches the point of sentencing deliberations, each juror has sat through days or weeks of testimony and argument. In this context, a reasonable juror is loath to cause a mistrial. When there is only one holdout juror in a capital case, the concern over being the person responsible for a mistrial increases exponentially. But the ability of that one person to stand behind his or her reasoned moral response to the evidence should not be “a game of ‘chicken,’ in which life or death turns on the . . . happenstance of whether the particular ‘life’ jurors or ‘death’ jurors in each case will be the first to given in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors”—i.e., a mistrial. Jones, 527 U.S. at 417 (Ginsburg, J., dissenting).

The misconception sown by Texas’s deceptive jury instructions—that the failure to convince everyone else or at least nine other jurors will result in a mistrial—amounts to an extraneous (and improper) influence on jury deliberations in the same way that a misconception about the possibility of parole was an improper influence that the Supreme Court found intolerable in Simmons. Specifically, by misleading jurors as to the result of their failure to reach a unanimous or ten-vote agreement, the statute improperly coerces jurors to concur in death sentences on the basis of reasoning divorced from the merits.

E. The Text of the Statutory Juror Instructions Deceives, Reflecting an Improper Legislative Intent.

The scant legislative history for Article 37.071, which contains the 10-12 rule and the gag rule, does not indicate an express admission on the Legislature’s part of an intent to deceive jurors in death-penalty cases to increase the likelihood that a death sentence would be obtained. But
“divining legislative intent” is supposed to begin by “look[ing] first to the language of the statute.” *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996). Indisputably, the language of the statute contains a directive to deceive by forcing trial judges to gives jurors instructions that are contrary to law and preventing judges from telling jurors the truth about how the law will ensure a definitive (and harsh) sentence even if only one juror disagrees about how to answer one of the special issues.

No other death-penalty jurisdiction mandates juror instructions analogous to the dishonest 10-12 rule, which is then compounded by the gag rule. Other jurisdictions have recognized the importance of giving jurors clarity about the effects of their responses on verdict forms in a capital-sentencing proceeding—and the impropriety of withholding such information. For instance, in *Louisiana v. Williams*, the state’s highest court has held that, “by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury’s discretion so as to minimize the risk of arbitrary and capricious action.” 392 So.2d 619, 634-35 (La. 1980). Similarly, Delaware recognized decades ago that a trial court’s decision not to inform jurors that their failure to agree unanimously on a death sentence would lead to an automatic life sentence was a “substantial denial of the defendant’s constitutional rights.” *Whalen v. State*, 492 A.2d 552, 562 (Del. 1985).

In Florida, it took significant litigation; but after the Supreme Court of the United States held unconstitutional Florida’s practice of permitting judges to override a non-unanimous jury and sentence a defendant to death, that state’s standard verdict forms now expressly state at each step that a non-unanimous vote will lead to imposition of a life sentence without the possibility of parole. *See In Re: Standard Criminal Jury Instructions In Capital Cases*, No. SC17-583 at
“Appendix” (Fla. May 24, 2018). Utah’s jury instructions, in more straightforward fashion, simply require jurors to decide between a death sentence, life in prison without the possibility of parole, or 25 years to life. Utah Code § 76-3-207(5). Moreover, Utah’s jury instructions make clear what happens when there is no unanimity. See also K.S.A. 21-6617 (Kansas’s capital jury instruction explaining that the failure to reach a unanimous sentencing verdict will result in “the court” sentencing the defendant “to imprisonment for life with no possibility of parole”). That is, there is no “hiding the ball,” as in Texas’s Article 37.071, section 2(a)(1).

Here in Texas, the full-time judiciary has failed for decades to scrutinize the work of the part-time Legislature, which enacted statutory text animated by an intent, suggested by the statute’s plain text, that is indefensible.

In the final analysis, what is the purpose of deceiving jurors with the “unless 10 or more jurors agree” language? See Tex. Code Crim. Proc. art. 37.071, sec. 2(d)(2) & (f)(2).

