

absence of any option to convict Applicant solely of murder if the jury believed from the evidence that the sexual intercourse with complainant was consensual, created the "substantial risk" identified by the Supreme Court in **Beck**, that the jury resolved any doubts about a sexual assault in favor of Applicant's conviction for capital murder.

The courts having taken into account the likelihood of such behavior in lesser included offense situations, and having recognized the constitutional basis for the requirement that juries be given the option of considering any lesser offense raised by the evidence, this Court should find that the trial court's refusal of a requested charge on murder constitutes reversible error in Applicant's case. The only remedy for this due process violation in Applicant's case is reversal of the illegal sentence of death, and remand for a retrial so that a jury will be allowed to consider the full range of offenses raised by the evidence.

#### **CLAIM FOR RELIEF NUMBER FORTY-FOUR**

**THE COURT ERRED IN DENYING THE DEFENSE REQUEST FOR AN INSTRUCTION ALLOWING THE JURORS TO CONSIDER ANY RESIDUAL DOUBT AS A MITIGATING CIRCUMSTANCE WHEN ANSWERING THE MITIGATION SPECIAL ISSUE, DEPRIVING APPLICANT OF HIS RIGHT TO PLACE ALL MITIGATING EVIDENCE, INCLUDING THE "CIRCUMSTANCES OF THE OFFENSE" WITHIN THE JURY'S**

**EFFECTIVE REACH IN DECIDING WHETHER A LIFE SENTENCE  
IS MORE APPROPRIATE THAN THE DEATH PENALTY. U.S.  
CONST. AMEND VIII.**

With great foresight,<sup>27</sup> the trial judge in Applicants's case granted the defense request to delete the statutory definition of mitigating evidence found in Art. 37.071, Sec.2(f)(4), V.A.C.C.P., which has been challenged as placing an unconstitutionally restrictive "nexus" test by narrowing the definition to only that evidence which could be shown to "reduce the defendant's moral blameworthiness" for committing the crime. (Cr 1., 176-183; RR, 28, 4). Elaborating on the language of the statute found in Art. 37.071, Sec. (d)(1), V.A.C.C.P., the court instructed the jury to consider mitigation in answering all the special issues. Thus, the jury was left with the following guidance on mitigation:

"You are further instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect to them in assessing the defendant's personal moral culpability at the time you answer the special issues." (CRI,

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The argument below demonstrates that the trial court's view, insofar as it is reflected by the deletion of the "reduces moral blameworthiness" definition, was the one taken by the United States Supreme Court this year in its **Tennard** and **Smith** opinions, *infra*.

The mitigation special issue itself tracked the language of Art. 37.071, Sec. (e)(1),

V.A.C.C.P.:

“Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background and the personal moral culpability of the defendant, William Darin Irvan, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?” (CR 1, 186).

Before the punishment charge was submitted, Applicant’s counsel requested an instruction on residual doubt as mitigation, referring to his written motion. The trial court denied the request. (RR 28, 7).

“Residual doubt over the defendant’s guilt is the most powerful “mitigating” fact. -- [The study] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.”

**United States v. Davis**, 132 F.Supp.2d 455, 463 (E.D. La. 2001), (citing **Tarver v. Hopper**, 169 F.3d 710, 715, 11<sup>th</sup> Cir. (1999) in turn discussing Stephen P. Garvey, *Aggravation and Mitigation and Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998)).

“The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.” **Tarver v. Hopper**, *supra*, 169 F.3d at 716, citing William S. Geimer and Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in 10 Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988) ).

Applicant submits that the broad definition of mitigation, as affirmed by the

Supreme's Court's recent decisions, encompasses residual doubt of guilt as a mitigating factor in a Texas capital case, so that he was entitled to his requested supplemental instruction. Only such instruction, authorizing the jurors to consider any residual doubt as a mitigating circumstance in deciding the appropriate punishment, is sufficient to satisfy Eighth Amendment principles. Applicant was entitled to this instruction as a means of placing this mitigating evidence within the effective reach of his jury. The current punishment instructions, even as redacted by the trial judge, did not grant Applicant the special instruction that would have enabled him to obtain the jury's effective consideration of residual doubt as a mitigating factor.

