

Of course, Applicant recognizes that there is no constitutional mandate for a state to provide life without parole as an alternative to death, any more than it has to give jurors the discretion to assess probation, or any term of years, in a particular capital case. However, when Texas chooses its "non-weighing" scheme making future dangerousness its single aggravating factor that mandates death, it may not come back years later and tack on a mitigation special issue that is so illogical the jury will not use it to nullify their future dangerousness verdict. At least the State cannot do so without offending the Eighth Amendment.

The structure of the Texas death penalty scheme has resulted in the imposition of the death penalty, by default, in Applicant's case, and its provisions therefore offend the principles of the Eighth Amendment to the United States Constitution, which guarantees a citizen's right to be free from cruel and unusual punishment. U.S. Const. Amend. VIII

CLAIM FOR RELIEF NUMBER FORTY-SIX

THE CONTINUING THREAT SPECIAL ISSUE WAS UNCONSTITUTIONAL, AS APPLIED TO OBTAIN THE DEATH PENALTY, BECAUSE THAT ISSUE WAS NOT SUSCEPTIBLE TO PROOF BEYOND A REASONABLE DOUBT AND THE JURY COULD NOT APPLY THE RULE FOR DECISION (BEYOND A REASONABLE DOUBT) FAIRLY IN THE CONTEXT OF THE PUNISHMENT QUESTION. U.S. CONST. AMEND. VIII

When a system, like the criminal justice system, is based upon the need to make decisions, to render judgments, it is inevitable that some of the decisions will be wrong; errors will be made. There is a necessity, then, to establish in advance a rule for decision, a framework that will reflect a preliminary judgment as to what type of error is more to be avoided. The criminal justice system is based on the judgment that it is better to err on the side of freeing the guilty than convicting the innocent, so that the rule for decision favors the accused; the burden of proof is on the State and it is weighted toward the defense with the degree of proof: beyond a reasonable doubt.

In the Texas death penalty scheme, specifically the continuing threat special issue, the rule for decision: proof beyond a reasonable doubt, cannot be fairly applied, and was not fairly applied in the circumstances of Applicant's case. When the jury has declined to acquit the defendant, and the testimony has shown him to be dangerous to free society (in that he may not be "curable", but only controllable, in prison society) then at the punishment phase of a Texas capital trial, in which future dangerousness is the only aggravating factor to be addressed, and the jury is instructed there is a possibility of parole, no jury will be able to abide by the rule for decision: proof beyond a reasonable doubt of future dangerousness.

The rule for decision embodied in the standard of proof beyond a reasonable doubt is that the factfinder is supposed to favor an "erroneous acquittal" over an erroneous conviction: "When in doubt, acquit". Instead, in the circumstances of this case, at the punishment phase of the Texas trial, the jury will not tolerate any doubt, much less a

"reasonable doubt" of the Applicant's being one day paroled into free society.

That mere possibility has the inevitable effect of reducing the prosecution's burden of proof to virtually zero. The burden of proof, the rule for decision, means that the jurors are supposed to answer "no" to the special issue unless the State has convinced them beyond a reasonable doubt of the probability the Applicant will commit criminal acts of violence that will constitute a continuing threat to society. The jurors are so likely to answer "yes" based on the mere possibility of parole release that the burden of proof is meaningless. The jurors will interpret a reasonable doubt to mean any tiny degree of likelihood because they are not willing to tolerate any risk, at whatever time, of the Applicant's release.

The jurors were charged at punishment in terms of Art. 37.071, Sec. 2(e),

V.A.C.C.P. They were told:

"The State must prove Special Issue No. 1 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 1.

It is not required that the State prove Special Issue No. 1 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant. (CR1, 178

The United States Constitution requires the State to prove a statutory aggravating factor beyond a reasonable doubt in a death penalty case. **Walton v. Arizona**, 497 U.S. 639, 650, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part, on other grounds.