The plain text can only be interpreted as a mechanism to stack the deck (yet again) in favor of a death sentence by creating the illusion that a holdout juror, in addition to adhering to his or her conscience, bears the additional burden of having to convince nine others to join them in resisting a death sentence or bear the onus of causing a mistrial.

And what is the purpose of precluding jurors from knowing about the effect of their responses to the special issues and that no agreement is needed for a harsh sentence to be imposed? See id., sec. 2(a)(1) and sec. 2(g).

The material omissions in the Texas death-penalty statute and the gag rule that prevents remedying the problem seem intended, at the very least, to create moral distance between the

---

115 Available at https://www.floridasupremecourt.org/content/download/243479/2145716/sc17-583.pdf.
decision-maker and the decision itself. In a Capital Jury Project interview, one juror admitted that the life-versus-death decision was “easier” than she suspected and that she “thought it would be harder than just answering questions.” Bentele & Bowers, above, at 1039. Another Texas juror recounted how the judge explained that the perception that the jury was responsible for making the life-or-death decision:

[The judge] said that he wanted us to understand that we were not choosing whether somebody should get the death penalty or not as far as being responsible if he ends up dying as a result of getting the death penalty. That it was up to us to answer yes or no to, I think it was three, questions. And based on the way we answered those questions. The death penalty would be assigned or not assigned, according to Texas law. The defense tried to make us feel as though we would be responsible for [the defendant] dying if we gave him the death penalty so I think that the judge maybe took some of that sting away.

Id. at 1040. In live interviews of 153 capital jurors, only 28% of jurors agreed that determining whether the defendant lived or died was “strictly the jury’s responsibility and no one else’s”—and only 21% of jurors who gave a death sentence agreed with that proposition. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, Jury Responsibility in Capital Sentencing: An Empirical Study, 44 Buff. L. Rev. 339, 350, 353 tbl.1 (1996). This empirical research underscores what the plain text of the statutory jury instructions shows: the legislative intent here is an improper one. The text prevents, rather than promotes, individual jurors’ ability to make a “reasoned moral response” to the question of whether death is the appropriate sentence in any given case, contrary to the Supreme Court’s directives.

In the civil law context, an actionable fraud involves proving that a material misrepresentation or omission was made knowingly or recklessly to induce reliance; and that the plaintiff actually and justifiably relied on the misrepresentation, which caused injury. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001). Yet, inexplicably, in the capital-sentencing context, state law requires that trial judges perpetrate a fraud on jurors
through material misrepresentations and omissions in the jury instructions, inducing several false impressions: that ten or more jurors are required to prevent entry of a death sentence or mistrial; that a mistrial will come from a failure to reach unanimity or at least a consensus of ten on the special issues; and that jurors, in answering the special issues, are not ultimately responsible for the resulting sentence. Jurors reasonably rely on the deceptive jury instructions that are given to them in reaching a sentence. Reliance on false information and the extraneous specter of a mistrial causes injury—not just to the defendant sentenced to death based on an unreliable mechanism. This dishonest sentencing procedure has a demoralizing effect on the rule of law. The State of Texas should not be in the business of actively deceiving its citizens, especially in a situation that asks these citizens to shoulder the momentous decision of deciding whether to sentence someone to death.

It is time for leadership from a Texas court regarding the deception that the Texas mandatory jury instructions perpetrate on citizens charged with the grave responsibility of deciding whether to sentence a capital defendant to death or to life without the possibility of parole. This Court should hold that this deception has no place in the capital-sentencing process. A statute that promotes deception through material misrepresentations and omissions prevents jurors from making a reasoned moral response to the question of sentencing, thereby violating the Eighth Amendment and the Fourteenth Amendment’s Due Process Clause. Sections 2(a)(1), 2(d)(2), and 2(f)(2) of Article 37.071 must be struck down.
VIII. The Cumulative Infirmities Plaguing Texas’s Approach to the Death Penalty Violate the Eighth and Fourteenth Amendments.