The issue presented in this case is not new, however, Applicant asks this Court to consider the significance of its new authority for his position. In the recent Supreme Court cases **Tennard v. Dretke**, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and **Smith v. Texas**, \_\_\_ U.S. \_\_\_, 125 S.Ct. 400 (2004), vacating this Court's decision in **Ex Parte Smith**, 132 S.W.3d 407 (Tex. Crim. App. 2004), the United States Supreme Court made clear that by its holdings in the two **Penry**<sup>28</sup> cases from Texas, it had not meant to limit the test for mitigating evidence to only the narrow class of evidence Mr. Penry had sought to present as mitigation in his own capital murder punishment trial. The Supreme Court reiterated the broad scope of mitigation promulgated in **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1977) and **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869,

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<sup>28</sup> **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (**Penry I**). **Penry v. Johnson**, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (**Penry II**).

71 L.Ed.2d 1 (1982). Those cases require that a capital sentencer be allowed to consider as a mitigating factor any aspect of a defendant's character or record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Applicant submits that this broad definition of mitigation doubt encompasses residual doubt of the defendant's guilt.

Until the Supreme Court's opinion in **Franklin v. Lynaugh**, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), federal courts had generally accepted the concept of residual doubt as a mitigating circumstance. In **Franklin**, however, the United States Supreme Court held that the Texas capital defendant did not have a constitutional right to a supplemental jury instruction regarding the jury's consideration of residual doubt. **Id.** Significantly, **Franklin** had offered no evidence specifically related to residual doubt, and the plurality stated that "mostly importantly," even if it had recognized such a right, there was "no violation of it in this case" because the trial court had not impaired **Franklin's** exercise of this right. **Id.**, 487 U.S. at 174. Applicant in this case did argue that the evidence had supported an instruction on residual doubt and argued that this factor was mitigating. However, there was no instruction authorizing the jury's consideration of residual doubt as mitigation. Thus Applicant in this case could not receive the jury's effective consideration, just as **Penry** could not, in either of his two cases, nor **Smith** and **Tennard**, in theirs.

Applicant in this case, unlike **Franklin**, presented evidence related to residual doubt on the issue of guilt, in the form of cross examination establishing the lack of evidence that

a sexual assault had occurred, and suggesting that there was a secret romantic relationship between Applicant and complainant. Notably the cross examination of Llamas, showed that the jury was taking a real risk in believing anything she had to say. Additionally evidence presented in both direct and cross examination also supported a conclusion that even if Applicant had had sexual intercourse with complainant, it was her estranged husband, Jack Shadbolt, who had killed her, and had escaped further investigation once HCSO had "cleared" him of murder, based only upon the conclusion that he was not the contributor of semen recovered at autopsy (a conclusion which several witnesses conceded was insufficient, alone, to clear him of the killing).

Applicant notes that when **Franklin v. Lynaugh, supra**, was decided in 1988, Texas had no mitigation issue and thus instructed jurors that they were entitled to consider, among other things, the circumstances of the offense, in deciding whether to spare the life of the defendant they had just found guilty. Therefore, the question whether residual doubt should be available as a mitigating factor under the current scheme is not answered by the **Franklin** opinion. Now, Texas has a definition of mitigation and Applicant acknowledges that the residual doubt issue is not a settled one, by any means, however Applicant submits that the better decisions favor his position and offers examples from other jurisdictions for the Court's consideration. See **United States v. Davis**, 132 F.Supp.2d 455, **supra**, (citing cases from the Fifth and Eleventh Circuits with positive treatment of residual doubt).

