Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70030

United States Court of Appeals
Fifth Circuit
FILED
June 11, 2018
Lyle W. Cayce
Clerk

PATRICK HENRY MURPHY,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:09-CV-1368

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Patrick Henry Murphy and six other Texas inmates escaped from prison and then pulled off a string of armed robberies, culminating in the fatal shooting of a police officer. Murphy was caught, convicted, and sentenced to death. Murphy's direct appeal and state habeas application failed, and the district court denied his federal habeas petition.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Murphy now asks this court for a certificate of appealability under 28 U.S.C. § 2253(c)(2) to appeal the denial of his petition for writ of habeas corpus. He presents three claims that he believes warrant further development: (1) an Eighth Amendment claim that his criminal culpability does not permit a death sentence under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987); (2) an ineffective-assistance-of-appellate-counsel claim based on appellate counsel's failure to raise the just-referenced *Enmund*/*Tison* claim on direct appeal; and (3) an ineffective-assistance-of-trial-counsel claim based on trial counsel's performance at the penalty phase of trial. We DENY Murphy's request on all claims.

I.

A.

On December 13, 2000, seven inmates escaped from a Texas state prison located in Kenedy, Texas. The seven inmates—George Rivas, Larry Harper, Donald Newbury, Randy Halprin, Joseph Garcia, Michael Rodriguez, and Patrick Henry Murphy—all were serving long sentences for violent crimes. The newspapers would call this group the "Texas Seven."

The breakout happened during lunch. Six of the seven, including Murphy, had work assignments in the prison's maintenance department. The day of the breakout, those six stayed behind during their lunch break to work in the warehouse. Once most of the people had cleared out for lunch, George Rivas asked Patrick Moczygemba, a civilian supervisor overseeing their work, to check some equipment under a table. As Moczygemba bent down, he was struck on the back of the head and knocked unconscious.

When he came to, Moczygemba struggled but was quickly subdued when Joseph Garcia put a shank to his throat. Moczygemba's clothes were stripped and he was tied, gagged, blindfolded, and carried to an electrical room. As other employees and inmates trickled back from lunch, they received similar

treatment. In total, about 14 people were caught and stuffed in the electrical room.

Sometime shortly after, the back-gate guard got a phone call from a person identifying himself as Patrick Moczygemba. The man said maintenance was en route to install surveillance equipment. Soon after, two inmates—one of whom was Murphy—and a man dressed as a civilian supervisor (who turned out to be Larry Harper) showed up at the back gate. Using a telephone call as a distraction, the inmates overpowered the guard, taped his ankles, handcuffed him to a chair, and shut him in a restroom. From there, the seven stole a variety of firearms and ammunition, and fled the prison in a stolen vehicle.

The group then headed to Irving, Texas, where they hatched a plan to rob Oshman's Supersports on December 24. It was during the Oshman's robbery that Officer Aubrey Hawkins was shot and killed.

Fifteen minutes before Oshman's closed, George Rivas and Larry Harper entered the store disguised as security guards. The other escapees—besides Murphy—were already inside, spread around the store, and pretending to be customers. Murphy was parked in Oshman's lot in a Chevrolet Suburban. He was, in his words, the "backup and lookout."

Back in the store, Rivas and Harper approached a store manager and told him they were investigating a local shoplifting ring. Rivas convinced the manager to let him check the store's security tapes. After viewing the tapes, Rivas said they did not help his investigation, and they returned to the store floor. By then, most of the store employees were gathered at the front, talking with Harper. With them gathered, Rivas announced that they were robbing the store.

The escapees surrounded the employees, guns drawn. The employees surrendered, got patted down, and were walked to a breakroom in the back. Rivas took the store manager back through the store, grabbing cash from the

registers and guns from the gun department. The manager was then returned to the back, where he and the other employees were tied up. Rivas took the keys to the manager's Ford Explorer and told the other escapees to meet him behind the store. Rivas left Oshman's, retrieved the manager's Explorer, and drove it around to the back of the store. While Rivas was retrieving the car, a witness who spotted some of the events inside Oshman's called the police.

Back inside the store, the manager heard someone on the radio tell the escapees to hurry up and get out because they "had company." Another employee said he heard, "Come on, we got to go. We got to go. We got company."

Officer Aubrey Hawkins was the company. He was the responding officer, sent to Oshman's on a suspicious persons call. When he drove around the store to the back, a firefight ensued. Hawkins was shot multiple times (Rivas and Halprin were as well). Hawkins was then pulled out of his car, run over, and dragged several feet by the escapees fleeing the scene in the Explorer. At the scene, Hawkins was found lying face down on the ground without a pulse.

The six in the Explorer met up with Murphy at a nearby apartment complex. From there, they headed to Colorado. A little less than a month after the shooting, Murphy and five of the other escapees were captured (Larry Harper committed suicide before being taken). Murphy and the surviving escapees were brought back to Texas, charged with capital murder, and informed that Texas would seek the death penalty in all their cases.[1]

B.

Pursuant to Texas's death-penalty scheme, Murphy's trial was split into guilt and penalty phases. Central to the State's case for Murphy's guilt was a

[1] All the surviving escapees were sentenced to death. George Rivas, Donald Newbury, and Michael Rodriguez have been executed. Joseph Garcia and Randy Halprin currently sit on death row.

statement Murphy wrote for police after he was captured. In this statement, Murphy explained the rationale for the robbery, his role in the heist, and what occurred.

Murphy wrote that the group picked Oshman's because it had a wide range of weaponry and clothing. Their goal was to increase their "arsenal" and ditch the guns taken from prison. Murphy explained that members of the group "were pretty much equal," and they "weighed the pro's and con's" of robbing Oshman's. Murphy added that he was against the plan because Oshman's had a lot of employees and he was afraid of being recognized. Nevertheless, he went along as the "backup and lookout."

To play his part, Murphy had a two-way radio and a radio scanner he programmed to police frequencies. He also had several loaded guns in the Suburban—two .357 revolvers, an AR-15, and a .12-gauge pump shotgun. Murphy knew that the escapees inside the store were similarly armed. Murphy added that if he were pursued by police, his purpose "was to initiate a firefight with the AR-15."

Murphy also described the events that precipitated Hawkins's death. While the robbery was in progress, Murphy spotted a police car and heard over the scanner a report of suspicious activity at Oshman's. Murphy radioed the group "to abort" because the police were there. He told them the patrol car's location and the direction it was headed. When he saw the car pass Oshman's and pull around to the back, Murphy radioed, "He's coming around the corner. Leave. Leave." Shortly after, one of the other escapees radioed Murphy and told him to meet them at the pickup point. Murphy secured his guns and rendezvoused with the group. When they met up, the other escapees told Murphy they had shot a police officer.

Murphy's counsel gave no opening statement, called no witnesses, and put on no evidence. The jury convicted Murphy of capital murder.

C.

At the penalty phase, the State introduced Murphy's prior convictions for burglary and aggravated sexual assault, called Murphy's sexual-assault victim to describe the facts of the at-knifepoint rape, corroborated her story with several witnesses and DNA evidence, called witnesses to the prison break, and put on a handwritten note found in Murphy's prison dormitory. The note read: "I refuse to abide by the dictations of a police state, which Texas has surely become. Today I fire the first shot of THE NEW REV[O]LUTION. Long live freedom. Death to tyranny."

To avoid the death penalty, Murphy called several witnesses to testify about his terrible childhood. Murphy's aunt testified that after Murphy was born, his mother would frequently leave him with relatives for long periods without explanation. When his mother would pick him up, she would be under the influence of drugs and alcohol. When Murphy was just a few months old, his mother became pregnant. Murphy's biological father, according to the aunt, physically abused his mother such that she miscarried. The two soon divorced. When Murphy was one and a half, his father lost custody rights over Murphy by failing to return him one weekend. Murphy's aunt added that when Murphy's father brought him to court for a custody hearing, Murphy was in bad shape. He, his clothes, and his diaper were dirty, he was covered with cigarette burns, and his diaper pin went through his skin.

When Murphy was four, his mother had another child. Soon after the child was brought home from the hospital, the man Murphy's mother was dating raped her, resulting in a two-week hospitalization. After this, Murphy's mother became physically abusive towards Murphy, hitting and slapping him. Murphy's mother also dated—on-again, off-again—a convicted child molester who served jail time on weekends. Murphy's mother continued to drink and use drugs regularly, and she gave birth to a child that had severe birth defects.

By nine or ten, Murphy became uncontrollable. Around that time, he began living with his biological father.

Murphy's biological father picked up where the aunt left off. He said that when he regained custody over Murphy, Murphy was dirty and covered in infected mosquito bites and ringworms. Murphy's father had to teach him basic hygiene, like how to bathe and brush his teeth. Murphy's father admitted he was frequently away from the house, due to his trucking job. Murphy would often run away from home.

On top of evidence of his rough upbringing, Murphy presented evidence that he would not be a future threat to society. One key witness for this was S. O. Woods, a former assistant director for the Texas Department of Criminal Justice institutional division. Before the breakout, Murphy had been incarcerated for 16 years. During that time, he incurred just three major disciplinary offenses. Murphy also was not in a prison gang, and, at one time, he had a projected release date of 2001. Woods said that if Murphy returned to prison, he would be put in administrative segregation, and would be given just one hour a day outside of his cell. By contrast, during Murphy's previous prison stint, he was housed in a low-security dormitory and had a low-security job.

Wood's cross-examination did not go well. The prosecutor asked Woods about Murphy's past crimes and the prison break. Eventually, the prosecutor pressed Woods into admitting that he thought Murphy would be "a very dangerous inmate."

Murphy's last witness was Doctor Mark Vigen. Vigen—who is a licensed forensic psychologist with over twenty years of experience at the time of trial—testified on Murphy's mental state and future dangerousness. To form the basis for his opinion, Vigen interviewed Murphy, his family members (Murphy's father, aunt, half-brother, two half-sisters, and two cousins), and two doctors—one psychiatrist and one psychologist—who had previously

evaluated Murphy. Vigen also reviewed Murphy's pre-prison records (juvenile records, army records, and arrest records) and his prison records, including Murphy's mental-health records, social-services records, and clinical records.

From this investigation, Vigen reached five conclusions. First, Murphy has a sexual disorder, not otherwise specified, and narcissistic, borderline, and antisocial personality traits.[2] Second, the disorder and traits were a result of a long and severe developmental history of family dysfunction. Specifically, Vigen isolated Murphy's experience of childhood neglect, abandonment, upheaval, physical abuse, and sexual abuse. Third, Murphy was more a follower than a leader in the escape, robbery, and murder. Fourth, Murphy presented a very low risk of future violence in prison because Texas would likely put him in administrative segregation. Fifth and finally, Murphy had potential for rehabilitation and "personal spiritual conversion" as he aged and received therapy in prison.

Both sides rested. After the jury was instructed on Texas's standard for a death sentence, it returned answers authorizing imposition of the death penalty. Murphy was then sentenced to death.

D.

After Murphy's direct appeal and state habeas application failed, he filed a federal habeas petition, which was referred to a magistrate judge. In it, Murphy attacked the constitutionality of his death sentence. Specifically, Murphy argued that the test for imposing the death penalty on a non-triggerman under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), was not satisfied. Murphy argued that under

[2] Vigen explained the difference between disorders and traits. A disorder is a group of symptoms that causes personal distress, dysfunction, loss of freedom, or the threat of death. By contrast, a trait is less severe. It meets some criteria of the associated disorder but not a sufficient number to cause distress or dysfunction.

Enmund/*Tison*, the death penalty may only be imposed on a non-triggerman that at least: (1) "played a major role in the criminal activities leading to [the] death," and (2) "displayed reckless indifference to human life." *See Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006). According to Murphy, the jury instructions across both stages of his trial were worded in such a way that the jury could have sentenced him to death without making either finding.

Murphy also brought two relevant claims not raised before any state court. He raised an ineffective-assistance-of-appellate-counsel (IAAC) claim, attacking state appellate counsel's failure to raise his *Enmund*/*Tison* claim. He also brought an ineffective-assistance-of-trial-counsel (IATC) claim, attacking trial counsel's performance at the penalty phase.

The magistrate judge held an evidentiary hearing to determine whether Murphy could excuse his procedural default of these ineffectiveness claims via *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Ultimately, the magistrate judge recommended denial of all Murphy's claims as procedurally barred and meritless. The district court adopted this recommendation, and also declined to issue a certificate of appealability (COA) on any of Murphy's claims. Murphy now seeks a COA from this court.

II.

We may issue a COA only when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further'"—that is, whether the applicant's claims are "debatable." *Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)).

Despite this lenient standard, issuance of a COA is not automatic. *See Miller-El*, 537 U.S. at 337. "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Id.* at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). If a district court dismisses a claim on procedural grounds (as was the case here), a COA should issue only if (1) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In this case, Murphy seeks a COA on three constitutional claims:

(1) Murphy claims he was sentenced to death without either necessary finding under *Enmund*/*Tison* for imposition of the death penalty on a non-triggerman.
(2) Murphy next claims that if his state appellate counsel failed to raise his *Enmund*/*Tison* claim on direct appeal, then appellate counsel rendered constitutionally deficient assistance.
(3) Murphy finally claims he was deprived of effective assistance of counsel in the penalty phase of his trial.

We consider each claim in turn. We ultimately conclude that all three are undebatably procedurally barred. Thus, we deny a COA on all three claims.

III.

Murphy's *Enmund*/*Tison* claim is clearly procedurally barred. But an extended digression into the path Murphy's *Enmund*/*Tison* claim took to get to us is necessary to understand why.

At the guilt phase of Murphy's trial, the jury was instructed on a total of four theories of capital murder. The jury was presented with two potential theories on the means or method of capital murder—murder of a peace officer and murder in the course of a robbery. *See* Tex. Penal Code Ann. § 19.03(a)(1),

(2). The jury was also given two so-called "law of parties" instructions—aider and abettor liability and conspiracy liability. *See id.* § 7.02(a), (b). This created a total of four potential theories of guilt (two means or methods times two criminal liability theories).

Before the jury was instructed, Murphy raised a variety of objections. Three of those objections are relevant here. First, he asked "the Court to enter an instructed verdict based on" *Enmund*, as the evidence failed to show that Murphy killed or attempted to kill Officer Hawkins. Next, Murphy asked the court to force the state to elect one of the two means or methods of capital murder—killing a police officer or murder during a robbery. Murphy argued that if both theories were given to the jury, the jury could split on the theories and still return a unanimous verdict. This, according to Murphy, would violate a constitutional requirement of jury unanimity. Finally, Murphy asked for an election between the two law of parties instructions—aider and abettor or conspiracy liability—again, based on jury unanimity concerns. All three objections were overruled.

At the penalty phase, the jury was instructed on Texas's standard for imposing the death penalty. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2. The jury received the traditional future-dangerousness and mitigating-circumstances special issues. *See id.* § 2(b)(1), (d)(1). But in addition, because the guilt-phase charge allowed the jury to find Murphy guilty as a party, the jury was given a modified version of the so-called "anti-parties" special issue meant to render a death sentence *Enmund*/*Tison* compliant. *See id.* § 2(b)(2). The jury was asked, "do you find from the evidence beyond a reasonable doubt that the defendant . . . intended to kill the deceased or another or anticipated that a human life would be taken." Murphy objected to this wording, claiming that it was not enough to render a potential death sentence *Enmund*/*Tison*

compliant. The court overruled this objection, and the jury received the anti-parties special issue described above.

After being convicted and sentenced, Murphy filed a direct appeal to the Texas Court of Criminal Appeals (TCCA), where he raised 42 points of error. He broke his claims into four categories: "Issues on Voir Dire," "Issues on Trial," "Issues on Punishment," and "Constitutional Issues." Murphy's eighteenth point—which fell in the "Issues on Trial" section—addressed *Enmund*. We reproduce it in full below:

> **Issue No. 18**
>
> **The trial court erred in overruling appellant's objection to the jury charge concerning the applicability of sec. 7.02(b) (conspirator liability) of the law of parties as being contrary to the constitutional requirements of Enmund v. Florida, supra; which requires that there be specific intent of the accused to kill or to cause the loss of life**
>
> **Arguments and Authorities**
>
> Appellant directs this Honorable Court's attention to Rep. R. Vol. 44 pp. 4-5 at which Appellant objected to the jury submission dealing with the law of parties as applied by the trial court in this case as it violated the holding of the United States Supreme Court in Enmund v. Florida, supra; which has specific requirements not found in the Texas Death Penalty Statute before death can be imposed as a possible punishment. The trial court erred in using language on issues not sanctioned by the Enmund case; which calls for reversal and new punishment hearing or rendering of a life sentence.

The TCCA overruled this point of error. *Murphy v. State*, No. AP–74,851, 2006 WL 1096924, at *21 (Tex. Crim. App. Apr. 26, 2006) (not designated for publication). Per the TCCA, Murphy only raised a challenge to the constitutionality of his conviction under *Enmund*. *Id.* This reliance on *Enmund* was misplaced according to the TCCA: "*Enmund* prevents imposition of the death penalty under certain circumstances; it does not prohibit a capital

murder conviction for a non-triggerman under the law of parties." *Id.* (citing *Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992)). The TCCA recognized that Murphy "made an *Enmund* objection at the punishment phase of the trial, but in his brief he cites and refers only to his objection at the guilt or innocence phase." *Id.* at *21 n.58.

Following the failure of his direct appeal, Murphy once again raised an *Enmund*/*Tison* claim in his state habeas application. This time, he broke the claim into two parts and made clear he was attacking his conviction *and* death sentence. The state habeas court found both claims procedurally barred and alternatively meritless. Murphy's attack on his sentence was procedurally defaulted based on *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998), per the state court because Murphy did not avail himself of the opportunity to raise it on direct appeal. The TCCA adopted the state habeas court's findings and denied Murphy's application. *Ex parte Murphy*, No. WR–63,549–01, 2009 WL 1900369, at *1 (Tex. Crim. App. July 1, 2009) (per curiam) (not designated for publication).

Based on this procedural history, it is undebatable that Murphy's *Enmund*/*Tison* claim is procedurally barred. Under the doctrine of procedural default, we are precluded from reviewing "claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). The state habeas court's finding of procedural default constitutes such a denial. The state court held Murphy's *Enmund*/*Tison* attack on his sentence procedurally defaulted under *Ramos*, 977 S.W.2d at 617, a case which in turn relies on *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996), *clarified on reh'g* (Feb. 4, 1998). This rule from *Gardner*—which bars consideration of claims that could have been but were not raised on direct appeal—is "an adequate state ground capable of barring

federal habeas review." *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005) (quoting *Busby v. Dretke*, 359 F.3d 708, 719 (5th Cir. 2004)).

Murphy makes neither of the traditional arguments to excuse his default: that (1) cause for the default and actual prejudice exist, or (2) failure to consider his claim will result in a miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Instead, Murphy's only retort is that the TCCA and state habeas court misapplied their own rules. But we cannot review the correctness of the state court's application of its own rule: "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Nobles v. Johnson*, 127 F.3d 409, 419 n.21 (5th Cir. 1997) ("[I]nsofar as [the petitioner] asks us to review the state court's application of state law, his claims are outside the scope of federal habeas review.").

Thus, as Murphy's *Enmund/Tison* claim is undebatably procedurally barred, we deny a COA on it.

IV.