The history and arguments developed above should make it clear that Texas’s approach to the death penalty, including its statutory scheme, is not the product of thoughtful reflection. Instead it is a Frankenstein’s monster, a hodgepodge of ill-conceived legislative measures, crafted at disparate periods, and then interpreted, over time, by the CCA in a manner that creates exceedingly broad discretion to find an individual death-qualified while also constraining the ability of jurors to consider evidence that might induce them to extend mercy instead.

In short, the cumulative problems with Texas’s scheme offend all four pillars of federal constitutional law that were developed at the outset of the modern death-penalty era. Texas’s approach:

- does not ensure heightened reliability;
- does not channel and limit the sentencer’s discretion to impose death in a manner that minimizes arbitrariness and caprice;
- does not give sentencers a means to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future; and
- does not comport with contemporary standards of decency.

Therefore, even if this Court were reluctant to find the death penalty per se unconstitutional, it should be plain that it is unconstitutional as practiced in Texas.

In light of the way these multiple failings work in concert, Texas’s capital-sentencing scheme must be found unconstitutional on its face—in all circumstances.


**CONCLUSION**

The basic legal parameters of a constitutional capital-sentencing scheme are seemingly simple: (1) the process of determining who will be eligible for a death sentence (among the many accused of murder against whom death is *not* sought) must be reliable; (2) the mechanism whereby the pool of individuals who can be sentenced to death is narrowed must channel sentencers’ discretion in a non-arbitrary fashion; (3) the sentencing mechanism must give sentencers broad discretion *not* to impose a death sentence by allowing a full and fair opportunity to consider and give effect to whatever mitigating evidence the defendant musters that might move any individual juror to show mercy; and (4) the punishment must not offend evolving standards of decency that mark the progress of a maturing society.

Texas’s scheme does not satisfy any of those requirements. The systemic failures recounted above are as follows:

- Texas’s capital-sentencing scheme has not been reliable since the outset of the modern death-penalty era and, as currently embodied in Article 37.071, is unreliable in its reliance on a demonstrably unsound inquiry into “future dangerousness” that has never been subjected to meaningful appellate review. This failing violates the Eighth and Fourteenth Amendments.

- Texas’s current capital-sentencing statute does not narrow the class of people susceptible to being killed by the state as punishment for their crimes but has instead expanded the class of death-eligible individuals in a manner at odds with any valid penological purpose. More specifically:
  - Texas Penal Code section 19.03 has been amended repeatedly to broaden the categories of death-eligible crimes, not to narrow the class of death-eligible individuals;
  - Texas Penal Code section 1.07(26) & (49), as amended by Senate Bill 319, have expanded death-eligibility by expanding the definitions of both life and death in a manner that violates multiple constitutional provisions as follows:
These provisions violate the Eighth Amendment by arbitrarily expanding the availability of the death penalty for crimes not previously considered to be capital crimes.

These provisions violate the Due Process Clause by defining fertilized eggs, embryos, and fetuses as persons.

These provisions violate the Supremacy Clause by defining fertilized eggs, embryos, and fetuses as persons.

These provisions violate the Establishment Clause by defining life as beginning at fertilization.

These provisions violate the Fourteenth Amendment's Equal Protection and Due Process Clauses by elevating potential life over actual life in furtherance of no valid penological purpose.

Texas’s capital-sentencing scheme provides no statutory directive guiding the exercise of prosecutorial discretion at the county-level, resulting in intolerable arbitrariness based on the vagaries of geography at the county-level and the factor of race. These failings violate the Eighth and Fourteenth Amendments.

In multiple ways, the so-called “future dangerousness” special issue in Article 37.071, sec. 2(b)(1), is unconstitutionally vague and fails to narrow the class of death-eligible defendants as follows:

- The vague text does not guide jurors who are ill-equipped to make the prediction called for by the special issue.
- The CCA’s failure to define, and thereby narrow vague terms in the future dangerousness special issue is without justification. Specifically:
  - “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.
  - “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.
  - “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.
• “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is unconstitutionally vague.