In the recent case of **United States v. Davis, Id**, the Eastern District Court of

Louisiana held that a residual doubt argument is permissible in a re-sentencing hearing.<sup>29</sup> The court recognized that "while the issue of residual doubt has been discussed extensively in both state and federal courts in connection with capital cases in state courts, no clear consensus has evolved as to whether defendants have an absolute "right" to present such a defense." *Id.* The court addressed the U.S. Supreme Court opinion of **Franklin v. Lynaugh**, *supra*, holding that a defendant does not (did not, in 1988) have a constitutional right to a jury instruction relating to residual doubt. **Davis**, 132 F.Supp.2d at 457, citing **Franklin**, 487 U.S. at 164 (1988).

In her concurring opinion in **Franklin**, Justice O'Connor more directly addressed the defendant's right to introduce residual doubt arguments to the jury, and focused on the language of the 1988 Texas sentencing statute at issue. Specifically, she opined that "mitigating circumstances" have been defined as "facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death." **Franklin**, 487 U.S. at 187-88. Further, "residual doubt is not a fact about the defendant or the circumstances of the crime."

In considering both the plurality opinion and Justice O'Connor's concurring opinion, the **Davis** court found "the defendants [did] not have a "constitutional right" to present "residual doubt" as a mitigating factor in the penalty phase of [the] case." **Davis**, 132

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The **Davis** Court had to consider the federal statutory scheme set forth in 18 U.S.C. § 3592, but the court relies on several opinions of the Fifth and Eleventh Circuits that address state statutory schemes regarding whether residual doubt is admissible in the sentencing phase.

F.Supp.2d at 458. The court then addressed the unanswered questions of “whether residual doubt arguments/instructions are entirely prohibited or whether they can be and are authorized by other than constitutional mandate..” *Id.* The **Davis** court painstakingly discussed several Fifth Circuit opinions that “consistently [acknowledge] residual doubt as a legitimate mitigating factor ....” *Id.*

Significantly, the Fifth Circuit Court of Appeals further narrowed the **Franklin** opinion soon after **Franklin** was published (**Jones v. Butler**, 864 F.2d 348 (5th Cir. 1988)), however the Fifth Circuit expressly retracted its restriction in a decision two years later. **Davis**, 132 F.Supp.2d at 460, (discussing **Smith v. Black**, 904 F.2d 950 (5th Cir. 1990), cert. granted and judgment vacated on other grounds, 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609 (1992)).

The **Smith** court wrote:

“We have previously recognized such re-argument of guilt as a sound strategy. [citation omitted] Although **Smith** was not constitutionally entitled to instruct the jury to consider such residual doubt, [citation omitted], the Supreme Court has subsequently recognized a difference between rules relating to what mitigating evidence the jury may consider and the rules relating to instructing the jury how to consider such evidence.” **Davis**, 132 F.Supp.2d at 460, citing **Smith**, 904 F.2d at 968-69.

The **Davis** court found the **Smith** decision significant “not just for its continuing recognition of the residual doubt argument but for its expressed repudiation of its alternative holding in **Jones**” that a “defendant has no constitutional right to have such residual doubts considered in sentencing.” **Davis**, 132 F.Supp.2d at 461, comparing **Jones v. Butler**, *supra*.

The **Davis** court also cited **Moore v. Johnson**, 194 F.3d 586 (5<sup>th</sup> Cir. 1999); as follows:  
“This court has recognized that, in an appropriate capital case, counsel’s decision to rely upon the jury’s residual doubt about the defendant’s guilt may be not only reasonable, but highly beneficial to a capital defendant.” **Davis**, 132 F.Supp.2d at 461.