Murphy next contends that if his appellate counsel failed to raise his *Enmund/Tison* claim on direct appeal, then appellate counsel rendered constitutionally deficient assistance. We will not linger on this claim as it is undebatably procedurally barred.

Murphy did not raise this IAAC claim in his original state habeas application. This failure renders it unexhausted. *See Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001). His unexhausted claim is procedurally barred if Texas courts would treat the claim as procedurally defaulted if presently raised. *See Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004). Texas courts would do so under the abuse-of-the-writ doctrine, a doctrine we recognize as an adequate and independent procedural rule in this context. *See Rocha v. Thaler*, 626 F.3d 815, 832 (5th Cir. 2010); *Beazley v. Johnson*, 242

F.3d 248, 264 (5th Cir. 2001). Murphy does not argue that an exception to this procedural bar is available. And none would be. The Supreme Court has recently held that default of an IAAC claim cannot be excused by ineffectiveness of habeas counsel via *Martinez* and *Trevino*. *See Davila*, 137 S. Ct. at 2063-64. Thus, as Murphy's IAAC claim is procedurally defaulted with no debatable case for excuse, we deny a COA on it.

V.

Murphy's final claim is that trial counsel rendered constitutionally deficient assistance at the penalty phase. As this IATC claim was not raised in Murphy's state habeas application, Murphy normally would be barred from raising it. *See Bagwell*, 372 F.3d at 755; *Beazley*, 242 F.3d at 264. But as this claim asserts ineffectiveness of *trial* not *appellate* counsel, Murphy may overcome this bar via the exception to procedural default set forth in *Martinez* and *Trevino*. *See Davila*, 137 S. Ct. at 2062-64.

Under *Martinez* and *Trevino*, Murphy may show cause and prejudice to excuse his default. To show cause, Murphy must demonstrate: "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013). Conveniently, the test for whether Murphy's underlying claim is "substantial" is the same as the one for granting a COA—that is, the test is whether the claim is debatable by reasonable jurists. *Trevino v. Davis*, 861 F.3d 545, 548-49 (5th Cir. 2017).

Most of the action on this claim pertains to prong one of *Martinez* and *Trevino*—whether Murphy's underlying IATC claim is "substantial." This underlying IATC claim is governed by the well-known *Strickland* standard. Murphy must show: (1) that his trial counsel rendered deficient performance,

and (2) that this deficient performance resulted in actual prejudice. *See Rhoades v. Davis*, 852 F.3d 422, 431 (5th Cir. 2017).

The first prong of *Strickland* "sets a high bar." *Buck*, 137 S. Ct. at 775. "To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, 'counsel's representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.'" *Rhoades*, 852 F.3d at 431-32 (quoting *Strickland*, 466 U.S. at 687-88). "Restatements of professional standards," like the American Bar Association's (ABA) Guidelines for defense attorneys, "can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *See Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689).

To meet the second prong of *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

We review the district court's conclusions of law de novo and factual findings for clear error. *See Woodfox v. Cain*, 609 F.3d 774, 788-89 (5th Cir. 2010). "A claim of ineffective assistance of counsel presents a mixed question of law and fact." *Id.* at 789. When confronting a mixed question of law and fact, we use "a de novo standard by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *See Richards v. Quarterman*, 566 F.3d 553, 561

(5th Cir. 2009) (quoting *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005)). A district court's finding of fact is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).[3]

For his part, Murphy argues that his procedural default is excused by *Martinez* and *Trevino* and that his underlying IATC claim has at least debatable merit. He focuses on his underlying IATC claim, arguing that trial counsel made errors that prejudiced him on both of Texas's special issues at the penalty phase—future dangerousness and mitigating circumstances.

On future dangerousness, Murphy claims that counsel elicited highly damaging testimony from her own expert—S. O. Woods—on the threat Murphy would pose if left alive in prison. In the same vein, he claims that a reasonable investigation would have revealed that Woods would give harmful testimony when cross-examined and therefore Woods should never have been called.

On mitigating circumstances, Murphy claims that counsel failed to conduct a reasonable mitigation investigation. This meant she never discovered or developed evidence that Murphy suffers from post-traumatic stress disorder (PTSD). If the jury knew of this PTSD diagnosis, according to Murphy, it may have found mitigating circumstances warranted a life-in-prison sentence rather than death sentence.

We consider both arguments in turn. For both, we conclude that Murphy cannot satisfy the first prong of *Martinez* and *Trevino*—that his underlying IATC claim is substantial or debatable.

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[3] The strictures of § 2254(d) do not apply as this claim was not presented to the state courts. *See* 28 U.S.C. § 2254(d) (governing only claims "adjudicated on the merits" by the state courts).

A.

Murphy's first alleged error is easily dispensed with. We have previously held that "[t]he decision whether to present a witness is considered to be essentially strategic." *See Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). A "strategic choice[]" made after "thorough investigation of law and facts relevant to plausible options [is] virtually unchallengeable." *Strickland*, 466 U.S. at 690. "[A]nd [a] strategic choice[] made after less than complete investigation [is] reasonable precisely to the extent that reasonable professional judgment[] support[s] the limitation[] on investigation." *Id.* at 690-91.

Here, counsel's decision to call Woods was an informed, strategic choice that simply backfired. At the evidentiary hearing, Murphy's lead trial counsel explained Woods's perks: he was a former warden, "a nationally respected expert" on prison safety, and he told trial counsel that he did not think Murphy would be a danger when placed in administrative segregation. In fact, trial counsel had spoken with Woods several times before trial and thought he would say that Murphy would not be a future threat in prison. Woods's damaging concession surprised trial counsel because it contradicted what he had told her in private. Based on this investigation, the fact that Woods buckled under cross-examination does not show that calling him was strategically unreasonable. *See id.*

And either way, the impact of Woods's admission is not measurably more damaging than the facts already before the jury. The evidence of Murphy's future dangerousness was already overwhelming. Murphy had been convicted of aggravated sexual assault and burglary. He had coordinated with others to break out of prison, during which his group violently incapacitated numerous people. He and the group were able to pull off an armed robbery during which a police officer was killed. Woods's opinion—that Murphy was a "very

dangerous inmate"—had no reasonable probability of changing the jury's mind on the future-dangerousness issue given all this other evidence. *See id.* at 694.

B.

Murphy's second alleged error—which relates to trial counsel's mitigation investigation—is also undebatably meritless. Viewed in its totality, without nitpicking or allowing hindsight bias to creep in, trial counsel's mitigation investigation was reasonable. A review of the evidence elicited at the evidentiary hearing amply demonstrates this.

At the evidentiary hearing, Murphy's lead trial counsel testified at length about her mitigation investigation. She explained that her main goal at trial was to save Murphy's life. Accordingly, she started looking for mitigation evidence soon after she was appointed to Murphy's case in 2001. She quickly hired a fact investigator. She and the investigator tracked down and interviewed Murphy's family, ex-girlfriends, and his ex-wife. They also gathered and reviewed Murphy's relevant records from schools, doctors, and prison.

In late June 2003, the Supreme Court decided *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, the Supreme Court granted an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to conduct an adequate mitigation investigation. *See id.* at 514, 519. Specifically, the Court held that counsel's failure in that case to retain a forensic social worker to prepare a social-history report on their client when funding was available rendered counsel's assistance constitutionally ineffective. *Id.* at 524.

According to counsel, *Wiggins* changed the prevailing norms on defense counsel's responsibilities with respect to mitigation investigations. Before *Wiggins*, counsel said lawyers still had to conduct a mitigation investigation, but it was not incumbent upon lawyers to retain a mitigation expert. Accordingly, before *Wiggins*, Dallas County judges were hesitant to pay for a

separate mitigation expert. But after *Wiggins*, Murphy's trial judge expressed willingness to pay for one. After getting the green light, trial counsel began looking for a mitigation expert.

Counsel got solicitations from a slew of "mitigation experts," but they all seemed suspect to her. Counsel, who was following the trials of the other members of the Texas Seven, thought that the mitigation experts in those cases were subpar. Instead of relying on solicitations, trial counsel made her own calls, and eventually got in touch with a psychologist she had worked with before. That psychologist recommended Doctor Mark Vigen. Lead counsel met Vigen, liked him, liked his curriculum vitae, and figured he would look good in front of a jury. She formally hired Vigen in September 2003.

When hired, Vigen had no specialized training or education as a mitigation investigator. Rather, he was an experienced forensic psychologist. Trial counsel knew this, but thought that few people had adequate training as mitigation investigators at the time.[4] She also lacked any confidence in the people who reached out to her.

Vigen was hired over two months before the guilt phase of Murphy's trial. Between when he was hired and trial, Vigen reviewed Murphy's records, spoke with other doctors, evaluated Murphy, and interviewed Murphy's family. Vigen reviewed Murphy's brain scans and neurological tests administered by other doctors. Before trial, Vigen relayed to counsel what he testified to at

[4] After the hearing, Murphy tried to submit affidavits impeaching trial counsel's testimony on this point. He submitted affidavits from mitigation experts who claimed to have been practicing in Dallas before 2003. The magistrate judge held that Murphy waived the opportunity to impeach trial counsel with these documents because they were not presented at the hearing. While Murphy argues that this ruling was erroneous, he cites no authority for his argument. Accordingly, his argument is forfeited. *See United States v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010); *see also* Fed. R. App. P. 28(a)(8)(A) (stating that briefs "must contain" the "appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies").

trial—namely, that Murphy had a sexual disorder as well as narcissistic, borderline, and antisocial traits; the disorder and traits were caused by childhood neglect and abuse; Murphy was more of a follower than a leader; Murphy had a low risk of future violence; and Murphy could be rehabilitated. Based on all of this, trial counsel's strategy was to show Murphy was a follower, an ineffective criminal, and had a terrible childhood that led to bad decisions. Her plan was to distance Murphy from "the really bad criminals he escaped with."

To support his case that trial counsel's mitigation investigation was lacking, Murphy submitted an affidavit of a psychologist, Doctor Behk Bradley-Davino, who reviewed Vigen's notes and the trial testimony of Murphy's father and aunt. Based on this review, Bradley-Davino determined that Murphy displayed behaviors and problems associated with PTSD. According to the Bradley-Davino, an in-person comprehensive psychological assessment taking into account PTSD was warranted. While Murphy's petition was pending, he was given another round of psychological tests by Doctor John Fabian. This evaluation revealed that he suffers from PTSD.[5]

At the evidentiary hearing, trial counsel was shown Fabian's report. Trial counsel swore that she was aware from her investigation of all the sources of trauma Fabian's report identified. But she did not pursue PTSD as a mitigation theory because neither Vigen nor three other mental health experts who evaluated Murphy suggested to trial counsel that Murphy might have PTSD. Counsel added that if Murphy had been diagnosed with PTSD or someone had raised the suggestion, she would have used it at trial because "it

[5] The State submitted its own expert reports claiming that Murphy did not suffer from PTSD. As reasonable jurists could debate whether Murphy suffers from PTSD, we will assume without deciding for the sake of the COA analysis that Murphy did in fact have PTSD at the time of trial. *See Buck*, 137 S. Ct. at 773-74.

would have dovetailed perfectly" with the defense case that Murphy "was a product of a terrible upbringing."

Before this court, to show trial counsel's ineffectiveness, Murphy argues that Vigen's hiring occurred later than it should have. Counsel only started looking for a mitigation expert after *Wiggins* was decided. But according to Murphy, even before *Wiggins* was decided, it was a prevailing professional norm for a defense lawyer to hire a mitigation expert as soon as she was appointed to a death-penalty case. Murphy also argues that Vigen was not qualified as a mitigation expert. He had no training, education, or experience in the field, and thus could not perform key tasks like compiling a life and social history.[6]

We are unpersuaded. On the timeliness argument, Murphy cites no evidence that pre-*Wiggins* there was a prevailing norm that lawyers representing death-penalty defendants had to hire a separate mitigation expert to compile a life and social history instead of relying on a fact investigator to track down and interview friends and family.[7] And even if the

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[6] *See* Guidelines for the Appointment and Performance of Def. Counsel in Death Penalty Cases Guideline 4.1 cmt. B (Am. Bar Ass'n, rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 959 (2003) [hereinafter 2003 ABA Guidelines] (explaining that mitigation specialists possess "clinical and information-gathering skills and training," including the ability to elicit sensitive information and compile life and social histories).

[7] We note that Murphy's references to the ABA's guidelines for defense lawyers are unavailing. The ABA's guidelines for defense lawyers on death-penalty cases underwent a revision in October 2003, over a month after Vigen was hired and months after *Wiggins* was decided. The revised guidelines place a duty on trial counsel promptly to retain a mitigation specialist. *See* 2003 ABA Guidelines, *supra*, Guideline 4.1(A)(1), at 952 ("The defense team should consist of no fewer than two attorneys . . . , an investigator, and a mitigation specialist.").

But the ABA's prior guidelines, effective at the time *Wiggins* was decided and when Vigen was hired, did not provide such a specific command. Instead, defense counsel is directed to obtain "all reasonably available mitigating evidence." *See* Guidelines for Appointment and Performance of Counsel in Death Penalty Cases Guideline 11.4.1(C) (Am. Bar Ass'n 1989). To do so, counsel must begin a mitigation investigation immediately upon appointment, hiring needed investigators. *See id.* Guideline 8.1 cmt. ("Since pretrial investigation and preparation are fundamental to attorney competence at trial . . . assigned

delay in hiring Vigen was unreasonable, Murphy presents no link between this delay and prejudice to his case. Murphy can only speculate that the two-month window between Vigen's hiring and trial caused Vigen to overlook PTSD. This speculation is unevidenced and unwarranted. In addition to citing no evidence on how much time a psychologist needs to spot PTSD, Murphy has no explanation for why his other evaluators, who had more than two months, also failed to spot PTSD.

Moving on, Murphy's argument that Vigen was not properly qualified to be a mitigation expert also falls flat. Again, he fails to cite anything to establish that at the time Vigen was hired, there were prevailing professional norms related to mitigation experts' precise qualifications, training, and role.[8] And even if there were such norms, counsel's selection of Vigen was a sound strategic judgment. Vigen was recommended to her by a psychologist she knew and trusted. Counsel thought Vigen had a strong curriculum vitae and would perform well in front of a jury. And counsel concluded that using a psychologist to organize and present Murphy's mitigation case would suffice, as other

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counsel requires the services of trial assistants such as investigators to gather evidence and witnesses favorable to the client and to enable counsel to intelligently assess conflicting options. . . . [C]ounsel in a capital case is obligated to conduct a thorough investigation of the defendant's life history and background . . . . Counsel . . . cannot adequately perform these and other crucial penalty phase tasks without the assistance of investigators and other assistants."). While the prior guidelines recommend the use of experts, it does not state that their use is mandatory to compile and present a social or life history. *See id.* Guideline 1.1 cmt. ("Utilization of experts has become the rule, rather than the exception, in proper preparation of capital cases."); *id.* Guideline 11.4.1(D)(7)(D) ("Counsel should secure the assistance of experts where it is necessary or appropriate for: . . . presentation of mitigation."); *id.* Guideline 11.8.3(F) ("In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following: . . . (2) Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor; . . . ."). We cannot say that it was unreasonable for trial counsel to decide, at least initially, to rely upon an investigator to compile the factual materials needed for a mitigation case.

[8] The ABA's guidelines effective at the time Vigen was hired do not mention mitigation experts, their role, or their requisite qualifications.

lawyers she respected had done. She testified that she thought a psychologist would be capable of doing the job of a mitigation expert—interviewing people, conducting and interpreting tests, and guiding counsel on putting together a mitigation case. Finally, trial counsel did not think she had better alternatives—she had no confidence in the mitigation experts who reached out to her. From counsel's perspective, "there were any number of hypothetical experts—specialists in psychiatry, psychology, . . . or numerous other disciplines and subdisciplines—whose insight might possibly have been useful." *See Richter*, 562 U.S. at 107. Given this array of options, we cannot say that counsel's reasoned selection of Vigen was even debatably outside "the range of professionally reasonable judgments." *See Strickland*, 466 U.S. at 699.

In any event, even if Vigen was unqualified to perform the tasks unique to mitigation experts, Murphy does not explain how that deficit made a difference. Murphy's current experts are also psychologists with no documented training (at least according to their CVs) in mitigation investigation. Trial counsel and Vigen were aware of the same traumatic childhood events that Murphy's current experts used to render a PTSD diagnosis. Indeed, that trial counsel collected the building blocks for a PTSD diagnosis and handed them over to her psychologist reflects the reasonableness of her investigation. In light of this, counsel cannot be faulted for Vigen's failure to spot PTSD. This failure was, at worst, attributable to Vigen's mistake as psychologist, not counsel's decision to hire a psychologist without training as a mitigation expert.[9] Without a red flag that Vigen's evaluation was

[9] *See Turner v. Epps*, 412 F. App'x 696, 702 (5th Cir. 2011) ("[C]ounsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment . . . and rule that his performance was substandard for doing so." (second alteration in original) (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *overruled in part on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004))); *Earp v. Cullen*, 623 F.3d 1065, 1077

defective or an indication from Vigen that he needed more information to properly evaluate Murphy, it is too much to insist that counsel second-guess her experts' conclusions.[10]

In sum, Murphy cannot show he has a substantial underlying IATC claim, and therefore he cannot debatably excuse his procedural default under *Martinez* and *Trevino*.

* * *

For the foregoing reasons, we DENY Murphy's request for a COA.

(9th Cir. 2010) (holding that even if the mental-health professionals who evaluated the petitioner at the time of trial failed to diagnose the petitioner properly, their failure "does not constitute ineffective assistance of *counsel*"); *Wilson v. Sirmons*, 536 F.3d 1064, 1089 (10th Cir. 2008) (noting that, to a degree, counsel should be able to rely on an expert to determine what evidence is necessary to an effective evaluation and what additional evidence the expert needs to complete testing); *cf. Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("In general, an attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense.").

[10] Because we conclude that Murphy's case for deficient performance is undebatably meritless, we need not consider whether the failure to obtain a PTSD diagnosis was prejudicial.

Appendix B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-74,851

PATRICK HENRY MURPHY, JR., Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. F01-00328-T IN THE 283RD DISTRICT COURT
DALLAS COUNTY

PRICE, J., ***delivered the opinion of the Court, in which*** **KELLER, P.J.,** ***and*** **MEYERS, JOHNSON, KEASLER, HERVEY, HOLCOMB,** ***and*** **COCHRAN, JJ.,** ***joined.*** **WOMACK, J.,** ***concurred in the result.***

OPINION

The appellant was convicted in November 2003 of capital murder.[1] Pursuant to

[1] TEX. PENAL CODE § 19.03(a).

employees a photographic lineup and viewed the store's surveillance videotape, Rivas drew his gun and announced the robbery. The rest of the escapees surrounded the employees with their weapons drawn. The employees were told to place their hands on the counter while the escapees searched them. Ferris testified that he heard Rivas talking to someone on a two-way radio. Rivas "asked if everything was okay outside and somebody responded saying everything was fine, the police were involved with an accident on 183."