• In multiple ways, the Texas approach to mitigation remains unconstitutional as follows:

  o Texas’s approach to mitigation, both in its jury instructions, Article 37.071, sec. 2(d)(1), 2(e)(1), and as interpreted by the CCA, unduly burdens the consideration of mitigating evidence in violation of the Eighth and Fourteenth Amendments and of Supreme Court directives in violation of the Supremacy Clause.

  o Texas’s statutory definition of “mitigating evidence” found in Article 37.071, sec. 2(e)(1) is unconstitutional because it constrains the wide-open concept of “mitigation” as defined in the Supreme Court’s Eighth Amendment jurisprudence.

  o The CCA’s interpretation of the statutory definition of “mitigating evidence” is unconstitutional because, by operating in contravention to the Supreme Court’s Eighth Amendment jurisprudence, it violates the Supremacy Clause.

  o In violation of the Eighth and Fourteenth Amendments, the CCA’s interpretation of what constitutes “relevant” mitigating evidence further constrains the scope of mitigation that juries are even allowed to hear.

  o The sequence and wording of the special issues, found in Article 37.071, sec. 2(b) and (e)(1), impair consideration of mitigation and privilege death over life. The Texas capital-sentencing scheme does so by exploiting cognitive biases, more specifically:

    ▪ The Texas capital-sentencing statute exploits the representativeness heuristic that predisposes jurors toward a death sentence.

    ▪ The Texas capital-sentencing statute exploits the anchoring-and-adjustment heuristic that predisposes jurors toward a death sentence.

• The Texas capital-sentencing instructions are crafted to deceive jurors thereby impairing their ability to make a “reasoned moral response” to sentencing, as the Constitution requires.

  o Texas’s mandatory jury instructions deceive in two critical ways:

    ▪ Texas’s mandatory jury instructions in Article 37.071, sec. 2(d)(2) & (f)(2) deceive regarding how many jurors must agree on the answers to the special issues.
Texas’s mandatory jury instructions in Article 37.071, sec. 2(c), 2(d)(2), 2(f)(1) deceive through a material omission about the effect of their answers.

- The deceptive jury instructions, along with Article 37.071, sec. 2(a)(1), which imposes a “gag rule” that prevents telling jurors the truth, is anathema to reliable sentencing and thus violate the Eighth Amendment.

- The material misrepresentations and omissions in Texas’s mandatory jury instructions also violate the defendant’s right to Due Process guaranteed by the Fourteenth Amendment.

- The plain text of the statutory juror instructions requires deception, reflecting an improper legislative intent rendering them voidable.

The cumulative infirmities in Texas’s approach to capital punishment render it irremediably unreliable, arbitrary, predisposed to impose death rather than permit the exercise of mercy, and an affront to the notion that punishments must serve a legitimate purpose.

For each and all of these reasons, the Texas death-penalty sentencing scheme should be found unconstitutional on its face in all circumstances. Mr. Clark asks for a hearing in which to present these arguments and answer the Court’s questions before making findings of fact and conclusions of law as to this critical threshold determination as to whether the death penalty should be an option in this (or any) Texas capital case.

Mr. Clark’s discrete motions addressing each of these challenges are presented separately along with a proposed order.
Respectfully submitted,

/s/ Bristol C. Myers
Bristol C. Myers
State Bar No. 24009734
Bristol C. Myers, P.C.
1411 West Avenue, Suite 200
Austin, Texas 78701
Tel: (512) 478-2100
Fax: (512) 478-2107
bristol.myers@gmail.com

/s/ Kellie M. Bailey
Kellie M. Bailey
State Bar No. 00787021
Law Office of Kellie M. Bailey, P.C.
1304 Nueces Street
Austin, Texas 78701
Tel: (512) 469-0905
kmbailey@kelliebailey.com

OF COUNSEL

/s/ Gretchen S. Sween
Gretchen S. Sween
State Bar No. 24041996
P.O. Box 5083
Austin, Texas 78763-5083
Tel: (214) 557-5779
Fax: (512) 551-9448
gsweenlaw@gmail.com

ATTORNEYS FOR DEFENDANT,
VONTREY JAMAL CLARK

204
CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, a true and correct copy of the above and foregoing Memorandum of Law was served on counsel of record for the State via the efiling system or electronic mail.

/s/ Gretchen S. Sween
Gretchen S. Sween