

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,²⁷ 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, 11th 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