Rivas then made the employees walk single file to the breakroom at the back of the store, where he ordered them to face the wall and remain silent. Rodriguez and Garcia remained in the breakroom with the employees, while Rivas escorted Ferris back through the store. Rivas took a tote bag off the wall on their way to the customer service area, where he had Ferris open the registers and place the money in the bag. He also made Ferris give him the keys to his car, a white Ford Explorer parked outside. Rivas took the store surveillance tape from the video room and had Ferris empty the cash from the office safe into the bag. They then went to the gun department, and Ferris gave Newbury the key to unlock the case where the shotguns and rifles were kept. Ferris retrieved handguns from a safe, then they went back to the employee breakroom. Rivas said that he was going outside to get the vehicle and directed Rodriguez and Garcia to tie up the employees and meet him behind the store.

When Rivas went outside, he encountered Misty Wright, who had arrived earlier to

feet. They then drove to a nearby apartment complex, where they met the appellant and abandoned the Explorer. When other officers arrived at Oshman's, they found Hawkins lying face down on the ground without a pulse. The medical examiner testified that Hawkins suffered eleven gunshot wounds, some of which caused fatal injuries to his brain, lungs, and aorta, and he had other injuries that were consistent with being run over and dragged by a vehicle.

Oshman's employees identified the escapees in a photographic lineup, and the Irving police prepared warrants for the seven suspects and sent the information to law enforcement agencies throughout the nation. On December 31, 2000, the escapees checked into the Coachlight Motel and RV Park in Woodland Park, Colorado, where they lived in their RV for several weeks and claimed to be traveling missionaries. They eventually aroused the suspicions of other people staying at the RV park, who contacted the Teller County Sheriff's Department on January 21, 2001. On January 22, local law enforcement officers and the FBI apprehended five of the escapees. When they surrounded the RV, Halprin surrendered and Harper committed suicide. Officers found firearms, cash, ammunition, two-way radios, an emergency frequency guide and scanners, a smoke grenade, and a security hat inside the RV. A bag outside the RV contained gun parts and electronic communication devices. Rivas, Rodriguez, and Garcia were captured in their Jeep at an area convenience store. Officers searched the Jeep and found firearms, cash, a two-way radio, a nightvision scope, a police scanner, and police radio frequency

and the appellant radioed them a few times to let them know there were some vehicles outside "apparently waiting on someone." After Rivas went outside, got into an employee vehicle, and drove around the back of the store, the appellant heard on the scanner, "Suspicious activity at the Oshman[']s." The appellant "got on the walkie-talkie and [told] them to abort[;] the police were here." He gave them the precise location of the patrol car and the direction it was traveling. When the patrol car drove around to the back of Oshman's, the appellant radioed, "He's coming around the corner, leave, leave." Shortly thereafter, Harper radioed the appellant and told him to go to the "pickup point." The appellant secured the weapons in the Suburban and drove to the apartment complex where he met the rest of the escapees. He stated that if he were pursued by police, his purpose "was to initiate firefight with the AR 15."

During the punishment phase, the State introduced evidence that the appellant had committed the offense of burglary of a building in February 1984. He received a six-year probated sentence for the offense. In March 1984, he entered the apartment of a woman he had known in high school, tied her up, held a knife to her, and sexually assaulted her. He was convicted of aggravated sexual assault and received a fifty-year sentence. The other escapees were also serving sentences for serious offenses such as aggravated robbery, kidnapping, injury to a child, murder, capital murder, and sexual assault.

After the escape an officer at the Connally Unit searched the appellant's dormitory cubicle and found a handwritten note. The note stated: "I refuse to abide by the

most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[4] In a factual sufficiency review, we view all of the evidence in a neutral light, and we will set the verdict aside only if the evidence is so weak that the verdict is clearly wrong and manifestly unjust, or the contrary evidence is so strong that the standard of proof beyond a reasonable doubt could not have been met.[5] A clearly wrong and unjust verdict occurs where the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias.[6]

The charge authorized the jury to convict the appellant of capital murder, as a party or a conspirator, under either of two theories: (1) the murder of a peace officer acting in the lawful discharge of an official duty, with knowledge that the victim was a peace officer; or, (2) murder in the course of committing or attempting to commit robbery. Because the trial court's charge authorized the jury to convict on alternative theories, the verdict of guilt will be upheld if the evidence was sufficient on any one of the theories.[7]

The appellant first argues that the State failed to prove that he knew the victim was a peace officer. This argument is refuted by the appellant's own statement, which says in

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[4]*See Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

[5]*Zuniga v. State,* 144 S.W.3d 477, 484-85 (Tex. Crim. App. 2004).

[6]*Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

[7]*Rabbani v. State,* 847 S.W.2d 555, 558-59 (Tex. Crim. App. 1992).

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[7]*Rabbani v. State,* 847 S.W.2d 555, 558-59 (Tex. Crim. App. 1992).

pertinent part:

> Rivas got into the vehicle and drove it around to the back of the store. I heard Rivas on the radio say let[']s load it up. It was about this time that I seen [sic] the patrol car. He had entered from my right. Immediately I heard on the scanner suspicious activity at the Oshman[']s. I got on the walkie talkie and telling [sic] them to abort the police were here. I was on the radio continuously. I never got off the radio. I gave precious [sic] location of the patrol and direction he was traveling. He traveled from my right to my left. He was just cruising. He passed the Oshman[']s store and then picked up speed and went around back. I radioed, "he's coming around the corner, leave, leave."

The appellant next argues that he "did not anticipate the shooting and wanted only to be away from the scene." In support of his argument, he points to the testimony of witness Michael Simpson and his own statement. Simpson testified that he heard a voice on the radio telling Rodriguez and Garcia, "Come on, we got to go. We got to go. We got company." The appellant said in his statement that he told the escapees to "abort" and to "leave." The appellant, however, also said in his statement: "My purpose was to if pursued by the police I was to initiate firefight with the AR 15." The appellant acknowledged in his statement that he knew the escapees who entered Oshman's were armed and planned to steal more guns from the store.

The evidence viewed in the light most favorable to the verdict was sufficient for a rational jury to find beyond a reasonable doubt that the appellant should have anticipated Officer Hawkins's death.[8] The evidence viewed in a neutral light was not so weak that

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[8]TEX. PENAL CODE § 7.02(b).

the verdict was clearly wrong and manifestly unjust, nor was the contrary evidence so strong that the beyond a reasonable doubt standard could not have been met. The evidence was both legally and factually sufficient to convict the appellant of capital murder. Points of error nine, ten, eleven, and twelve are overruled.

In points of error thirteen and fourteen, the appellant alleges that the evidence is legally and factually insufficient to support an affirmative answer to the anti-parties special issue:

> Do you find from the evidence beyond a reasonable doubt that the defendant, PATRICK HENRY MURPHY, JR., did not actually cause the death of the deceased, Aubrey Hawkins, but intended to kill the deceased or another or anticipated that a human life would be taken?

The appellant argues that the evidence is insufficient to show that he anticipated that a human life would be taken.

The appellant again points to his written statement and Simpson's testimony as evidence that he only intended to "abort" the robbery and to "leave" the scene. He asserts that his intentions were confirmed by Rivas's punishment phase testimony that minimized the appellant's involvement in the Oshman's robbery. However, Rivas admitted that he had committed perjury three times in the past, and there were some discrepancies between his testimony and the appellant's statement. Rivas portrayed himself as the mastermind who planned the prison escape and the robberies, and described the appellant as merely a "lookout" during each event. The appellant said in his statement that they made a group decision to rob Oshman's after they "weighed the pros and cons," and that the escapees

were "pretty much equal." Rivas testified that the appellant was hesitant about the Oshman's robbery. The appellant explained in his statement, "What I didn't like was so many employees," and, "Being familiar to Irving I knew [police] response was very quick." The appellant stated that he was "to initiate firefight" with the AR 15 if pursued by police, but Rivas denied that this was part of the plan and testified that the weapons were in the Suburban simply because he did not want to leave them in the hotel room. The jury was free to take these discrepancies into account and to believe or disbelieve any portion of Rivas's testimony based on their evaluation of his credibility.

The appellant, by his own admission, participated in the planning of the Oshman's robbery, prepared his weapons, and programmed police frequencies into his radio scanner. He knew that the escapees were armed and was uneasy about the large number of Oshman's employees and the possibility of a quick police response. He alerted the escapees when Officer Hawkins arrived and gave them Hawkins's precise location as he drove around to the back of the store. He believed that he was "to initiate firefight" if pursued by police, and thus a rational jury could find that he anticipated that the other escapees would do the same.

The evidence viewed in the light most favorable to the verdict was sufficient for a rational jury to find beyond a reasonable doubt that the appellant anticipated that a human life would be taken. The evidence viewed in a neutral light was not so weak that the verdict was clearly wrong and manifestly unjust, nor was the contrary evidence so strong

that the beyond a reasonable doubt standard could not have been met. The evidence was both legally and factually sufficient to support the jury's affirmative answer to the anti-parties special issue. Points of error thirteen and fourteen are overruled.

C. Challenges for Cause

In points of error one through six, the appellant alleges that the trial court improperly denied his challenges for cause against six venire members: Brad Richards, Don Jones, Louise Marker, Carol Cunningham, Maribel Willis, and Robert DeRossett. The appellant alleges that these venire members were challengeable for cause under Article 35.16 because they were biased either against the appellant or against some phase of law upon which he was entitled to rely.[9]

To preserve error for a trial court's erroneous denial of a challenge for cause, the appellant must show that: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) all of his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and, (5) an objectionable juror sat on the jury.[10] The appellant has properly preserved error with respect to each of the challenged venire members.

When the trial judge errs in overruling a challenge for cause against a venire member, the defendant is harmed if he uses a peremptory strike to remove the venire

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[9]TEX. CODE CRIM. PROC. Art. 35.16(a)(9) and (c)(2).

[10]*Green v. State,* 934 S.W.2d 92, 105 (Tex. Crim. App. 1996).

member and thereafter suffers a detriment from the loss of the strike.[11] Because the appellant received one additional peremptory challenge, he can demonstrate harm only by showing that the trial court erroneously denied at least two of his challenges for cause.[12]

When reviewing a trial court's decision to deny a challenge for cause, we look at the entire record to determine if there is sufficient evidence to support the ruling.[13] We give great deference to the trial court's decision because the trial judge is present to observe the demeanor and tone of voice of the venire person.[14] When a venire member's answers are vacillating, unclear, or contradictory, we accord particular deference to the trial court's decision[15].

Brad Richards

The appellant argues that Richards was biased against him because he was one of the "Texas Seven" escapees. He asserts that Richards "had a definite opinion that an accomplice should not receive the death penalty, but after learning the trial would involve a member of the 'Texas Seven' he completely reversed his view on an accomplice receiving the death penalty."

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[11]*Demouchette v. State,* 731 S.W.2d 75, 83 (Tex. Crim. App. 1986).

[12]*Chambers v. State,* 866 S.W.2d 9, 23 (Tex. Crim. App. 1993).

[13]*Feldman v. State,* 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

[14]*Ibid.*

[15]*Ibid.*

The prosecutor initially asked Richards his opinion regarding an accomplice receiving the death penalty in the following exchange:

Q. Do you think accomplices should be prosecuted and ultimately receive the death penalty, depending on the facts, or would you only reserve the death penalty, if it was up to you, for the actual triggerman?

A. I think it would just depend on the evidence. But I would be more inclined to - - I mean, I guess the circumstance could be, you know, brought down to where say maybe the getaway driver and the guy that's holding the money, maybe those three made a pact they are not going to kill anybody, if something like that were to come out, and he on his own, did that. I would probably be more inclined, the guy that was just bagging the money and getaway driver, you know, maybe not the death penalty for those.

Q. Okay.

A. That's not to say I don't believe in it. That's what I put on my questionnaire. I think there are circumstances that even accomplices would be associated with capital, you know, crime, such as you described that they might not be charged with the death penalty.

Q. Is it something that you believe that if it were up to you, we could make you king of Texas or Governor of Texas, king of Texas, and if you were to decide about our death penalty laws, would you have a death penalty for an accomplice or would you put it just for the triggerman, the person that actually caused the death?

A. I think that I would probably be more inclined to have it for the triggerman.

Q. And would not have it for the accomplices?

A. No.

The prosecutor then asked Richards about his statement on his jury questionnaire that he had seen the media coverage of the "Texas Seven" cases. Richards stated that he did not follow the cases closely. The prosecutor asked him if knowing this was a "Texas

Seven" case would affect him in any way, and Richards replied, "I don't think it would."

The prosecutor again questioned Richards regarding the death penalty for an accomplice:

> Q. Okay. Now, let me get back to this accomplice business. Saying what you said that if it was up to you, you probably wouldn't have the death penalty for an accomplice. I will, also, tell you this now, that we're prosecuting the defendant under the theory of parties as an accomplice, not the actual triggerman.
>
> Knowing how you feel about that, do you think then, you could ever assess the death penalty to someone who is not the actual triggerman, but just an accomplice situation?
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> A. I think I could. I think before I answered it, it would just depend on the circumstances and the evidence that was, you know, provided.
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> * * *
>
> Q. Okay. Let me ask you, then, if it gets down to it, you do feel, then, in the prosecution of someone who is not the actual triggerman, a party to the offense, an accomplice to the offense, that you could, if the evidence showed you, sentence him to death, even though, you know, he's not the triggerman?
>
> A. Yes.

Defense counsel complained to the trial court that Richards "flipflopped" on "whether or not an accomplice was death worthy" after learning that the case was one of the "Texas Seven." Contrary to the appellant's assertion, Richards did not have "a definite opinion that an accomplice should not receive the death penalty," and then completely reverse that opinion after learning that the appellant was a member of the "Texas Seven." Before the prosecutor brought up the topic of the "Texas Seven," Richards acknowledged that he was "more inclined" to reserve the death penalty for the

actual triggerman, but stated that he could sentence an accomplice to death depending on the circumstances and evidence. After the prosecutor brought up the "Texas Seven," Richards continued to state that he could sentence an accomplice to death depending on the circumstances and evidence. The trial court did not abuse its discretion in denying the appellant's challenge for cause on this basis.

The appellant also complains that Richards "indicated that his moral code of conduct would be stronger than the Court's instructions." Defense counsel questioned Richards about this issue during the following exchange:

> Q. It's been a while since you filled this [jury questionnaire] out. One of the questions was, "Do you agree with the following statement?" And the statement was, "Regardless of what the Judge says the law is, the jury should do what they believe is the right thing." And you wrote, you checked the box that said yes. And you explained it by saying, "If I believe strongly that something is right, I'm going to go with my instincts."
>
> And I just want to explore what you meant by that.
>
> A. And the question was about doing - -
>
> Q. Basically, was some people think that or regardless of what the Judge says the law is, in other words, whatever the law is, jurors should do what they believe is the right thing to do.
>
> A. Okay. I must have misinterpreted that question. I mean, if I served on the jury and I took an oath, I would do everything based by the law and not my own personal, you know, feelings.

Upon further questioning by defense counsel, Richards reiterated that he "misread" or "misinterpreted" the question, and that he "would obey what the law told him to do." Defense counsel explained that Richards' "sole job as a juror" was "to decide whether the

State has proven their case beyond a reasonable doubt," and that as a juror he would take an oath to hold the State to that burden. Defense counsel continued to question Richards as follows:

> Q. Now that I have explained it that way, would you be more concerned about doing what you thought was right - -
>
> A. No. I would be more concerned with how the evidence was presented.
>
> Q. And then after it was presented, would you still hold the State to their burden and make them prove their case beyond a reasonable doubt?
>
> A. Yes.
>
> Q. And make them prove those Special Issues?
>
> A. Yes.

Defense counsel argued to the trial court that Richards demonstrated a bias in his answers to the questionnaire and on voir dire and indicated that "his moral code of conduct would be stronger than the Court's instructions." The trial court denied his challenge for cause, stating:

> Court finds that when Mr. Richards was explaining the law and had an opportunity to explain his answers he provided on the questionnaire, on further reflection he had acknowledged to the Court that he understands the law. The Court finds this juror to be qualified.

The record supports the trial court's ruling. The appellant has failed to meet his burden to show that Richards had a bias or prejudice that would have substantially impaired his

ability to carry out his oath and instructions in accordance with the law.[16]

Don Jones

The appellant argues that Jones was challengeable for cause because he would place the burden of proof on the defense to prove that the defendant would not be a future danger. When he was first questioned by the prosecutor, Jones acknowledged that he would not automatically answer the future dangerousness special issue in the affirmative if the appellant were convicted of capital murder. He agreed that he would listen to the punishment evidence and then decide whether the State proved beyond a reasonable doubt that there was a probability of future dangerousness.

When defense counsel asked Jones if he would automatically be persuaded that the appellant would be a future danger if he were convicted of capital murder, Jones replied, "No, I would have to hear the other facts before I could make that determination." Defense counsel continued to question Jones on the issue. The appellant relies on the following exchange between defense counsel and Jones to support his argument on appeal:

> Q. But would you need to hear anything from the defense, in order to make up your mind about probability? I mean, would you need to hear something?
>
> A. Yes, I would.
>
> Q. Okay. Can you elaborate on that?

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[16] *Feldman,* 71 S.W.3d at 744.

A. Yeah. Well, yeah, there again, I would need to know some background information.

Q. So don't let me put words in your mouth, please, because that just makes us stay here longer. Would you want to hear from the defendant himself about his background or his - -

A. I don't think I would have to hear from him, but I would think the defense would want to give some kind of explanation.

Q. Okay. Then if you - - keeping this a hypothetical jury, on this hypothetical jury, after the jury has found somebody guilty of capital murder and you have either maybe you heard something from the State or maybe the State has not put anything on, because you can just consider the crime itself, of course, for that answer. Some capital murders will effectively answer the future dangerousness question without too much problem. In your mind, you would need to hear from the defense, in order to answer that question no?

A. Yes.

Q. I think that's fair enough. So you need to hear a little bit from both sides - -

A. Right.

After defense counsel's examination of Jones, the trial court explained to him that the law requires the State to prove the future dangerousness issue beyond a reasonable doubt, and that "[t]he defense has no burden to put on any evidence at all." Jones indicated that he understood, and the trial court continued:

> THE COURT: You said that you understand that concept. And one of her questions, would you like to have some evidence from the defendant or would you like to hear him testify? You answer was, no, I don't have to hear from the defendant, but I might - - I can't remember the exact word. I would like to hear from the defense or I would think you would hear something from the defense before I could answer that question no.

> Do you understand, sir, that they can sit there and do crossword puzzles, they don't have to present any evidence at all? It's the State's burden to prove to you beyond a reasonable doubt Special Issue No. 1 and 2.
>
> [JONES]: Okay. I guess I misunderstood.
>
> THE COURT: Now that you understand the law, could you answer Special Issue No. 1 yes or no, depending on the evidence you hear from the State?
>
> [JONES]: Yes, I could answer that one.

When the trial court explained the law to Jones, he admitted that he had been confused and agreed that he could follow the law requiring the State to prove the future dangerousness special issue beyond a reasonable doubt. The appellant has not shown that Jones had a bias that would have substantially impaired his ability to carry out his oath and instructions in accordance with the law.[17]

Louise Marker

The appellant argues that the trial court erred in denying his challenge for cause to Marker because she would shift the burden of proof to the appellant to disprove the anti-parties special issue, and she would automatically answer "yes" if she found the appellant guilty of capital murder. Marker first indicated that she understood the prosecutor's explanation of the anti-parties special issue and the State's burden of proof. However, when she was questioned by defense counsel regarding the anti-parties special issue, she expressed confusion and vacillated in her answers:

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[17] *Feldman,* 71 S.W.3d at 744.

