

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.

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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.

When the State has life without parole, the prosecutor cannot argue that the defendant is a continuing threat or a future danger to society without also telling the jury that the defendant can never be released into free society. That truth-in-sentencing rule tells the prosecutors they cannot mislead the jury with the possibility of the defendant's danger to free society unless he might be in free society. If the defendant can be shown to be a danger in prison society, the State may obtain a "yes" answer based on that evidence, but according to the rule in **Simmons**, the State may not mislead the jurors by raising a danger that does not exist, as a necessary corollary to that restriction, neither may the State exaggerate the danger that does exist, under the existing law. See, **Simmons v. South Carolina**, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); **Shafer v. California**, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001).

The jury faces a decision-making problem at the punishment phase of a capital murder trial concerning the person they have just found guilty of a violent, dangerous act. As in other areas, decision-makers in the legal field are often faced with uncertainty in the course of their duties, yet some norm of decision-making has to be established so that uncertainty will not paralyze the system, which must proceed. The standard itself has never been changed in American criminal jurisprudence; it has remained the State's burden to establish its contention beyond a reasonable doubt.

In England and the United States, in criminal trials, there is and has been an explicit rule for arriving at a decision in the face of uncertainty: "A person is innocent until proven

guilty." "Proven" is clarified by the requirement that the evidence of guilt (or continuing threat) must be compelling beyond a reasonable doubt. The command of the rule of decision is, "When in doubt, acquit." The jury must not be equally wary of an erroneous conviction and an erroneous acquittal: the error that is to be avoided, according to the rule for decision is the erroneous conviction (here, the erroneous prediction that the defendant will be a continuing threat, which is the death decision). The command of the rule is, "When in doubt; answer no to continuing threat." The concept is often expressed by familiar maxim. "Better a hundred guilty men go free, than one innocent man be convicted." Translated into the context of punishment in Texas death penalty cases in which the only aggravating factor concerns the protection of society, rather than retribution, the rule dictates, "Better a hundred dangerous men be confined for life than one non-dangerous man be executed."

The consequences of the rule for society, are far less serious in the death penalty punishment context than in guilt, where a man wrongly "acquitted" of future dangerousness does not go free, but is imprisoned for life. So, if we as a society continue to maintain the rule at the trial itself, how much more easily should it be accommodated as the rule for determining whether a convicted capital murderer is executed or is given a sentence of life in prison? It is assumed that in most cases a conviction, if erroneous, will do irreversible harm to the individual, who is seen as weak and defenseless in relation to the community and deserving of the protection of being presumed innocent. An erroneous acquittal, on the other hand, damages society because the person who actually committed a crime goes unpunished

and may commit additional crimes. The deterrent effect of punishment for the rest of society is reduced, also, if it becomes known that a guilty person went free. To this point, the American system has judged that society is able to sustain these damages without serious consequences, or at least without consequences that outweigh those of erroneous conviction of an innocent individual.

When a convicted capital murderer has shown himself to be dangerous to free society, the jurors are not likely to accept any risk, however small, that he may be released into free society. In Appellant's case, the prosecution took full advantage of the fact that Dr. Gollaher acknowledge to no one, not even an expert, could accurately predict at the time of trial, the probability of Applicant's being a threat to free society when and if he came up for parole at some unknown time in the future. The jurors were required to make a prediction which Dr. Gollaher admitted her own professional and ethical guidelines did not allow her to make. (R.R, 27, 147).

The rule for decision: proof beyond a reasonable doubt, requires the jurors to favor a life answer (an "acquittal") if they harbor such a doubt about the correctness of their answer. The risk the Texas jury is assessing is not the risk of the "dangerous" defendant's being a threat to free society; it is the risk that he will be released into free society at some time, where the evidence tells them he might still be a threat. The question for the jury then becomes not so much a question of predictive fact as a moral question, and the jurors are not likely to tolerate any risk at all in the circumstances, as the jurors in Applicant's case "could

not chance the possibility” of his being released on parole.

As the Supreme Court reasoned in **Beck v. Alabama, supra**, where the Court reversed for the failure to provide an option for the jury to convict the capital defendant of a lesser included offense, although in theory the jury would choose acquittal when the evidence did not support conviction for the greater offense, that option was not a realistic one because the evidence showed the Defendant had committed a crime. The risk was too great, the Court found, that theory would diverge from fact, and the defendant would be convicted upon less than proof beyond a reasonable doubt of every element of the offense. **Id.**, 447 U.S. at 635. Here, it is demonstrably true that Applicant was sentenced to death upon less than proof beyond a reasonable doubt of the continuing threat special issue, because the Texas Death penalty statute did not provide jurors with the sentencing option life without parole.

#### **IV. PRAYER FOR RELIEF**

WHEREFORE, Applicant, William Darin Irvan, prays that this Court:

A. Issue a writ of habeas corpus to have him brought before it, to the end that he may be discharged from his unconstitutional confinement and restraint and/or be relieved of his unconstitutional sentence of death;

B. Conduct a hearing at which argument may be offered concerning the allegations of his petition;

C. Permit him, because of his indigence, to proceed without prepayment of costs and