The **Davis** court considered equally positive opinions from the Eleventh Circuit, “the sister court to the Fifth Circuit,” which “likewise has a long history of acknowledging residual doubt as a valid factor in the penalty phase of capital cases.” **Id.** The **Davis** court recognized that while the relevant opinions of **Smith v. Wainwright**, 741 F.2d 1248 (11<sup>th</sup> Cir. 1984), **cert. denied**, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 151 (1985) and **King v. Strickland**, 748 F.2d 1462 (11<sup>th</sup> Cir. 1984), **cert. denied**, 471 U.S. 1016, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985) predated the U.S. Supreme Court’s decision in **Franklin**, “the Eleventh Circuit has continued to recognize residual doubt as a compelling factor in the penalty phase.” **Davis**, 132 F.Supp.2d at 462, addressing **Smith v. Wainwright**, *supra* and **King v. Strickland**, *supra*.

The **Davis** court also addressed another post-**Franklin** case, **Tarver v. Hopper**, 169 F.3d 710 (11<sup>th</sup> Cir. 1999), which cited a comprehensive study on capital jurors’ opinions as stated:

“Residual doubt over the defendant’s guilt is the most powerful “mitigating” fact. -- [The study] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.”

**Davis**, 132 F.Supp.2d at 463, (citing **Tarver**, 169 F.3d at 715, discussing Stephen P. Garvey, *Aggravation and Mitigation and Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998)).

The **Davis** court concluded its survey of Eleventh Circuit law by addressing the recent case of **Chandler v. United States**, 218 F.3d 1305 (11th Circuit 2000), cert. denied, 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001) which also acknowledged the validity of the strategy of raising residual doubt at punishment.

The **Davis** court then addressed various state statutory provisions regarding the admissibility of certain mitigating evidence. For example, the court noted that while the Ohio statute suggests the admissibility of residual doubt by including a "catch all" provision, the Ohio courts have precluded the admission of residual doubt by holding that it is not considered "mitigating evidence." **Davis**, 132 F.Supp.2d at 465.

The **Davis** court also reviewed California case law interpreting the California capital sentencing statute. California courts permit the introduction of residual doubt arguments in mitigation in the penalty phase. *Id.* (citing several California cases), and further addressed several policy arguments that weigh in favor of the admission of residual doubt evidence in the sentencing phase of capital cases:

"Nevertheless, being convicted "beyond a reasonable doubt" does not mean a person is in fact guilty. Innocent people have been convicted and many, hopefully most, were ultimately exonerated. This is possible as long as the person is alive, even if imprisoned. Capital punishment does not allow for that correction. The United States Supreme Court has acknowledged repeatedly that "death as a punishment is unique in its severity and irrevocability." **Gregg**

**v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2902, 49 L.Ed.2d 859 (1976); **Corbitt v. New Jersey**, 439 U.S. 212, 217, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) . . . . The irrevocability of the death penalty, the recognition that it is “an extreme sanction, suitable to the most extreme of crimes,” **Gregg**, 428 U.S. 187, and the reality that mistakes are made weigh very heavily on one side of the scales. On the other side of the scales is the alternative to capital punishment which is, under virtually all, if not all, the capital sentencing procedures in the country, life imprisonment. If a guilty offender is spared capital punishment, he is not released onto the street to jeopardize the health and safety of others as he would be if he had been acquitted outright. Almost invariably, he is imprisoned in a maximum security facility, a severe punishment in and of itself and one that is protective of society.” **Davis**, 132 F.Supp.2d at 467-68.

Finally, the court cited Justice Marshall’s dissent from the denial of certiorari in ,

**Heiney v. Florida**, 469 U.S. 920, 921-22 , 105 S.Ct. 303, 83 L.Ed.2d 237 (1984):

“There is certainly nothing irrational--indeed there is nothing novel--about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.” **Davis**, 132 F.2d at 467-68.

As a result of all the above-referenced analysis, the **Davis** Court held that a residual doubt argument is permissible in the sentencing phase, and it must be considered by the jury if offered by the defense. **Id.**

In **State v. Hartman**, 42 S.W.3d 44 (Tenn. 2001), the Supreme Court of Tennessee reiterated its earlier holding in **State v. Teague**, 897 S.W.2d 248 (Tenn. 1995) that “Tennessee law requires that a defendant be allowed to present evidence at a re-sentencing