Q. Okay. And the law - - the law doesn't require us to do it. But what I'm hearing from you is you would need to hear something from us to answer that question no?

A. If I have already decided he's guilty, yes, I would have to hear something that would show that he did not intend.

Q. I hope I haven't confused you . . . That's the law, that we don't have to. But in your mind you want to hear from us. You are just answering how you really feel about that. Is that a fair statement?

A. Well, I mean my understanding, right. You don't have to give anything. You don't have to - - from what I understand from what they said, you absolutely don't even have to say a word during the whole thing and they have to prove all of this. Well, that would, also, if they could not prove these things, then I would not answer that question in that direction.

Q. All right. And that's fair. But then I asked you - -

A. But if you are going to start, if you are going to talk, I would expect that you would be supporting what you want me to know and you would probably bring up something that maybe they didn't know. I mean, that's - - but if you are not going to talk, they are going to have to prove to me all of these things, answer those things.

* * *

Q. Some people say to us, actually, if I have already found them guilty of capital murder, I've already found, you know, that they should have known that this was going to happen. And to me they did anticipate that a human life would be taken. I would say yes to that question without even needing to hear anything else from the State or from the defense. I've already answered that question yes in my mind when I found him guilty. Is that - -

A. That could happen.

Q. Well - -

A. I mean, I don't know, but that could happen.

* * *

Q. And it's your testimony or answer that you would automatically answer that question yes if you had found someone, found the defendant guilty of capital murder in the first part of the trial?

A. That's what I said, yes.

Defense counsel then challenged Marker for cause because she "expressed the inability to follow the scheme and has predecided Special Issue No. 2," and the trial court directed Marker to be brought back for further questioning. Marker expressed some confusion in response to defense counsel's questions, but indicated an understanding of the anti-parties special issue and the State's burden of proof when the trial court explained it to her:

> THE COURT: But anticipated that a human life would be taken, there's a - - it's a filter. There's a capital scheme in saying we're going to reserve the death penalty for those people who actually caused the death, intended to cause the death, or anticipated that a human life would be taken. It's a higher burden. So the law contemplates that simply because you found someone guilty of capital murder - - and then examples they're using as an accomplice.
>
> [MARKER]: Uh-huh.
>
> THE COURT: You step back and you answer that question, did their mental state go to that higher level to impose a death sentence? It's a filter. Does that make some sense?
>
> [MARKER]: Yeah, that makes a lot of sense.
>
> THE COURT: Okay. The parties, is that a decent explanation? Okay. Her question to you is, are you capable of stepping back and reviewing all the evidence, whether there's more or not provided to you, and filtering these facts, whatever the facts may be, to determine whether or not the State has proven this additional or higher burden of did anticipate that a human life would be taken?

[MARKER]: And you want my answer? Yes, I could do that.

Defense counsel reiterated his challenge for cause, and the trial court denied it, stating as follows:

> You know, if you let people just talk and she's answered to both of the issues of contention here, I told you that an hour ago. And her last response is yes, I could consider a life sentence. And with what she does on dealing with complex issues on a daily basis, I have a very good feeling that if she understands the law, if it's given to her and she has any more than 30 minutes to deal with it, that she does understand the law and would be able to follow the law. She's just told us that she could consider a life sentence, even though having found 1 and 2 to be in the affirmative. She's gone back and forth.
>
> But, there again, if you get her to back up and understand the program here, I find that she is capable as exhibited in her own words that she can understand the law and can follow it.

The record supports the trial court's ruling. Marker vacillated in her answers, but ultimately stated that she understood and could follow the law when the trial court clearly explained it to her.

Carol Cunningham

The appellant argues that the trial court should have granted his challenge for cause to Cunningham for several reasons. He first alleges that she was biased in favor of the death penalty. On direct examination by the prosecutor, Cunningham agreed that she was in favor of the death penalty for certain crimes and stated that she "believe[d] in the death penalty, if it's needed." She replied in the affirmative when the prosecutor asked her if she was the type of person that "could take pen in hand" and answer the special

issues "in such a way that may lead to the execution of another human being." She explained: "I just - - I just have strong convictions about that. It's not an opinion that I have, but a conviction. I think life is very precious. But there are consequences to all of our actions and it's just the way I feel about it." She later acknowledged that she could keep an "open mind" with regard to the special issues, she could consider evidence of mitigation, and she would not prejudge or automatically answer the questions based on what she heard during the guilt phase of the trial.

When examined by defense counsel, Cunningham initially stated that the death penalty would be her "first choice" for a defendant convicted of capital murder, but she acknowledged that she "would have to take into account the special issues." Upon further questioning, she expressed some confusion and vacillated as to whether she could keep an open mind with regard to the special issues. She then stated in response to trial court questioning that she would listen to the punishment evidence and that she "could certainly go with life imprisonment" if warranted by the facts. When defense counsel later questioned her about the mitigation special issue, she stated, "I believe that life imprisonment needs to be taken into consideration," and agreed that she could answer the question in such a way that would result in a life sentence.

The appellant next alleges that Cunningham was challengeable for cause because "she stated she would consider the parties to have the same intent based on the actions of the triggerman," pointing to Cunningham's testimony in the following exchange with the

prosecutor:

Q. And some people we talk to, if it were up to them, you know, they may feel very strongly in favor of the death penalty for the triggerman, the guy that pulled the trigger. But if it was up to them, they wouldn't have the death penalty available as an option for those accomplices. For whatever reason, religious, moral, or ethical, they just don't feel a death sentence would be justified for those accomplices that didn't actually take the life.

And some people feel differently, you know. They would keep that option available for both the triggerman or the nontriggerman. Where do you kind of come down on that issue?

A. Well, I don't know if this is a valid reason or not, but if you accompany somebody who does pull the trigger, to me you are equally as capable of doing that, even though you may not have done it at the time.

Q. Okay. So, you wouldn't automatically take the death penalty off the table for the accomplice, the person that didn't actually cause the death. Is that kind of what I hear you saying?

A. Right, yes, sir.

Upon further questioning by the prosecutor and defense counsel, Cunningham indicated an understanding of the anti-parties special issue and stated that she would hold the State to its burden to prove beyond a reasonable doubt that the appellant anticipated that a human life would be taken.

Finally, the appellant alleges that Cunningham was challengeable for cause because she investigated the appellant's case on the internet.[18] Cunningham stated that

[18] The appellant also alleges that his confrontation rights were violated because he "could not defend himself against an unknown article a prospective juror had read," but he failed to object on this basis at trial. TEX. R. APP. P. 33.1.

she looked up the "Texas Seven" on her computer after she had appeared in the trial court four months earlier. Cunningham stated that "[i]t was a one-page thing on the Internet" which consisted of "a little picture of [the appellant] and a couple of paragraphs." She stated: "About the only other thing I remember about that was it seems like that he had a history of previous offenses, and I can't remember what they were." When the prosecutor asked her if what she read would affect her as a juror in the case, she replied: "I don't think that would have any bearing on the case." When the prosecutor asked her if she could put aside any opinions or impressions and base her verdict only on the evidence presented at trial, she responded: "Put it aside? Yes."

Defense counsel continued to question Cunningham on the matter:

Q. Okay. Well, and based on what you found out as part of your curiosity, what opinions have you formed about him before we even start trial?

A. I really didn't, I just didn't have any opinions.

Q. Have you formed the opinion that he has been in lots of trouble before?

A. I don't know about lots, but - -

Q. But some?

A. That's what I read.

Q. Okay. And before you start the trial, of course, you know, it's going to be hard to get that out of your mind. You're going to know that going in and you're going to be thinking that while you're listening to the evidence.

A. Well, I think, I don't mean to make a blanket statement, but I think a lot of people who are guilty of things like that, probably have been involved in other things in previous, you know, previous years, could have. So that's

not anything surprising or shocking to me.

* * *

Q. And, you know, it sounds to me like you have already formed at least some opinion about Mr. Murphy before we've even started this case. Would I be fair in saying that?

A. I guess you could say that.

Q. And, of course, you would, you know, it's kind of hard to unring the bell, once you've heard something. I mean, that would, you'd know that once you were sitting over there in the trial and it could affect you in some way. We don't know now how it could, but it could. Would that be fair to say?

A. Yes, sir.

At the conclusion of Cunningham's voir dire, defense counsel argued that she had a "clearly stated bias in favor of the death penalty" and "she would consider the parties to have the same intent based on the actions of the triggerman." The trial court found her to be qualified, stating that the totality of the examination showed that she understood and could follow the law. Defense counsel argued that Cunningham read about the appellant on the internet and formed an opinion about the facts of the case and the appellant's criminal history. The trial court again found her to be qualified, stating in pertinent part:

> I believe she was quite honest in her proffer that, hey, after the questionnaire, I did go look on the Internet and find out his name and recognized his picture with the beard. But, you know, I can set that aside. If she is on the jury, obviously, I will instruct her, as I have done in the past in writing and today, that she's not to look at anything further, from any source or don't discuss this case with anyone. I believe she understands that.
>
> She said that she could make a decision based on the evidence she hears in

> open court. She is - - once again, once she understood the law she, said, yes, I could set that aside and base my decision on the evidence I heard in court.

The record supports the trial court's ruling. Cunningham expressed that she would require the State to prove beyond a reasonable doubt that the appellant anticipated that a human life would be taken. She also demonstrated that her belief in the death penalty and her knowledge of the appellant's criminal record would not substantially impair her ability to carry out her oath and instructions in accordance with the law.[19]

Maribel Willis

The appellant asserts that Willis did not understand the special issues because she told defense counsel she would assess a life sentence if she had a reasonable doubt about the appellant's guilt:

> Q. You stated when I asked you what you - - whether you would feel comfortable with a life sentence . . . and you said, well, if I had a doubt about something, I would give life. Right? Is that what you said?
>
> A. Correct.
>
> Q. Okay. Would we need to show you anything?
>
> A. No.
>
> Q. Okay. What would you need to have a doubt about?
>
> A. Well, if the State didn't prove something that you are saying that he is innocent on, that they didn't prove that he was guilty, then there's where the doubt is.

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[19] *Feldman,* 71 S.W.3d at 744.

Q. Okay. So you would give life instead of death if he wasn't proved guilty beyond a reasonable doubt?

A. Correct.

Defense counsel then explained that "the question of death or life is not in the first part of the trial," and that if the appellant was found guilty of capital murder, then he would receive a life sentence unless the special issues were answered in a certain way:

Q. And then you have to make other determinations to give them a death sentence. And those other determinations are these Special Issues we've been discussing. The law says that life is automatic, unless these Special Issues are answered this way. I think I hear you saying that your feelings are that if you wrote the law, the death sentence would be automatic, and it would have to be proved that the person should get life. Is that a fair statement?

A. No.

Q. Well, you wrote in your questionnaire - -

A. I know what I answered. I misunderstood the question on that. But the law says that if you find him guilty, you automatically get a life sentence, but there should be other extenuating circumstances that should merit - - mete out the death penalty.

Q. Right.

A. Good.

Q. Now, in your heart of hearts do you think that you can do that and really give him a life sentence, if the State failed to prove any of these things?

A. If the State failed to prove, yes.

Q. Okay. And would you make them prove these to you beyond a reasonable doubt?

A. Yes.

Defense counsel then questioned Willis regarding the anti-parties special issue. Defense counsel asked, "And if that person didn't actually cause the death, what are you called upon to decide?" Willis responded, "Whether yes or no, he's innocent or guilty." The trial court clarified that Willis was "using the words innocent or guilty and yes or no interchangeably." Upon further questioning, Willis demonstrated that she understood the anti-parties question and could answer it "yes" or "no."

Defense counsel challenged Willis for cause, arguing that she did not understand the law and "stated unequivocally that she would give life, if she had a doubt as to whether or not he was guilty or not." The trial court disagreed and found that Willis did understand the law. The trial court's ruling is supported by the record. The totality of the voir dire shows that Willis understood and could follow the law.

The trial court did not abuse its discretion in denying the appellant's challenges for cause to Richards, Jones, Marker, Cunningham, and Willis. Because the appellant has failed to show that at least two of his complained-of challenges for cause were erroneously denied, he cannot show harm on appeal.[20] Points of error one through six are overruled.

In point of error seven, the appellant alleges that he received ineffective assistance of counsel. He states: "This issue is being submitted contingently on whether this Court

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[20]*Chambers,* 866 S.W.2d at 23.

for any reason rules that the appellant's counsel waived any complaint in the jury selection process; if the Court does not find any waiver or other attorney error, then this issue is withdrawn." As discussed above, defense counsel preserved error on claims one through six, which we held to be without merit. Point of error seven is overruled.

D. Commitment Question

In point of error eight, the appellant complains that the trial court allowed the State to ask venire member J. Robert DeRossett an improper commitment question.[21] Commitment questions "commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact."[22] A commitment question can be proper or improper, depending on whether the question leads to a valid challenge for cause.[23] Commitment questions are improper when (1) the law does not require a commitment or (2) when the question adds facts beyond those necessary to establish a challenge for cause.[24] When the law requires certain types of commitments from jurors, attorneys may ask the prospective jurors whether they can follow the law in

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[21] The State posed its hypothetical to other venire members during jury selection, but the appellant specifically complains only about the portion of the record containing the voir dire examination of DeRossett.

[22] *Standefer v. State,* 59 S.W.3d 177, 179 (Tex. Crim. App. 2001); *Lydia v. State,* 109 S.W.3d 495, 498 (Tex. Crim. App. 2003).

[23] *Standefer,* 59 S.W.3d at 181.

[24] *Id.* at 181-182.

that regard.[25] The use of a hypothetical fact situation during voir dire is permissible if it is used "to explain the application of the law."[26]

During his voir dire questioning of DeRossett, the prosecutor explained that "[t]he law allows [the State] to prosecute not only the triggerman for capital murder and ultimately the death penalty, but also depending on the facts and circumstances, we could prosecute the accomplice, the nontriggerman." When the prosecutor began to give an illustrative example to show DeRossett "how the law works," the appellant objected to the use of "a specific fact situation." The prosecutor responded that he intended to use a hypothetical "to explain the law, not committing him to those facts." The trial court overruled the appellant's objection and the prosecutor posed the hypothetical to DeRossett:

> I want to talk with you a little bit about the death penalty and its application to what we call, basically, accomplices, the common term for people that didn't actually pull the trigger. And let me give you an example to kind of show you how the law works in Texas.
>
> Mr. Shook and I agree we're going to rob a bank. The plan is he's going to go in with a gun. I'm not going to be armed. I'm just going to have a bag and collect the money as he holds up the tellers. And at some point as we go to do that, for whatever reason, Mr. Shook shoots and kills the teller. And we get the money and get out of there. And ultimately we get arrested and are brought back for trial.
>
> Mr. Shook, obviously, could be convicted of capital murder, that

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[25] *Id.* at 181.

[26] *Atkins v. State,* 951 S.W.2d 787, 789 (Tex. Crim. App. 1997).

> intentional murder in the course of a robbery. Depending on how, you know, the jury answers the questions, he could receive the death penalty. The law also allows for people like me, the accomplice, the nontriggerman, depending on the facts and circumstances, to also be prosecuted for capital murder and again, depending on the facts and the answers to the questions, I could also potentially receive the death penalty.
>
> And, again, a lot of people would draw that line between the shooter and the nonshooter. What do you think about that, the death penalty for an accomplice?

DeRossett indicated that he understood the law and could impose the death penalty on an accomplice. DeRossett also responded in the affirmative when the prosecutor asked the next question:

> I think the way you feel is exactly what the law contemplates. There are some people that just wouldn't consider it, no matter what the facts and circumstances are. We just want somebody that can keep an open mind and follow the law.
>
> There are, basically, two different ways that I can be held responsible. If you find that I actively encouraged, directed, solicited, or aided him to commit capital murder, then I could be found guilty as an accomplice. Or if you found that we, under the law of conspiracy, if we agreed or conspired to commit one crime and during that crime, the bank robbery, Mr. Shook shot and killed the teller and committed capital murder, if the jury finds that I should have anticipated, if the accomplice should have anticipated that death, then you can find the accomplice guilty of capital murder. Does that make sense to you?

The prosecutor's hypothetical did not attempt to commit DeRossett to resolve or refrain from resolving an issue on the basis of particular facts.[27] The purpose of the hypothetical was to explain the application of the law to a capital murder case prosecuted

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[27] *Standefer,* 59 S.W.3d at 179.

under the law of parties.[28] If DeRossett had stated that he could not find guilt or assess the death penalty for a non-triggerman, then he would have been challengeable for cause.[29] The trial court did not abuse its discretion in allowing the prosecutor to ask the question. Point of error eight is overruled.

E. Admission of Oral and Written Statements

In point of error twenty-four, the appellant argues that the trial court erred in admitting the oral statements he made to Colorado Springs police officers during the hotel standoff. He complains that these statements "were the result of de facto custodial interrogation" and that the officers failed to warn him as required by Article 38.22.

The appellant filed a pretrial motion in limine requesting a hearing outside the presence of the jury before the State attempted to introduce the oral statements. The trial court heard the anticipated testimony of Officers Jim Stinson and Matt Harrell and ruled the evidence admissible over the appellant's objection.

Stinson testified before the jury that, when he made initial contact with the appellant on the telephone at the hotel, he told the appellant that he was with the Colorado Springs police department, that they were looking for the remaining Texas fugitives, that the room was surrounded, and that he needed to exit the room with his hands raised so

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[28] *Atkins,* 951 S.W.2d at 789.

[29] TEX. CODE CRIM. PROC. Art. 35.16(b)(3). Article 35.16(b)(3) provides that the State may challenge a venire member for cause if "he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment."

they could identify him. The appellant then stated, "Well, Detective, you found us." Stinson asked, "Who is this?" and the appellant responded that he was "Patrick." At one point in their conversation, the appellant asked Stinson if he could "turn his phone into a speakerphone" because "he needed to keep his hands free." When Stinson said he was unable to fulfill that request, the appellant hung up the phone. A few minutes later Stinson called back and the appellant answered the phone. Stinson asked, "What are you doing? What's going on?" and the appellant responded, "We're watching porn."[30]

Harrell testified before the jury that he later took over the telephone negotiations with the appellant. Harrell testified that he did not try to elicit any information about the Oshman's incident, but that the appellant "brought it up on his own." The appellant told Harrell that "he was in a truck with radio contact, with an AR-15, and he was set up to do damage from behind in a stand-off situation," and that "during the Oshman's [robbery] some people acted in a wrongful manner and a police officer lost his life." In response to defense counsel's questioning on cross-examination, Harrell acknowledged that the appellant said he "wouldn't have done the Oshman's" before he said that "some people acted in a wrongful manner and a police officer lost his life."

Article 38.22 applies to statements taken while a defendant is subject to custodial

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[30]In the same point of error, the appellant also argues that "the prejudicial effect outweighed any probative value" of his statements, specifically his "oral statement about viewing pornography on television." He does not cite Rule 403, nor does he set out a separate and specific Rule 403 claim. This portion of his argument is multifarious and inadequately briefed. TEX. R. APP. P. 38.1.

interrogation. Nothing in Article 38.22 precludes the admission of a statement that does not stem from custodial interrogation or that is the res gestae of the arrest or offense.[31] A defendant is in custody if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.[32] "Interrogation" is defined as any words or actions by the police that they should have known are reasonably likely to elicit an incriminating response.[33]

The appellant's oral statements were not the result of custodial interrogation. He made the statements while armed and unrestrained during a standoff with police.[34] The evidence showed that the police did not question the appellant about the Oshman's incident; instead, he volunteered that information during the course of the standoff negotiations. The trial court did not abuse its discretion in admitting the statements. Point of error twenty-four is overruled.

In point of error fifteen, the appellant contends that the trial court should have suppressed the written statement he gave to Irving police officer Randall Johnson after he was arrested in Colorado Springs. He asserts that he made the statement after the long

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[31]Art. 38.22, § 5.

[32]*Stansbury v. California,* 511 U.S. 318, 324-26 (1994).

[33]*Rhode Island v. Innis,* 446 U.S. 291, 302 (1980).

[34]*See Hernandez v. State,* 819 S.W.2d 806, 815-16 (Tex. Crim. App. 1991) (holding that statements Hernandez made during a standoff after an attempted jail break were not the result of custodial interrogation).

standoff with police at the hotel, that he suffered from sleep deprivation and a lack of food, and that he was inadequately clothed in cold weather. He argues that his resulting state of mind and physical condition made him unable to comprehend and voluntarily waive his *Miranda* rights.[35]

An inquiry into the waiver of *Miranda* rights "has two distinct dimensions."[36] First, the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[37] Second, the waiver must be made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[38] However, the "Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."[39] It is enough that the suspect "knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time."[40]

Johnson and the appellant both testified at the hearing on the motion to suppress

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[35] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[36] *Colorado v. Spring,* 479 U.S. 564, 573 (1987).

[37] *Ibid.*

[38] *Ibid.*

[39] *Id.* at 574.

[40] *Ibid.*

the appellant's statement. The evidence showed that the hotel standoff began at around 7:00 p.m. on January 23, 2001, and lasted until approximately 4:00 a.m. on January 24. The appellant was then transported to the Colorado Springs Police Department, where he met with Johnson and another Irving police officer in an interview room. Johnson read the appellant his *Miranda* warnings and the appellant agreed to waive his rights and give a statement. Johnson began taking his statement at 4:21 a.m. The appellant dictated his statement while Johnson wrote it down, and the taking of his statement lasted approximately two and one-half hours. He was given the opportunity to read and make changes to his statement before signing it in the presence of a civilian witness.

The appellant testified that he did not understand the *Miranda* warnings, and that he would not have made a statement if he "had a chance to rest or perhaps *Miranda* had been explained to [him] in more detail." He testified that the hotel standoff was stressful and that he "had been operating on adrenaline" with "very little rest" before he was taken into custody. He testified that he had not slept for twenty hours and he was fatigued, drowsy, and "would nod out" at times during the interview. Johnson testified, however, that the appellant was awake and alert during the entire interview and he never looked as if he were about to fall asleep. Johnson acknowledged that the appellant was not wearing a shirt, but denied the appellant's assertion that he was "shivering" during the interview. The appellant testified that he began crying at one point, but Johnson denied that the appellant was crying or upset during the interview. The appellant testified that he had not

eaten for sixteen hours, but he did not remember asking for any food. He testified that he received a soft drink and two bathroom breaks, and that no one ever threatened him or promised him anything in exchange for his statement. He acknowledged that he understood his *Miranda* warnings when he was arrested on two prior occasions in 1984. He also acknowledged that he understood his *Miranda* warnings when TDCJ investigators later questioned him after his interview with Johnson, but explained that he had the opportunity to sleep for a few hours before the TDCJ interview. He testified that he would have consulted an attorney before speaking with Johnson if he had had access to one, but acknowledged that he later agreed to continue talking with TDCJ investigators without counsel even when they informed him that an attorney was there for him.

The trial court found that the appellant was interviewed shortly after the standoff ended, that it "defie[d] logic" that the appellant "was on an adrenaline rush just an hour before and no longer able to stay awake during this interview." The trial court also found that he understood his *Miranda* rights when he was arrested in 1984 and when he was interviewed by TDCJ investigators following his interview with Johnson; that he was not threatened, coerced, or promised anything in exchange for his statement; and that he chose not to consult with counsel during the TDCJ interview. The trial court did not abuse its discretion in finding that the appellant "freely and voluntarily made an informed decision to waive his rights and to provide the statement." Although the appellant and

Johnson gave conflicting testimony, the trial court was entitled to believe Johnson.[41]

In the same point of error, the appellant also claims that "his written statement was obtained in violation" of Article 38.22 and "he did not knowingly and intelligently waive his constitutional right to counsel before giving his statement when police denied access to [him] by the public defender attorney assigned to his case and provided for by Colorado statute."[42] These arguments are multifarious and inadequately briefed. The appellant generally asserts a violation of his "constitutional right to counsel," but fails to make a clear and concise argument in support of a Sixth Amendment claim.[43] With regard to his Article 38.22 claim, he fails to allege exactly how Article 38.22 was violated.[44] He also failed to object to his written statement on the basis of Article 38.22 at trial.[45] Point of error fifteen is overruled.

In point of error sixteen, the appellant alleges that he received ineffective assistance of counsel. He states that "[t]his issue is being submitted contingently on

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[41] *See Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (giving almost total deference to the trial court's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor).

[42] In support of his claim that a Colorado public defender had been assigned to his case, the appellant has filed a motion requesting this Court to take judicial notice of the testimony from the trial of co-defendant Donald Keith Newberry. This is unnecessary to our resolution of point of error fifteen.

[43] TEX. R. APP. P. 38.1(h).

[44] *Ibid.*

[45] TEX. R. APP. P. 33.1.

whether this Court for any reason denies request to take judicial notice and/or finds any form of waiver or attorney error in this issue."

To prevail on a claim of ineffective assistance of counsel, the appellant must show (1) deficient performance and (2) prejudice.[46] To show deficient performance, the appellant must prove by a preponderance of the evidence that counsel's representation fell below the standard of professional norms.[47] To demonstrate prejudice, the appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[48] Judicial scrutiny of counsel's performance is highly deferential, and the appellant must overcome the strong presumption that counsel's actions were sound trial strategy.[49]

Counsel failed to object at trial on the basis of Article 38.22, but the appellant fails to explain on appeal exactly how Article 38.22 was violated. The appellant complains that counsel failed to supplement the record with evidence showing that the admission of his statement violated his constitutional right to counsel, but he fails to raise a separate, clear, and concise "right to counsel" argument on appeal. Without more, he cannot demonstrate deficient performance and prejudice as required by *Strickland*. Point of error

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[46]*Strickland v. Washington,* 466 U.S. 668, 687 (1984).

[47]*Id.* at 688.

[48]*Id.* at 694.

[49]*Id.* at 689.

sixteen is overruled.

F. Lesser Included Offense

In his seventeenth point of error, the appellant complains that the trial court erred in refusing to instruct the jury on the lesser included offense of murder. We use a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser included offense.[50] The first step is to determine if the lesser offense is included within the proof necessary to establish the offense charged.[51] The first prong of the test is satisfied here because murder is a lesser included offense of capital murder.[52] The second step is to determine if there is some evidence that would permit the jury to rationally find that if the defendant is guilty, he is guilty of the lesser offense but not the greater offense.[53] The jury was authorized to convict the appellant of capital murder, as a party or a conspirator, under either of two theories: (1) the intentional or knowing murder of a peace officer acting in the lawful discharge of an official duty; or, (2) an intentional murder in the course of committing or attempting to commit robbery. The appellant is entitled to a requested lesser included offense charge if a rational jury, after considering each of the alternative theories of commission, could convict him only on the lesser

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[50]*Rousseau v. State,* 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

[51]*Ibid.*

[52]*Feldman,* 71 S.W.3d at 750.

[53]*Rousseau,* 855 S.W.2d at 673.

included offense.[54]

The appellant argues that he was entitled to a charge on the lesser included offense of murder because "there was no evidence of the specific intent to kill," but this was not required because the jury was instructed on the law of parties.[55] The evidence showed that the appellant intended to promote or assist the commission of the offense or that he should have anticipated Hawkins's death as a result of carrying out the conspiracy to commit robbery. The appellant participated in the planning and execution of the Oshman's robbery and alerted the other escapees when Hawkins arrived in his patrol car and drove around the back of the store. The evidence would not permit the jury to rationally find that the appellant was guilty only of murder. The appellant has thus failed to meet the second prong of the test.[56] Point of error seventeen is overruled.

G. *Enmund* Objection

In point of error eighteen, the appellant alleges that his capital murder conviction is unconstitutional under *Enmund v. Florida,* a case in which the Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will

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[54]*Feldman,* 71 S.W.3d at 752 (citing *Arevalo v. State,* 970 S.W.2d 547, 548-49 (Tex. Crim. App. 1998)).

[55]TEX. PENAL CODE §§ 7.02(a) and (b).

[56]*Rousseau,* 855 S.W.2d at 673.

be employed."[57] The appellant specifically alleges that "[t]he trial court erred in overruling [his] objection to the jury charge concerning the applicability of Sec. 7.02(b) (conspirator liability) of the law of parties as being contrary to the constitutional requirements of *Enmund v. Florida,* which requires that there be specific intent of the accused to kill or to cause the loss of life."[58]

The appellant's reliance on *Enmund* is misplaced. *Enmund* prevents imposition of the death penalty under certain circumstances; it does not prohibit a capital murder conviction for a non-triggerman under the law of parties.[59] Point of error eighteen is overruled.

H. Request for Election

In points of error nineteen and twenty, the appellant argues that the trial court erroneously denied his request to require the State to elect which theory of capital murder and which theory of party liability it sought to rely on for conviction. As discussed above, the charge authorized the jury to convict the appellant of capital murder, as a party or a conspirator, under the alternative theories of murder of a peace officer or murder in the course of committing or attempting to commit robbery. The appellant claims that the

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[57] 458 U.S. 782, 797 (1982).

[58] The appellant also made an *Enmund* objection at the punishment phase of the trial, but in his brief he cites and refers only to his objection at the guilt or innocence phase.

[59] *See Johnson v. State,* 853 S.W.2d 527, 535 (Tex. Crim. App. 1992) (holding that an individual may be found guilty of capital murder based on the law of parties without violating *Enmund*).

trial court's denial of his request for an election denied him his right to a unanimous jury verdict.

There is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict, such as the manner and means by which one offense was committed.[60] The appellant was charged with one offense, the capital murder of Aubrey Hawkins. The alleged theories of culpability and party liability were merely alternate methods or means by which the appellant committed one charged offense. Points of error nineteen and twenty are overruled.

I. Independent Impulse

In point of error twenty-one, the appellant claims that the trial court erroneously denied his requested defensive charge on independent impulse. Relying upon *Mayfield v. State*, he claims that he was entitled to such an instruction because he was charged as a conspirator and "the evidence shows that [he] participated in some wrongful conduct but he did not contemplate the extent of the criminal conduct by his companions."[61]

As we explained in *Solomon v. State*, there is no enumerated defense of "independent impulse" in the Penal Code. The appellant's proposed defensive issue

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[60] *Schad v. Arizona,* 501 U.S. 624, 632 (1991) (plurality opinion); *Kitchens v. State,* 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).

[61] 716 S.W.2d 509 (Tex. Crim. App. 1986)

would simply negate the conspiracy liability element of the State's case.[62] All that is required is for the appropriate portions of the jury charge to track the language of Section 7.02(b) of the Texas Penal Code.[63] *Solomon* overrules *Mayfield* to the extent that it holds to the contrary.[64]

The jury charge on conspiracy liability in the instant case properly tracked the language contained in Section 7.02(b). Point of error twenty-one is overruled.

J. Jury Argument

In point of error twenty-two, the appellant claims that the trial court erred in overruling his objection to the prosecutor's prejudicial closing argument during the guilt phase of the trial. The appellant asserts that the prosecutor improperly argued outside the record as follows:

> [PROSECUTOR]: [Hawkins] was surrounded and they ambushed him. They lured him in. And the only reason they were able to do that is because of [the appellant]. You can call him all kinds of things. He was their lookout, he was their guardian angel.
>
> I'm reminded, you know, this year we've had troops over in Iraq fighting and we saw it on the news all the time. They talk about the guys that are on the ground.
>
> [DEFENSE COUNSEL]: I'll have to object to arguing outside the record.
>
> THE COURT: Overruled at this time. Be careful, Mr. Shook.

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[62] *Solomon v. State,* 49 S.W.3d 356, 368 (Tex. Crim. App. 2001).

[63] *Ibid.*

[64] *Ibid.*

> [PROSECUTOR]: Air controller, the guys that are out there and can target our bombs. They put the laser on the individual, the air, the building, whatever. And that allows airplanes to come in, the precision bombing. That's what Mr. Murphy is. He allows them, he lets them know there's a police officer here. He gives them details. He's going out front. He's coming around back.

Generally, permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement.[65] A prosecutor has wide latitude in the language and manner of arguing the State's case consistent with the evidence.[66] A prosecutor may also use an analogy to emphasize and explain the evidence.[67]

The appellant admitted in his statement that he acted as "backup and lookout," sat outside the Oshman's store in a Suburban loaded with weapons, monitored police frequencies on his radio scanner, alerted the escapees when Hawkins arrived and told them his precise location as he drove around to the back of the store, and was prepared to "to initiate firefight" with the AR 15 if pursued by police. Given this evidence, it was not improper for the prosecutor to compare these actions to a military ambush. Even if we were to assume error, the prosecutor's argument did not affect the appellant's substantial

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[65]*Cannady v. State,* 11 S.W.3d 205, 213 (Tex. Crim. App. 2000).

[66]*Holberg v. State,* 38 S.W.3d 137, 141 (Tex. Crim. App. 2000).

[67]*See Broussard v. State,* 910 S.W.2d 952, 959 (Tex. Crim. App. 1995) (upholding prosecutor's comparison of the appellant to a volcano when the evidence showed that the appellant behaved peaceably at times and also had a great propensity for violence).

rights.[68] The argument was not extreme or manifestly improper, nor did it inject new and harmful facts into evidence.[69] Point of error twenty-two is overruled.

K. Victim Impact Evidence

In point of error twenty-three, the appellant complains that the trial court erred during the punishment phase when it admitted victim impact evidence related to the appellant's prior conviction for aggravated sexual assault. He claims that the admission of this evidence violated his right to due process under the Fourteenth Amendment and Rules 403 and 404 of the Texas Rules of Evidence.

Jeannie Grieser, the victim of the aggravated sexual assault, testified during the punishment phase. The trial court held a hearing outside the presence of the jury before allowing Grieser to testify about how the crime affected her. Grieser stated that after the attack she moved from her apartment, had trouble sleeping, had nightmares for several years, employed extra security measures, and took medication for panic attacks. The appellant objected that this was improper victim impact evidence that was irrelevant and unduly prejudicial. The trial court ruled the evidence admissible, but the State never elicited this testimony from Grieser in front of the jury. There was no error because the evidence the appellant objected to was not admitted before the jury. Point of error twenty-three is overruled.

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[68]TEX. R. APP. P. 44.2(b).

[69]*Shannon v. State,* 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).

L. Authentication of Handwritten Note

In point of error twenty-five, the appellant complains about the admission of State's Exhibit 1010, the handwritten note that a Connally Unit officer found in his dormitory cubicle shortly after his prison escape which stated: "I refuse to abide by the dictations of a police state, which Texas has surely become. Today I fire the first shot of THE NEW REV[O]LUTION. Long live freedom. Death to tyranny." The appellant argues that the exhibit was not properly authenticated as required by Rule 901 of the Texas Rules of Evidence.[70]

During the punishment phase, Officer Rita Samaniego testified at a hearing outside the presence of the jury that she found the handwritten note in the appellant's cubicle when she searched the dormitory where he resided shortly after the prison escape. She testified that she was not familiar with the appellant's handwriting and that approximately sixty or seventy other inmates were in the dormitory that day. The trial court ruled the evidence admissible over the appellant's Rule 901 objection. Samaniego then testified before the jury that she found the note in a box under the cot in the appellant's cubicle about thirty minutes after the escape. The note was admitted into evidence and the prosecutor read the contents of the note to the jury.

The appellant argues on appeal that the note was inadmissible because it was

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[70] The appellant also argues that the note "constituted the rankest hearsay," but he failed to make a hearsay objection to the note at trial. TEX. R. APP. P. 33.1.

found in a dormitory occupied by multiple inmates, "there was absolutely no authentication of origin or former possession through any means," and no "handwriting or fingerprint analysis" was performed. Even if we were to assume error, the appellant has failed to demonstrate that his substantial rights were affected by the admission of the note.[71] Given the other evidence of the appellant's prior offenses of burglary of a building and aggravated sexual assault and his willing participation in a planned prison escape and multiple robberies thereafter, there is no reasonable likelihood that the note moved the jury from a state of nonpersuasion to persuasion regarding the punishment issues.[72] Point of error twenty-five is overruled.

M. Texas Death Penalty Statute

The appellant raises numerous constitutional challenges to Article 37.071 in his remaining points of error. In point of error twenty-six, he argues that the State should be required to make an affirmative showing that he is not mentally retarded, citing *Atkins v. Virginia.*[73] In point twenty-seven, he asserts that the statute violates the Eighth Amendment because it allows the jury unlimited discretion to impose the death penalty, citing Justice Blackmun's dissenting opinion in *Callins v. Collins.*[74] In point twenty-

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[71]TEX. R. APP. P. 44.2(b).

[72]*See Jones v. State,* 833 S.W.2d 118, 127 (Tex. Crim. App. 1992).

[73]536 U.S. 304 (2002).

[74]510 U.S. 1141 (1994).

eight, he asserts that the statute violates the Eighth Amendment as interpreted in *Penry v. Johnson,* because "the mitigation special issue sends mixed signals to the jury thereby rendering any verdict reached in response to that special issue intolerable and unreliable."[75] In points twenty-nine and thirty, he complains that the statute violates the state and federal constitutions because it implicitly puts the burden on the defendant to prove the mitigation special issue. In point thirty-one, he argues that the State should instead be required to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt.

In point of error thirty-two, the appellant claims the statute violates the Eighth and Fourteenth Amendments by requiring at least ten "no" votes for the jury to return a negative answer to the punishment special issues. In point thirty-three, he complains of the failure to define the terms "probability," "criminal acts of violence," and "continuing threat to society" in the jury instructions. In points thirty-four and thirty-five, he argues that the statute violates the state and federal constitutions "because of the impossibility of simultaneously restricting the jury's discretion to impose the death penalty while also allowing the jury unlimited discretion to consider all evidence militating against imposition of the death penalty." In point thirty-six, he claims that the statute is unconstitutional because it "fails to require the issue of mitigation be considered by the jury." In point thirty-seven, he complains that the statute fails to place the burden of

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[75]532 U.S. 782 (2001)

proof on the State "regarding aggravating evidence" in the mitigation special issue. In point thirty-eight, the appellant argues that the statutory *Penry* special issue violates the Eighth and Fourteenth Amendments because it allows the type of open-ended discretion that was condemned in *Furman v. Georgia*.[76] In point thirty-nine, he contends that the statute is unconstitutional because it "does not permit meaningful appellate review."

This Court has previously rejected all of these claims, and the appellant has given us no reason to revisit these issues here.[77] Points of error twenty-six through thirty-nine are overruled.

In point of error forty, the appellant claims that the trial court erroneously denied his second motion to quash the indictment, in which he generally alleged numerous constitutional challenges to the Texas death penalty scheme. In his brief on appeal, the appellant simply re-states the general claims that he alleged in the motion, without any additional argument or authority in support thereof. His argument is both multifarious and inadequately briefed.[78] Point of error forty is overruled.

In points of error forty-one and forty-two, the appellant asserts that "the

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[76]408 U.S. 238 (1972).

[77]*Escamilla v. State,* 143 S.W.3d 814, 878-28 (Tex. Crim. App. 2004), *cert. denied,* 544 U.S. 950 (2005); *Rayford v. State,* 125 S.W.3d 521, 532 (Tex. Crim. App. 2003), *cert. denied,* 543 U.S. 823 (2004); *Hughes v. State,* 24 S.W.3d 833, 844 (Tex. Crim. App. 2000); *Pondexter v. State,* 942 S.W.2d 577, 587 (Tex. Crim. App. 1996); *Russell v. State,* 155 S.W.3d 176, 183 (Tex. Crim. App. 2005).

[78]TEX. R. APP. P. 38.1.

cumulative effect of the above-enumerated constitutional violations" denied him due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and due course of law under Article I, Section 19 of the Texas Constitution. This Court has recognized the proposition that a number of errors may be found harmful in their cumulative effect; however, we have rejected each of the appellant's points of error individually. Without error, there is no cumulative effect.[79] Points of error eighteen and nineteen are overruled.

We affirm the judgment of the trial court.

Delivered: April 26, 2006

Do Not Publish

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[79] *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000).

Appendix C

40) The witness said he heard "Come on, we got to go. We got to go. We got company." (Rep. R. Vol. 41 p. 41) The men left quickly after hearing this. (Rep. R. Vol. 41 p. 41) There was no forensic evidence which linked Appellant to the crime scene.

See also *Ross v. State*, 861 S.W.2d 870 (Tex. Crim.App. 1993) which held that the trial court erred in failing to instruct the jury on the lessor included offense of felony-murder or murder.

ISSUE NO. 18

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY CHARGE CONCERNING THE APPLICABILITY OF SEC. 7.02 (b) (CONSPIRATOR LIABILITY) OF THE LAW OF PARTIES AS BEING CONTRARY TO THE CONSTITUTIONAL REQUIREMENTS OF ENMUND V. FLORIDA, SUPRA; WHICH REQUIRES THAT THERE BE SPECIFIC INTENT OF THE ACCUSED TO KILL OR TO CAUSE THE LOSS OF LIFE

ARGUMENTS AND AUTHORITIES

Appellant directs this Honorable Court's attention to Rep. R. Vol. 44 pp. 4-5 at which Appellant objected to the jury submission dealing with the law of parties as applied by the trial court in this case as it violated the holding of the United States Supreme Court in Enmund v. Florida, supra; which has specific requirements not found in the Texas Death Penalty Statute before death can be imposed as a possible punishment. The trial court erred in using language on issues not sanctioned by the Enmund case; which calls for reversal and new punishment hearing or rendering of a life sentence.

Appendix D

the court of appeals erred in dismissing the appeal and failing to address the merits.

Pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, a majority of this court grants Vanscot's application for writ of error, reverses the judgment of the court of appeals, and remands this case to that court for consideration of Vanscot's points of error.

Gary JOHNSON, Appellant,

v.

The STATE of Texas, Appellee.

No. 70713.

Court of Criminal Appeals of Texas, En Banc.

Dec. 16, 1992.

Rehearing Denied March 17, 1993.

Defendant was convicted of capital murder and was sentenced to death by the 12th Judicial District Court, Walker County, Jerry A. Sandel, J., and he appealed. The Court of Criminal Appeals, Benavides, J., held that: (1) defendant was not entitled to accomplice-witness instruction where defendant called the accomplice himself; (2) evidence was sufficient for jury to return affirmative finding on question of future dangerousness; (3) law of parties was applicable in determining whether two persons were murdered in the same transaction, but defendant could not be put to death for being party to murder absent finding of deliberateness; (4) there was no egregious error in instruction on the special issue concerning deliberateness; and (5) defendant's mitigating evidence was sufficiently taken into account in connection with the future dangerousness issue.

Affirmed.

Baird and Maloney, JJ., concurred in the result.

Clinton, J., filed a dissenting opinion.

1. Criminal Law ⇐780(1)

Defendant was not entitled to accomplice witness instruction where defendant called the witness himself and the state did not seek to rely on the testimony of such witness. Vernon's Ann.Texas C.C.P. art. 38.14.

2. Homicide ⇐357(3)

Evidence was sufficient to support affirmative finding as to special issue concerning deliberateness during punishment phase of capital murder trial; even aside from testimony of accomplice called by defendant, evidence showed that one victim was shot at point blank range in the face and then shot again while lying on the ground, and that defendant told his brother that victims were killed because, "Dead men don't talk."

3. Criminal Law ⇐1144.17
Homicide ⇐357(3)

Determination of special issue of deliberateness, at punishment phase of capital murder trial, must be found from totality of the circumstances, and evidence must be viewed in the light most favorable to the verdict.

4. Homicide ⇐357(6)

Evidence was sufficient for jury at punishment phase of capital murder trial to return affirmative finding on question of future dangerousness; evidence showed that, as persons approached during burglary, defendant hid in waiting instead of fleeing, and then shot two victims because, "Dead men don't talk." Vernon's Ann.Texas C.C.P. art. 37.071(b)(2).

5. Homicide ⇐357(6)

Factors to be considered in determining future dangerousness at punishment phase of capital murder trial include, but are not limited to, the following: circumstances of the offense, calculated nature of the acts and forethought and deliberateness exhibited, existence of prior criminal record, defendant's age and personal cir-

cumstances, whether defendant was acting under duress or domination of another, and psychiatric and character evidence. Vernon's Ann.Texas C.C.P. art. 37.071(b)(2).

6. Criminal Law ⇐1130(5)

Contention that statute violated State Constitution would not be considered where defendant proffered no argument or authority as to the protection offered by the State Constitution or how it differed from protection guaranteed by the United States Constitution.

7. Criminal Law ⇐1213.8(8)
Homicide ⇐357(7)

Addition of a second murder in the same transaction to the list of aggravating circumstances supporting capital punishment does not make statute overbroad so as to violate the Eighth Amendment. V.T.C.A., Penal Code § 19.03(a)(6); U.S.C.A. Const.Amend. 8.

8. Constitutional Law ⇐42.1(3)

Defendant could not challenge as void for vagueness that part of the capital punishment statute which was inapplicable to his conviction. V.T.C.A., Penal Code § 19.03(a)(6)(B).

9. Homicide ⇐351

Within statute defining capital murder as including the murder of more than one person during the same criminal transaction, term "criminal transaction" was not vague as applied to facts of case in which, during burglary, two men discovered presence of defendant and his accomplice and both such men were shot, even if defendant, himself, did not murder both of them. V.T.C.A., Penal Code § 19.03(a)(6).

10. Homicide ⇐357(1)

Within statute defining capital murder as including murder of more than one person during the same criminal transaction, law of parties is applicable in determining whether two murders have occurred in the same transaction, but defendant cannot be put to death for merely being a party to the murder, without affirmative finding on special issue as to whether defendant acted deliberately in causing the death of deceased, and thus statute does not unconstitutionally allow death penalty based on the law of parties. V.T.C.A., Penal Code §§ 7.01, 7.02, 19.03(a)(6), (a)(6)(A).

11. Criminal Law ⇐1038.1(1)

Absent timely objection to trial court's charge, defendant could obtain reversal based thereon only if error was so egregious and created such harm that he could not have a fair and impartial trial.

12. Homicide ⇐311, 357(3)

Within instruction on special issue of deliberateness in punishment phase of capital murder trial, requiring finding that defendant contemplated that death of victims would result, term "contemplated" was not a legal term of art requiring trial court to define it, and jury was entitled to give term its common and ordinary meaning.

13. Homicide ⇐325

At punishment phase of capital murder trial, even though preparatory instruction on special issue of deliberateness, by itself, may not have focused jury's attention on the conduct of defendant, who was acting with accomplice, no egregious harm was shown by the unobjected-to instruction, since the special issue itself clearly focused on the conduct of defendant.

14. Homicide ⇐311, 357(1)

Law of parties cannot be applied to punishment phase of capital murder trial, and when the law of parties is presented in the guilt phase of trial, trial court should give an "anti-parties" charge at punishment when requested, but such charge is not required by statute or by the Constitution absent objection or request.

15. Criminal Law ⇐829(22)

There was no egregious harm in instruction on special issue of deliberateness at punishment phase of capital murder trial, on theory that it allowed affirmative answer if defendant was shown to be in furtherance of conspiracy to commit burglary, where jury was instructed that if, at guilt phase, guilty verdict was predicated on conspiratorial liability, then at punishment phase it was mandated that jury find that defendant contemplated that death of victims would result, and instruction was

coupled with instruction on defendant's own conduct.

16. Homicide ⇐311

In charge on special issue of deliberateness at punishment phase of capital murder trial, no instruction was required defining "deliberately."

17. Criminal Law ⇐1213.8(8)
Homicide ⇐311, 357(4)

For purposes of Eighth Amendment requirement that trial court in death penalty case submit instruction that takes into account defendant's mitigating evidence, evidence of murder defendant's nonviolent behavior and that he was a hard-working individual were mitigating in nature, but mitigating effect of such evidence could be considered within special issue on future dangerousness. U.S.C.A. Const.Amend. 8.

18. Criminal Law ⇐1213.8(8)
Homicide ⇐311, 357(4)

For purposes of Eighth Amendment requirement that trial court in capital murder prosecution submit instruction that takes into account defendant's mitigating evidence, testimony from defense expert specifically challenging state expert's ability to predict future dangerousness was not in itself mitigating evidence, but challenged credibility, and jury could consider any mitigating effect of that testimony in assessing the weight and credibility of the state's expert, in consideration of the special issue of future dangerousness. U.S.C.A. Const. Amend. 8.

19. Homicide ⇐271

Evidence in capital murder prosecution was insufficient to raise issue of provocation; evidence did not support claim that there was exchange of gun fire with the victims and indicated that defendant initiated the violence. Vernon's Ann.Texas C.C.P. art. 37.071(b).

Roy E. Greenwood, court appointed on appeal, Austin and Hal Ridley, on appeal only, Huntsville, for appellant.

Frank Blazek, Dist. Atty., Timothy J. Ferreri, Asst. Dist. Atty., Huntsville, and Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

BENAVIDES, Judge.

Appellant was convicted of Capital Murder for intentionally killing James Hazelton and Peter Sparagana during the same criminal transaction. Tex.Penal Code Ann. § 19.03(a)(6)(A) (West 1990). After the jury returned an affirmative answer to both special issues submitted under Tex. Crim.Proc.Code Ann. Art. 37.071(b) (West 1988), the judge assessed a sentence of death. The judgement of the trial court is affirmed.[1]

I.

On the evening of April 30th, 1986, Bill and Shannon Ferguson were in their pasture waiting on a mare to foal. Sometime before 10:00 p.m. they observed a truck heading in an eastward direction pull over near a gate of the adjacent Triple Creek Ranch. They noticed someone get out of the truck, heard a chain rattle on the gate, and observed someone from the truck go through the gate and onto the ranch. The truck's headlights had been turned off, but Mrs. Ferguson noticed that when the driver of the truck applied the brakes, an unusual brake light pattern appeared. Concerned there was a burglary in progress, Mrs. Ferguson ran to her house to call the ranch managers, the Hazeltons. Other evidence showed that the original chain had been cut and a new lock had been placed on the gate.

Fifteen minutes later, the Fergusons observed Jim Hazelton's truck appear at the same gate on Highway 30. Unable to enter that gate, Hazelton backed up and entered the Ranch from another location.

1. By per curiam order we withdrew our original opinion of December 19, 1990. The cause was resubmitted on original briefs on May 23, 1991.

Eventually, the Fergusons heard Hazelton's truck stop. Upon hearing a gunshot, Mrs. Ferguson rushed to her house to phone Mrs. Hazelton and the police.

While Mrs. Ferguson was calling the police, Mr. Ferguson remained in the pasture watching to see if anyone exited the gate. Several minutes after the first gunshot, Mr. Ferguson heard several shots fired in rapid succession. After a brief silence, Mr. Ferguson heard someone plead for his life. The pleas were silenced by two more shots.

When the police arrived, they discovered the bodies of Jim Hazelton and Peter Sparagana, Hazelton's brother-in-law, dead from bullet wounds fired at close range.

At trial the State presented damaging evidence from three of appellant's brothers—Tracey, Randy, and Ricky. Tracey Johnson testified that appellant came to Missouri during the fall of 1986, returned Tracey's .44 caliber pistol and asked him to destroy it because the pistol had been involved in a double murder in which appellant and their brother Terry had participated.

During that same visit to Missouri, Ricky Johnson testified that appellant was in possession of the .44 caliber pistol; that appellant admitted killing one man with the gun; and that appellant and Terry had also killed a second man. A state firearms examiner later identified a bullet fragment retrieved from Hazelton's body as being fired from the same .44 caliber pistol appellant returned to Tracey.

Randy Johnson also testified that appellant told him of the events that transpired at the Triple Creek Ranch. Appellant told Randy that he and Terry were out at the Triple Creek to steal something when two men "got the drop on them." While Terry distracted them, appellant was able to shoot one of the men. Appellant and Terry caught the other man, brought him back to the barn, made him kneel, and tied his hands behind his back. While the second man plead for mercy, appellant shoved the gun in his mouth. The medical examiner later testified that the second man died from a contact bullet wound to the mouth.

Appellant explained the reason for killing the two men to his brother Randy: "Dead men don't talk."

II.

[1] In the first point of error, appellant contends that he was entitled to an accomplice-witness instruction under Tex.Code Crim.Proc.Ann. Art. 38.14 (West 1979):

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Appellant requested the instruction because of the testimony of Terry Johnson, appellant's brother, who was indicted for the same offense. As part of a plea agreement with the state, Terry Johnson had agreed to testify against his brother. The state, however, decided their evidence was complete without Terry's testimony and chose not to call Terry to the witness stand. During defense's case-in-chief, appellant attempted to inculpate Terry by calling him to testify. On direct examination by defense counsel Terry testified as to his participation in the robbery and inculpated appellant in the killing of Hazelton and Sparagana.

Appellant recognizes prior case law which indicated that when an accomplice is called by the defense to testify on behalf of the defense, no accomplice-witness instruction is required. But appellant argues the rationale for such a rule was based on the old "voucher" rule which is no longer in effect, and thus appellant was entitled to the instruction. *See Russeau v. State,* 785 S.W.2d 387 (Tex.Crim.App.1990). However, in *Selman v. State,* this Court reaffirmed the "established principal in this State that testimony elicited from a witness called by the accused and offered by the accused is not accomplice-witness testimony which must be corroborated as contemplated under Article 38.14." 807 S.W.2d 310, 311 (Tex.Crim.App.1991); *see also Brown v. State,* 576 S.W.2d 36, 42 (Tex. Crim.App.1979); *Cranfil v. State,* 525

S.W.2d 518, 520 (Tex.Crim.App.1975); *Aston v. State*, 656 S.W.2d 453, 456 (Tex. Crim.App.1983) (trial court erred in giving accomplice-witness instruction where witness was called by defense). The very language of the rule illustrates its inapplicability to appellant's cause. The statute begins, "A conviction cannot be had upon the testimony of an accomplice ..." *supra*. But the State did not rely on the accomplice's testimony but closed its case-in-chief without calling him. It did not seek a conviction based upon the testimony of Terry Johnson. The statute provides for situations where a conviction is based in some part on the testimony of an accomplice. In this case, the witness was called by the defense, and his testimony as to the events of the crime was elicited by the defense. While the State did cross-examine the witness concerning his testimony, the witness had already testified as to the events of the crime. *See Selman, supra* (Miller, J. concurring opinion). As we opined in *Selman*, "accomplice-witness testimony must be corroborated and the jury so instructed only when the State calls the witness and seeks to rely on such witness's testimony." 807 S.W.2d at 311. This is not the type of evidence which must be corroborated under the statute. No accomplice-witness instruction was required.

[2] Point of error three is related to point of error one. Appellant complains that because the trial court failed to give an accomplice-witness instruction during the guilt-innocence phase, the evidence is insufficient to support the jury's affirmative finding to special issue number one during the punishment phase. Appellant contends, among other things, that if the testimony of Terry Johnson was excluded the remaining evidence is circumstantial as to the issue of deliberateness and the jury was left in the position of guessing how the actual deaths occurred. But since all of his arguments are predicated on the contention that the trial court improperly failed to instruct the jury on the accomplice-witness rule during the guilt-innocence phase, we reject appellant's arguments.

[3] We find there is sufficient evidence to find appellant acted deliberately. The facts at the guilt stage of the trial alone can often be sufficient to support the affirmative finding of the jury to the special issues at the penalty stage of the trial. *Williams v. State*, 773 S.W.2d 525, 538 (Tex.Crim.App.1988), *cert. denied*, 493 U.S. 900, 110 S.Ct. 257, 107 L.Ed.2d 207 (1989). "A jury must find 'a moment of deliberation and the determination on the part of the actor to kill' before it is justified in answering 'yes' to special issue number one." *Kinnamon v. State*, 791 S.W.2d 84, 95–96 (Tex.Crim.App.1990). The determination of deliberateness must be found from the totality of the circumstances. *Williams*, 773 S.W.2d at 539; *Cannon v. State*, 691 S.W.2d 664, 677 (Tex.Crim.App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986). In determining the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the verdict. *Dunn v. State*, 819 S.W.2d 510, 513 (Tex.Crim.App.1991); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Hazelton died as a result of gunshot wounds to the head, a contact type gunshot wound to the face into the neck, and a graze wound to the right shoulder. The medical and firearms examiner identified the fragments retrieved from the neck of Hazelton as being fired from the .44 caliber pistol retrieved from appellant's brother Tracey. There were also .38 caliber fragments retrieved from the gunshot wound to the head. The medical examiner's testimony and the evidence of the position of the body was consistent with someone being shot at point blank range in the face, and then when Hazelton was lying on the ground he was again shot in the head by someone standing over the body. The contact wound to the face could illustrate deliberateness.

But in addition to the wounds, Terry Johnson testified during defense's direct that he told appellant someone was coming up in a truck through the woods. Appellant's reply was that they would have to shoot it out because he was not going to get caught. While Terry went to look for a

means of escape, appellant hid in waiting. The evidence reflects much more than an intentional killing of Hazelton. Appellant recognized and determined that by killing Hazelton and Sparagana, he could not be implicated because, as he told Randy: "Dead men don't talk." Viewed in the light most favorable to the verdict, the evidence is sufficient to allow a rationale juror to have found beyond a reasonable doubt that appellant deliberately killed Hazelton. Appellant's first and third points of error are overruled.

III.

[4] In appellant's second point of error, he contends that the evidence was insufficient for the jury to return affirmative finding to the question of future dangerousness. Again, in determining the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the verdict. *Dunn v. State,* 819 S.W.2d 510, 513 (Tex.Crim.App.1991); *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

[5] The jury can consider numerous factors in determining whether the defendant poses a continuing threat to society including, but not limited to, the following:

1. The circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;
2. The calculated nature of the defendant's acts;
3. The forethought and deliberateness exhibited by the crime's execution;
4. The existence of a prior criminal record, and the severity of the prior crimes;
5. The defendant's age and personal circumstances at the time of the offense;
6. Whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
7. Psychiatric evidence; and
8. Character evidence.

Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim.App.1987).

Specifically, appellant claims that "the mere fact of two persons being murdered in the same transaction should not be considered a special factor" on the issue of future dangerousness in the second special issue. *See* Tex.Code Crim.Proc.Ann. Art. 37.071(b)(2) (West 1988). But it is not the mere fact of two persons being murdered that is a special factor. No killing exists in a vacuum. The circumstances of the offense, and the events surrounding it may provide greater probative value than any other evidence regarding the probability of future acts of violence. *Alexander v. State,* 740 S.W.2d 749, 761 (Tex.Crim.App. 1987); *see also Vuong v. State,* 830 S.W.2d 929, 935 (Tex.Crim.App.1992); *Sosa v. State,* 769 S.W.2d 909, 912 (Tex.Crim.App. 1989); *Moreno v. State,* 721 S.W.2d 295 (Tex.Crim.App.1986). We are unwilling to abandon this view and to disregard the circumstances of the offense in making our sufficiency review.

During the punishment hearing, a state's expert testified that the defendant represented a future threat to society. There was also testimony from a neighbor that appellant shot and killed his dog. Appellant fired a semi-automatic rifle at a range of 75 to 100 feet killing the dog which was approximately 3 to 5 feet from appellant's neighbor. When the jury considered the second issue, the circumstances surrounding the criminal act itself were certainly more damaging than the testimony at punishment. Evidence at trial also indicated appellant had previously worked on the ranch. This work presented appellant ample opportunity for him to prepare a plan for the burglary. Appellant and his brother entered the Triple Creek Ranch late at night. They cut the gate's lock and replaced the lock with one of their own to prevent detection and entered the ranch heavily armed with an intention of stealing a specific welder that appellant had observed at the ranch.

When appellant and his brother heard the approaching truck, instead of fleeing the scene, appellant hid in waiting. As Hazelton and Sparagana approached, appellant's brother distracted Hazelton providing appellant an opportunity to shoot Ha-

zelton and capture Sparagana. Appellant then had Sparagana get on his knees, and while Sparagana plead for mercy, appellant shoved the pistol barrel in Sparagana's mouth and fired. The *purpose* for both murders was that "dead men don't talk." The circumstances of the offense are such that the jury could rationally find beyond a reasonable doubt that appellant presented a future threat to society. *See Vuong*, 830 S.W.2d at 935. Accordingly, appellant's second point of error is overruled.

IV.

In points of error four, five, and six, appellant attacks the court's charge during the guilt-innocence phase of the trial on numerous grounds including the constitutionality of Tex.Penal Code Ann. § 19.03(a)(6)(A).[2]

In point of error four, appellant contends § 19.03(a)(6)(A) is unconstitutional in its application, violating the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 13, of the Texas Constitution, and that the statute is unconstitutionally vague and indefinite under numerous provisions of the Texas and U.S. constitutions. We disagree.

[6] While appellant complains that § 19.03(a)(6) violates the Texas Constitution, appellant proffers no argument or authority as to the protection offered by the Texas Constitution or how that protection differs from the protection guaranteed by the U.S. Constitution. We decline to pursue appellant's Texas Constitutional arguments for him. *Narvaiz v. State*, 840 S.W.2d 415 (Tex.Crim.App.1992); *Morehead v. State*, 807 S.W.2d 577, 579 n. 1 (Tex.Crim.App.1991); *McCambridge v. State*, 712 S.W.2d 499, 501–502 n. 9 (Tex.Crim.App.1986); Tex.R.App.Proc. 74 and 210.

[7] With regard to the claims under the U.S. Constitution, we note that prior to the enactment of § 19.03(a)(6) the Supreme Court upheld the constitutionality of the Texas capital punishment scheme in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (plurality opinion). When analyzing whether a state's capital murder scheme is violative of the Eighth Amendment, the Supreme Court has continually considered whether the scheme sufficiently narrows or limits the class of death-eligible defendants and whether the scheme allows a jury to sufficiently consider the mitigating evidence. *Jurek v. Texas*, 428 U.S. at 273–274, 96 S.Ct. at 2957; *Blystone v. Pennsylvania*, 494 U.S. 299, 305, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255 (1990).

Initially we must decide whether the Texas capital murder scheme, with the enactment of § 19.03(a)(6), complies with the Eighth Amendment by sufficiently narrowing the class of death-eligible defendants. In *Blystone v. Pennsylvania*, the Supreme Court noted "[the] presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by the jury." 494 U.S. at 306–07, 110 S.Ct. at 1083. While we note that with the addition of Tex.Penal Code § 19.03(a)(6) the Texas capital murder scheme is broader than it existed when *Jurek* was decided, the addition of a second "murder" to the list of aggravating circumstances, such as rape, burglary, kidnapping, etc., does not make the Texas statute overbroad so as to violate the Eighth Amendment. The addition of this aggravating circumstance to the Texas capital murder scheme adequately channels the jury's discretion in the assessment of punishment, thus satisfying the Eighth Amendment. *Narvaiz v. State, supra;*

2. Section 19.03 of the Penal Code provides, in pertinent part, that:

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

...

(6) 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.

Blystone v. Pennsylvania, 494 U.S. 299, 305, 110 S.Ct. 1078, 1083 (1990). We reject appellant's facial attack to the statute in his fourth point of error.

[8] In the same point of error, appellant additionally argues that the statute is void for vagueness because the statute fails to define the terms "criminal transaction" and "same scheme or course of conduct." Initially, appellant must show that the statute is unconstitutional as applied to him. *Vuong*, 830 S.W.2d 929, 941 (Tex.Crim. App.1992); *Parent v. State*, 621 S.W.2d 796, 797 (Tex.Crim.App.1981). Because the phrase "same scheme or course of conduct" relates to § 19.03(a)(6)(B) which was inapplicable to his conviction, the constitutionality of that portion of the statute may not be challenged. *See Vuong*, 830 S.W.2d at 941; *Parent*, 621 S.W.2d at 797.

[9] We also find that the term "criminal transaction" is not vague as applied to the facts of this case. There is no dispute on appeal that appellant and his brother entered the property with the intent to steal certain specified items from the Ranch. While appellant and his brother were in the course of this transaction, two men discovered their presence. While one of the men was distracted appellant shot him. The other man was caught and shot execution style. Appellant's brief only suggests that appellant, himself, did not murder both men, but that instead his brother actually pulled the trigger. While these issues may present a defense to the capital murder charge, we cannot see how this even raises the issue of whether the murders were committed within the same "criminal transaction." As we stated in *Vuong*, "[e]ven the most narrow construction of the term 'same criminal transaction' would include the type of actions the jury determined were committed by appellant." 830 S.W.2d at 941. Appellant's constitutional challenge to the statute on the basis that it is void for vagueness is also rejected in appellant's fourth point of error.

[10] In both points of error four and five, appellant recognizes the general rule that the law of parties applies to the capital murder statute. Nevertheless he contends the legislature did not intend for the law of parties to apply to the newly enacted § 19.03(a)(6)(A). We refuse to read such an exception in the statute. This Court has continually held that the law of parties announced in §§ 7.01 and 7.02 is applicable to capital murder cases. *Crank v. State*, 761 S.W.2d 328, 351 (Tex.Crim.App.1988), *cert. denied*, 493 U.S. 874, 110 S.Ct. 209, 107 L.Ed.2d 162 (1989); *English v. State*, 592 S.W.2d 949, 955 (Tex.Crim.App.), *cert. denied*, 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980); *Ruiz v. State*, 579 S.W.2d 206, 209 (Tex.Crim.App. [panel op.] 1979); *Pitts v. State*, 569 S.W.2d 898 (Tex. Crim.App.1978) (en banc). It would be an anomaly for this court to say the law of parties under §§ 7.01 and 7.02 applies to capital murder cases except under § 19.03(a)(6), where there is no language in the statute indicating such an exception. *See Boykin v. State*, 818 S.W.2d 782 (Tex.Crim. App.1991); *Garcia v. State*, 829 S.W.2d 796, 799 (Tex.Crim.App.1992) (plurality opinion) ("As jurists, we are obliged to implement the expressed will of our legislature, not the will it keeps to itself.")

Appellant's final arguments, intertwined within points of error four, five and six, are based on the assumption that the law of parties does not apply to § 19.03(a)(6)(A). At trial during the guilt-innocence stage, the jury was instructed on the law of parties under Tex.Penal Code §§ 7.01 and 7.02.[3] (West 1990). Appellant's argument

3. The jury was instructed on the law of parties under § 7.01(a), which states:

> A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both.

The trial court also instructed the jury under § 7.02(a)(2) and (b):

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
>
> . . . . . .
>
> (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 ...
> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is

is both a constitutional argument and a challenge to the interpretation of the statute.

Appellant contends a capital murder conviction based on the law of parties under § 7.02(b) is unconstitutional under *Enmund v. Florida*, 458 U.S. 782, 788, 102 S.Ct. 3368, 3371, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Appellant's reliance on *Enmund* and *Tison* are misplaced.

The Texas capital murder scheme does not allow an individual to be put to death for merely being a party to a murder. As this court said in *Cuevas v. State:*

> To be convicted of a capital felony in Texas, a defendant must intentionally or knowingly cause the death of an individual in certain enumerated circumstances. *See* V.T.C.A., Penal Code Sec. 19.03. Of course, application of the law of parties at the guilt phase means it is possible for a non-triggerman, such as appellant, to be convicted of a capital offense. However, a capital defendant will be assessed the death penalty only if the jury answers the special issues of Art. 37.071(b) in the affirmative. Special issue number one requires the jury to determine "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased would result." Because the law of parties may not be applied in answering this issue, an affirmative verdict is possible only when the jury finds that the defendant's *own* conduct satisfies both parts of special issue number one. *Therefore, the first special issue of Art. 37.071(b) includes the Enmund and Tison findings.*

742 S.W.2d 331, 343 (Tex.Crim.App.1987), *cert. denied* 485 U.S. 1015, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988). The Texas special issue contained in Art. 37.071(b) sufficiently limits the imposition of death so as to meet constitutional challenges under *Enmund* or *Tison*. Having found that an individual may be found guilty of capital murder based on the law of parties and the statute is constitutional as applied to appellant, his fourth, fifth, and sixth points of error are overruled.

V.

[11] Appellant next complains of certain instructions given to the jury in the court's punishment charge. The instructions immediately preceded the first special issue and provided as follows:

> In answering Special Issue No. 1 you are instructed that before you may answer "yes" to Special Issue No. 1, you must find from the evidence, beyond a reasonable doubt, that the defendant, Gary Johnson, either solely caused the death of James Hazelton and Peter Sparagana by shooting them with a handgun, or that the defendant contemplated that the death of James Hazelton and Peter Sparagana would result while acting as a party or in furtherance of a conspiracy to commit the offence [sic] of burglary of a building.

Appellant's seventh, eighth and ninth points of error essentially complain of error in the use of three specific terms—"contemplated," "party," and "conspiracy," respectively in the instruction quoted above. Because appellant failed timely to object to the Court's charge, appellant must claim any such error was 'fundamental,' and "... he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Almanza v. State*, 686 S.W.2d 157 at 171 (Tex.Cr.App. 1984).

[12] In point of error seven, appellant contends that the trial court's insertion of the word "contemplated" rises to the level of egregious harm because of its vague and indefinite nature and thus, since the court did not give a concomitant definition of the term, appellant was denied due

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.

course of law under Article I, Sections 10, 13 and 19 of the Texas Constitution. Because the court failed to define "contemplated" in the charge, appellant argues the jury did not examine appellant's conduct but rather what appellant may have contemplated. We do not believe that the term "contemplated" has become so technical that it is a legal term of art requiring the trial court to define the term. As opined in *Russell v. State:*

> Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury. [Citations omitted.]

665 S.W.2d 771, 780 (Tex.Crim.App.1983), *cert. denied,* 465 U.S. 1073, 104 S.Ct. 1428, 79 L.Ed.2d 752, *rehearing denied,* 466 U.S. 932, 104 S.Ct. 1720, 80 L.Ed.2d 192 (1984). The jury was entitled to give the term the common and ordinary meaning of the word. We are not persuaded that the trial court erred in failing to instruct the jury on the definition of "contemplated."

[13] Appellant also argues that the preparatory instruction for special issue one is fundamentally defective because it allows the jury to answer in the affirmative without any regard to the specific conduct of the defendant. While the preparatory instruction, by itself, may not focus the jury's attention on the conduct of appellant, special issue one clearly does:

> Was the *conduct of [appellant]* that caused the death of the deceased, James Hazelton and Peter Sparagana, *committed deliberately and with the reasonable expectation that the death of the deceased or another would result.*

[Emphasis added.] Because the first special issue correctly focuses the jury's attention on the conduct of appellant, and no egregious harm is shown, his seventh point of error is overruled.

[14] Appellant further complains that the term "party" in the preparatory instruction constitutes an instruction on the law of parties, such that, appellant can be sentenced to death for being merely a party to the offense. Appellant correctly notes that the law of parties cannot be applied to the punishment phase of a capital murder trial. *Green v. State,* 682 S.W.2d 271 (Tex.Crim.App.1984), *cert. denied,* 470 U.S. 1034, 105 S.Ct. 1407, 84 L.Ed.2d 794 (1985). When the law of parties is presented to the jury in the guilt phase of a trial, a trial court should give an "anti-parties" charge at punishment when requested. *Belyeu v. State,* 791 S.W.2d 66, 73 (Tex.Crim.App.1989), *cert. denied,* —— U.S. ——, 111 S.Ct. 1337, 113 L.Ed.2d 269 (1991); *Webb v. State,* 760 S.W.2d 263, 268 (Tex.Crim.App.1988); *Cuevas v. State, supra.*

Appellant argues that failure to give such an instruction is harmful whether or not an objection is made, thus requiring a reversal under Tex.R.App.P. 81(b)(2). We disagree. Absent an objection or request, an "anti-parties" charge is not required by statute or by the constitution. *Belyeu v. State,* 791 S.W.2d at 73; *Green v. State,* 682 S.W.2d 271 (Tex.Crim.App.1984), *cert. denied,* 470 U.S. 1034, 105 S.Ct. 1407, 84 L.Ed.2d 794 (1985). Because no objection is made, appellant's eighth point of error is rejected.

[15] Appellant specifically complains in point of error nine that the preparatory instruction was fundamentally defective because it lessened the prosecutor's burden. Appellant believes the jury was authorized to answer affirmatively to special issue number one, if appellant was shown to be "in furtherance of a conspiracy to commit the offense of burglary of a building." Essentially, appellant argues, if the jury found appellant participated in a conspiracy they were authorized to answer the special issue in the affirmative. The charge merely instructed the jury that if, at the guilt phase of the trial, their guilty verdict was predicated upon § 7.02(b), criminal responsibility involving conspiratorial liability, then at the punishment phase, in order to warrant the affirmative finding, it was mandated that the jury find from the evidence beyond a reasonable doubt that appellant "contemplated" that the death of

the victims would result. Coupled with the instruction focusing on appellant's own conduct causing the death of the victims which was committed by him deliberately with the reasonable expectation that death would result, we fail to see any egregious harm which could have resulted from the trial court's instruction. Point of error nine is overruled.

VI.

[16] Appellant's tenth point of error alleges that the trial court erred in failing to instruct the jury on the requested definition of "deliberately." This Court has previously addressed the issue of defining "deliberately" and held no definition is required. We decline to reconsider the issue here. *Lewis v. State*, 815 S.W.2d 560, 563 (Tex.Crim.App.), *cert. denied*, — U.S. —, 112 S.Ct. 1296, 117 L.Ed.2d 519 (1991), and cases cited therein.

VII.

In the eleventh, twelfth, and thirteenth points of error, appellant contends that the Texas capital murder statute is unconstitutional on its face and as applied. He claims a violation of the Eighth Amendment of the U.S. Constitution based upon the trial court's failure to submit an additional instruction that takes into account appellant's mitigating evidence.

[17, 18] This Court addressed appellant's facial challenge to the Texas statutory sentencing scheme recently in *Lewis v. State*. We opined:

> It is plain from a reading of *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) that the statutory method of assessing the death penalty in Texas can be administered in a manner consistent with the Eighth Amendment of the United States Constitution. Whether it is so administered in fact depends upon the circumstances of individual cases. But, in any event, the capital sentencing procedure is not itself unconstitutional for its failure to provide for jury consideration of mitigating evidence.

815 S.W.2d at 567. The central question in analyzing the constitutionality of the Texas statutory scheme is the application of the capital sentencing procedure, and whether the special issues sufficiently allow for the jury to consider any mitigating evidence.

Appellant directs this Court's attention to the following mitigating evidence in support of his constitutional challenge:

> 1) evidence of lack of violent behavior towards other persons,
>
> 2) evidence that he was a hard worker at his last place of employment,
>
> 3) testimony by his ex-wife that he was non-violent,
>
> 4) and testimony from an expert witness specifically challenging the state expert's ability to predict future dangerousness.

The evidence of appellant's non-violent behavior and the evidence that he is a hard working individual are mitigating in nature. However, the mitigating effect of such evidence can be considered within the second special issue. *See Mooney v. State*, 817 S.W.2d 693, 705–6 (Tex.Crim.App.1991); *Boyd v. State*, 811 S.W.2d 105, 111 (Tex. Crim.App.), *cert. denied*, — U.S. —, 112 S.Ct. 448, 116 L.Ed.2d 466 (1991); *Ex Parte Baldree*, 810 S.W.2d 213 (Tex.Crim.App. 1991); *Ex Parte Ellis*, 810 S.W.2d 208, 211 (Tex.Crim.App.1991). On the other hand, the evidence from appellant's expert witness is not in itself mitigating evidence, but rather a challenge to the credibility or the weight of the State's expert witness. The jury could consider any *mitigating* effect of the testimony in assessing the weight or credibility of the State's expert in the consideration of the special issue. Accordingly appellant's points of error are overruled.

VIII.

[19] In the fourteenth point of error, appellant contends the trial court committed fundamental error by failing to charge the jury on the issue of provocation as required by Tex.Crim.Proc.Code Ann. Art. 37.071(b) (West 1988), which states:

> On conclusion of the presentation of the evidence, the court shall submit the fol-

> lowing three issues to the jury: ... (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was reasonable in response to the provocation, if any, by the deceased.

The third special issue must be given if raised by the evidence. *Robinson v. State,* 851 S.W.2d 216 (Tex.Crim.App.1991), *reh'g granted on other grounds,* (July 3, 1991). In support of his argument that it was raised by the evidence, appellant points to the testimony of Mr. Ferguson who testified he heard five to seven shots fired. Because appellant's .44 magnum revolver only held six shots, appellant asks us to infer that one of the victims fired *first,* and in such a manner that it provoked appellant to shot him. Such is more in the nature of speculation than a permissible inference, especially since all the evidence indicates quite to the contrary that in fact appellant initiated the violence. Appellant additionally points to the testimony of Terry Johnson in support of his contention that a gun fight ensued. However a more careful reading of Terry's testimony supports the contrary. Terry testified during the defense's direct examination that appellant told him that "as soon as he hit [Hazelton] he fired a shot at him, Hazelton boy fired a shot at him as he was going down." Additionally, Terry testified that when they heard the approaching truck, Terry told appellant that they were going to get caught. Appellant replied, "the only thing we can do is shoot it out with them." None of the evidence presented raises an inference that appellant was provoked into shooting Hazelton. No error was committed by the trial court's failure to *sua sponte* charge the jury on the third special issue. Appellant's fourteenth and final point of error is overruled. The judgement of the trial court is affirmed.

BAIRD and MALONEY, JJ, concur in the result.

CLINTON, Judge, dissenting.

Appellant presented evidence that he is not a man of violent character, that he neither drinks nor takes drugs, and that he was a diligent employee respectful of his coworkers. These character traits do not fall squarely within the ambit of *Penry v. Lynaugh,* supra, and they obviously carry little weight as mitigating evidence with the majority today. Nevertheless, it is not plain to me that jurors would find these facets of appellant's character insignificant in making the normative evaluation whether he deserves to live in spite of his crime. The Supreme Court has not expressly limited its view of "relevant" mitigating evidence to those circumstances necessarily bearing on personal culpability for the particular offense committed or those aspects of the defendant's background or makeup to which his crime may be, at least in part, attributable. See *Skipper v. South Carolina,* 476 U.S. 1, at 4–5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 7 (1986). To the contrary, there is every indication a majority of the Supreme Court believes "[e]vidence of voluntary service, kindness to others, or of religious devotion" to be relevant inasmuch as it "might demonstrate positive character traits that might mitigate against the death penalty." *Franklin v. Lynaugh,* 487 U.S. 164, at 186, 108 S.Ct. 2320, at 2333, 101 L.Ed.2d 155, at 173 (1988) (O'Connor, J., concurring). Appellant's proffered evidence was of the same ilk. Because jurors in this cause were precluded from effectuating that evidence beyond the scope of special issues under Article 37.071, § (b), V.A.C.C.P., appellant has been sentenced to death in contravention of the Eighth Amendment. His conviction should be reversed and remanded for new trial. Article 44.29(c), V.A.C.C.P.

I also disagree with the majority's treatment of appellant's first point of error. Article 38.14, V.A.C.C.P., reads substantially as it has read since originally promulgated as Art. 653 of the Old Code, *viz:*

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

The majority concludes that a defense witness may not be considered an accomplice for purposes of this statute, and thus con-

cludes the trial court did not err in failing to submit appellant's requested instruction at the conclusion of the guilt phase of trial. In this I believe the majority errs.

It is true that in relatively recent years the Court has said that, e.g., "Article 38.14, supra, is not construed to require corroboration of a witness called by the accused. *Brown v. State,* 476 S.W.2d 699 (Tex.Cr. App.1972); *Davis [sic] v. State,* 162 Tex. Cr.R. 280, 284 S.W.2d 713 (1955)." *Jenkins v. State,* 484 S.W.2d 900, at 902 (Tex. Cr.App.1972). Reasoning from this proposition, the Court later concluded that any testimony offered by an accused "is not that of an accomplice witness." *Cranfil v. State,* 525 S.W.2d 518, 520 (Tex.Cr.App. 1975); *Aston v. State,* 656 S.W.2d 453, 455 (Tex.Cr.App.1983). All of these holdings seem to me to derive from a misunderstanding of earliest holdings construing predecessors to Article 38.14, supra.

In *Joseph v. State,* 34 Tex.Cr.R. 446, 30 S.W. 1067 (1895), the decomposed body of a newborn was found in a cistern, and Joseph was charged with infanticide. Marie Nicholas, a woman with whom Joseph was "engaged in the business of peddling," testified that:

> "she gave birth to the child; that she did so in a privy on the premises; that, after its birth, it uttered a cry, and she took it up, and it immediately died; and that by herself, without any knowledge on the part of any person, she disposed of it in the cistern."

Id., 30 S.W. at 1068. The trial court gave an accomplice witness instruction pursuant to then Article 741 of the 1879 Code of Criminal Procedure. After quoting the statute, this Court observed:

> "If there was a crime committed in this case, certainly Marie Nicholas was an accomplice. She was not introduced by the state as a witness, and all her testimony was in favor of the defendant; and yet the jury were told that, if the state relied for a conviction in any measure upon her testimony, they were to discredit it to the extent of requiring its corroboration before they would be authorized to convict. While this might be true as an abstract proposition, yet, without a pertinent charge telling the jury in this connection that the same rule did not apply to said witness where her testimony was in favor of the defendant, it was liable to mislead and confuse the jury, and to discredit said witness when they should come to consider her testimony. Under such a charge they were liable to regard the same rule applicable to the state as equally applicable to the defendant, and to require that she be corroborated before they would be authorized to acquit the defendant upon the testimony of said witness alone. We believe that the charge was erroneous as to said witness."

Id., 30 S.W. at 1068–69. A year later, in *Williams v. State,* 37 S.W. 325 (Tex.Cr. App.1896), the accused appealed his conviction for incest. "The appellant proposed to prove by his said daughter, in substance, that at no time had he ever had carnal intercourse with her." He sought a continuance to obtain her presence, and in the process of holding it should have been granted, the Court opined:

> "The law does not require the testimony of an accomplice to be corroborated, when given for the accused. The statute forbids conviction upon the testimony of an accomplice, unless corroborated, but does not require such testimony to be corroborated when given for the accused."

Id. Thus, the Court indicated that when an accomplice witness testifies purely to facts favorable to an accused, an instruction pursuant to the statute, without qualification, would be error inasmuch as it might lead the jury to believe, contrary to the law, that an accomplice witness's testimony must be corroborated not only before it may support a conviction, but also before it may support an acquittal.[1] That is to say,

1. Prior to this Court's decision in *Daviss v. State,* 162 Tex.Cr.R. 280, 284 S.W.2d 713 (1955), see text *post,* the rule was stated in the second edition of Branch's as follows:

> "When an accomplice testifies for the defendant it is error to charge that if the State relies for a conviction in any measure upon his testimony it must be corroborated, *if the*

a jury must not be misled to believe that testimony from an accomplice that exculpates an accused need also be corroborated under the statute.

Two points must be noted. First, the Court did not hold in these cases that a witness called by the defendant to give exculpatory testimony cannot be considered an accomplice. Quite the contrary, both *Joseph* and *Williams* identify the defense witness as an accomplice, "[i]f there was a crime committed" at all. Second, by "given for the accused," the Court did not mean simply that the testimony was proffered during the defendant's presentation of evidence, but that the testimony was exculpatory, admitted solely in an effort to persuade the jury to acquit, not to convict, as would be impermissible *sans* corroboration under the statute. These cases do not address the question whether the statute requires corroboration of an accomplice who is called by the defendant, but gives testimony upon which the jury could rationally rely to convict. Facially, the statute would appear to require corroboration in the premises, for it contains no express or implicit qualification based upon which party sponsors the accomplice witness.

Nevertheless, on opinion on appellant's motion for rehearing in *Daviss v. State*, 162 Tex.Cr.R. 280, 284 S.W.2d 713, at 714 (1955), the Court held that inculpatory testimony from an accomplice witness, when the witness is proffered by the accused, need not be corroborated under the statute. Without further elaboration, the Court simply cited *Joseph* and *Williams*, both supra, and concluded that no corroboration was required because the testimony at issue had been "given for the accused." The holding of *Daviss* was uncritically accepted and expanded in *Jenkins*, *Cranfil*, and *Aston*, all supra, to the point that we now say that no witness called by an accused can be an accomplice at all. It seems to me these cases thwart the very purpose of Article 38.14, supra.

Frequently the State must offer an accomplice immunity or leniency in order to induce him to forego constitutional privileges against self-incrimination and testify. There is reason to mistrust testimony of an accomplice under those circumstances, for he has every incentive to fabricate, or to downplay his own involvement in the offense to the detriment of the accused. He wants to appease the State and "to save his own skin." But suppose an accused can prove some exculpatory fact through no means other than the testimony of an accomplice who otherwise has an abundance of inculpatory testimony to give. If the State declines to call that witness, must the accused suffer loss of the benefit of Article 38.14, supra, simply because he must rely on that witness for partial exculpation? An accomplice witness willing to relinquish his testimonial privilege without benefit of a deal with the State, willing to establish some small point in favor of the accused because it does not concomitantly incriminate him, may nevertheless harbor strong incentive to inculpate an accused in other aspects to deemphasize his own involvement in the crime. As to those inculpatory aspects of his testimony, the same reasons exists to mistrust his testimony as had the State itself called the accomplice. Moreover, in this cause Terry Johnson had worked out a plea agreement with the State in exchange for testimony at appellant's trial. That the State then declined to call him in its case-in-chief does not relieve the pressure he was under to testify in such a way as to appease the State. Under such circumstances "the aura of distrust" does not lift simply because appellant himself called the witness to the stand.

I cannot imagine a rationale for holding that an accomplice witness called by an accused who gives inculpatory testimony is not subject to the statutory corroboration requirement, unless it is a remnant of the "voucher" notion—that a party is bound to the testimony of the witnesses he presents, and any grounds for mistrust must fall

charge omits to also inform the jury that the same rule does not apply to his testimony given in favor of the defendant." (Emphasis added.)

2 Branch's Annotated Penal Code, § 744 (2d ed. 1956).

away. This "voucher" requirement has been largely discredited on the sensible ground that a party must take his witnesses as he finds them. See 3A Wigmore, Evidence, Chadbourn rev. 1970, § 898; McCormick, Evidence, Cleary ed. 1984, § 38. Accordingly, Rule 607 of the Federal Rules of Evidence has abandoned the former common law prohibition against a party impeaching its own witness, at least on its face.[2] Except for the gender-neutral terminology in the current federal rule, our Tex.R.Cr.Evid., Rule 607 is identical to its federal counterpart. Having abandoned "voucher" in the context of impeachment, I can see no compelling reason that we should cling to it in the context of construing the corroboration requirement of Article 38.14, supra. I would therefore hold the trial court erred in failing to give the requested instruction.[3]

Although the majority correctly disposes of appellant's remaining points of error, a few bear further comment. In his seventh, eighth, and ninth points of error appellant alleges the trial court erred in instructing the jury at the punishment phase of trial that it must find appellant either "solely caused the death" of the two victims, or else "contemplated" that they would be killed. In my view this instruction was not only not erroneous, it was probably necessary if a sentence of death was to pass Eighth Amendment muster in this cause.

In *Cuevas v. State*, 742 S.W.2d 331, 343 (Tex.Cr.App.1987), the Court held that the first special issue alone is sufficient to meet the demands of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). I do not believe that invariably to be the case, however.

We have held that when a jury convicts a capital accused as a party under the provisions of V.T.C.A. Penal Code, § 7.02(a)(2), the verdict of guilty entails a sufficient finding under *Enmund* and *Tison*, both supra. See *Webb v. State*, 760 S.W.2d 263, at 268–69 (Tex.Cr.App.1988); *Tucker v. State*, 771 S.W.2d 523, at 530 (Tex.Cr.App. 1988). This is so because:

> "before the accused may be found criminally responsible for the conduct of another who 'intentionally commits the murder,' under the provisions of V.T.C.A. Penal Code, § 7.02(a)(2), it must be shown the accused harbored a specific 'intent to promote or assist the commission of' the intentional murder the other

2. Caselaw requirements of "surprise" and "damage" as prerequisites to impeaching one's own witness are conspicuously absent from Federal Rule 607. These requirements were designed to protect against a party calling a witness he knows will testify adversely to his cause solely so that he might introduce as "impeachment" a prior inconsistent statement of that witness, hoping the jury will consider the statement for its substantive content, the hearsay rule notwithstanding. The drafters of Federal Rule 607 dispensed with this problem by "proposing a definition of hearsay which excluded prior inconsistent statements, thereby making such evidence admissible for all purposes." 27 Wright & Gold, Federal Practice and Procedure: Evidence § 6091 (1990), at 483. Because by this scheme prior inconsistent statements were to be admitted for any purpose, there would no longer exist an incentive to present a witness solely to "impeach" him with one, and the necessity for showing surprise and damage as a prerequisite to impeachment of one's own witness would disappear. "Unfortunately, ... Congress would reject Rule 801 as proposed and greatly limit the class of prior inconsistent statements that may be considered 'not hearsay.' Congress made no effort to revise Rule 607 in light of the changes made to Rule 801(d)(1)(A)." *Id.* Commentators and federal courts have struggled with the question of whether, and if so how, to read "surprise" and "damage" requirements back into Rule 607, in view of the fact that prior inconsistent statements are still considered inadmissible hearsay. *Id.*, § 6093, at 496–515. Because Tex. R.Cr.Evid., Rule 801(e)(1)(A) echoes Federal Rule 801(d)(1)(A), presumably this Court will eventually confront a similar problem.

3. One of appellant's other brothers testified during the State's case-in-chief that appellant had admitted to him facts that were substantially the same as those Terry Johnson later testified to, insofar as they inculpated appellant. Under these circumstances the Court has held under earlier incarnations of Article 36.19, V.A.C.C.P., that failure to give an accomplice instruction "was not calculated to injure the rights of the defendant...." *Saucier v. State*, 156 Tex.Cr.R. 301, 235 S.W.2d 903, at 909–910 (1951), and cases cited therein. Because I believe that it was reversible error not to give appellant's requested mitigation instruction, I need not address the question of harm.

committed. *Meanes v. State,* [668 S.W.2d 366,] at 375–76 [(Tex.Cr.App. 1983)]; *Rector v. State,* 738 S.W.2d 235, 244 (Tex.Cr.App.1986); See also *Martinez v. State,* 763 S.W.2d 413, 420 n. 5 (Tex.Cr.App.1988). One could hardly indulge an intent to promote or assist in the commission of an intentional murder without, at a minimum, intending or contemplating that lethal force would be used. In short, that the jury may not have believed [a capital accused] pulled the trigger of the actual murder weapon is of no moment. Because it was required to find an intent to promote or assist commission of *an intentional murder* before the jury could convict [him] as a party to the offense in the first instance, we cannot say its later punishment verdict was 'fatally defective' under *Enmund.*" [4]

Webb v. State, supra. The same cannot be said where the jury may have reached a verdict of guilty relying upon a conspiracy theory of parties under V.T.C.A. Penal Code, § 7.02(b). That provision reads:

"(b) 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."

Under § 7.02(b), supra, a jury could convict a capital accused upon no more than a finding that the killing "should have been anticipated as a result of the carrying out of the conspiracy." That a result "should have been anticipated" does not necessarily mean a capital accused did in fact intend or contemplate it, or even that he harbored "the reckless indifference to human life implicit in knowingly engaging in criminal activities *known* to carry a grave risk of death." *Tison v. Arizona,* 481 U.S. at 157, 107 S.Ct. at 1688, 95 L.Ed.2d at 144. A guilty verdict premised upon § 7.02(b), supra, will not meet the dictates of *Enmund* and *Tison.*

Furthermore, the first special issue will also prove insufficient to ensure that *Enmund* and *Tison* have been met where a capital accused has been convicted under a conspiracy theory of parties. The jury is to focus on "the conduct of the defendant that caused the death of the deceased" under Article 37.071(b)(1), V.A.C.C.P. When a capital defendant has been found guilty as a party under § 7.02(a)(2), supra, we have construed Article 37.071(b)(1), supra, to require that what must be scrutinized for deliberateness is not the conduct of the primary actor which directly caused the death, but the conduct of the defendant by which he solicited, aided, encouraged or directed that killing. *Meanes v. State,* supra, at 375–76; *Martinez v. State,* supra, at 420, n. 5. Analogously, unless we are to hold that the law of parties does apply at the punishment phase of a capital case—something we expressly declined to do in *Green v. State,* 682 S.W.2d 271 (Tex.Cr.App.1984)—then what must be shown to have been deliberate on the part of a capital accused found guilty under § 7.02(b), supra, is his conduct as a conspirator. But again, because that is conduct which may have been committed without actual anticipation that death would result, application of the first special issue in this context may not satisfy *Enmund* and *Tison* after all.

Thus, the instruction given in this cause, that if the jury finds appellant himself was not the triggerman it must find at least that he "contemplated" that death would result, may very well have been necessary to render any sentence of death imposed as a consequence of the jury's answers to special issues valid under the Eighth Amendment. Appellant contends the instruction operated to lessen the State's burden of proof on the issue of his deliberateness, in violation of due process and due course of law. But the only finding of deliberateness required by Article 37.071(b)(1), supra, focuses on appellant's conduct as a conspirator in the underlying felony. Requiring a finding for purposes

4. Emphasis in the original.

of the Eighth Amendment that appellant at least "contemplated" that death would result as a consequence of carrying out the conspiracy only serves to increase the State's burden beyond that which the statute alone imposes, not to decrease it.[5]

For this reason I also agree with the majority's ultimate disposition of appellant's seventh, eighth, and ninth points of error. Nevertheless, because in my view the trial court erred in failing to give the requested *Penry* instruction, I respectfully dissent.

Katherine Helen ARNOLD, Theresa Case, Daniel Gohl, Carey Hattic, Kathleen Kern, Justin McCoy, Marc Salomon, Kelly Severin, Susan Svatek, Denise Szymczak, Appellants,

v.

The STATE of Texas, Appellee.

Nos. 1559–89 through 1568–89.

Court of Criminal Appeals of Texas, En Banc.

April 7, 1993.

Rehearing Denied May 19, 1993.

Rehearing Denied May 26, 1993.

Defendants were convicted in the County Court at Law No. 1, Travis County, Leslie D. Taylor, J., of disruptive activity on a university campus, and they appealed. The Court of Appeals, 778 S.W.2d 172, affirmed. Discretionary review was granted. The Court of Criminal Appeals, McCormick, P.J., held that: (1) the civil rule governing recusal motions applied in a criminal case, but the untimely recusal motion waived appellate review; (2) the statute proscribing disruptive activity on a university campus was not overbroad or vague, and (3) testimony of witnesses who did not participate in an antiapartheid demonstration was too conjectural to be admissible on whether the defendants acted willfully.

Affirmed.

Clinton, J., dissented.

1. Judges ⇐51(1)

Civil rule setting forth procedures for recusal of judges applies in criminal cases. Vernon's Ann.Texas Rules Civ.Proc., Rule 18a.

2. Criminal Law ⇐1044.2(1)

Untimely motions for recusal of trial judge waived appellate review of denial of opportunity to have recusal motions heard by judge other than assigned judge in criminal case. Vernon's Ann.Texas Rules Civ. Proc., Rule 18a.

3. Constitutional Law ⇐90(3)

Resolution of overbreadth claim requires determination of whether statute, in addition to proscribing activity which constitutionally may be forbidden, sweeps within its coverage a substantial amount of expressive activity which is protected by free speech guarantees. U.S.C.A. Const. Amend. 1.

4. Colleges and Universities ⇐2, 9.30(2)
Constitutional Law ⇐90.1(1.4)

Antiapartheid activists' seizing university president's office, barricading doorways, and disconnecting telephones and computers was not constitutionally protected activity and, thus, statute proscribing disruptive conduct on university campus was not overbroad. V.T.C.A., Education Code §§ 4.30, 4.30(a), (b)(2); U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐47

In resolving vagueness challenge to statute that regulates conduct not involving any historic or traditional constitutionally protected expressive activity, it is nec-

5. Whether the instruction given here is authorized or even permitted under Article 37.071, supra, is quite another question, cf. *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990), but one which appellant does not now raise.