
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES

FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN, AND PETER CHICKRIS

SUBJECT: 06/11/08 COURT OF CRIMINAL APPEALS OPINIONS

DATE: 07/03/08

CC: JACK THOMPSON

***Ex Parte Chi*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,930; AP-75931, 06/10/08].**

HERVEY, J., *announced the judgment of the Court and delivered an opinion in which KELLER, P.J., Meyers, and KEASLER, JJ., joined. COCHRAN, J., filed a concurring opinion in which WOMACK, J., joined PRICE, J., filed a dissenting opinion. JOHNSON, J., filed a dissenting opinion in which HOLCOMB, J., joined.*

FACTS: A jury convicted defendant of capital murder, the Court of Criminal Appeals (CCA) affirmed his conviction and denied his initial application for writ of habeas corpus. The trial court then set his execution date. Arguing that the Texas’ lethal injection protocol violates the Eighth Amendment prohibition of cruel and unusual punishment, defendant filed this subsequent application for habeas corpus and a petition for a writ of prohibition. Holding that challenges to Texas’ lethal injection protocol are not cognizable claims for habeas relief, the CCA denied the application and the petition for writ of prohibition.

POST JUDGMENT WRITS—WRIT OF PROHIBITION

Before a defendant may prevail on a petition for writ of prohibition, he must show he has a clear legal right to the relief he seeks and that he has no adequate remedy at law. ***Ex Parte Chi*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,930; AP-75931, 06/10/08].**

HABEAS CORPUS—LETHAL-INJECTION CHALLENGES

A petitioner must show his entitlement to relief by writ of prohibition by “clear and indisputable,” or “unequivocal,” or “abundantly clear” evidence. The petitioner must make a clear showing that, under certain facts, the law is subject to but one interpretation; he must then show that undisputed facts exist which unequivocally entitle him to a right flowing from that single interpretation. ***Ex Parte Chi*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,930; AP-75931, 06/10/08].**

***Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].**

MEYERS, J., *announced the judgment of the Court and delivered an opinion in which KELLER, P.J., and KEASLER, and HERVEY, J.J., joined. COCHRAN, J., filed a concurring opinion in which WOMACK, J., joined. PRICE, J., filed a dissenting opinion. JOHNSON, J., filed a dissenting opinion in which HOLCOMB, J., joined.*

FACTS: A jury found the defendant guilty of capital murder and sentenced him to death. The Court of Criminal Appeals (CCA) affirmed his conviction on direct appeal and denied his first habeas application. The Fifth Circuit reversed and remanded the case to the trial court for a new sentencing hearing. On retrial, defendant was again sentenced to death. The CCA affirmed the second conviction and denied defendant's second application for writ of habeas corpus. Defendant filed an application for habeas relief in the federal court challenging the constitutionality of Texas' lethal injection statutes. The federal court ordered defendant to raise the issue in state court. Defendant then filed this application for writ of habeas corpus. Holding that challenges to Texas' lethal injection protocol are not cognizable claims for habeas relief, the CCA denied the application

HABEAS CORPUS—REQUISITES

An application for a writ habeas corpus must state a claim that, if true, would entitle the applicant to habeas relief. The claim must challenge the judgment against the applicant or seek to change his sentence. ***Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].**

HABEAS CORPUS—NECESSARY CLAIMS

An application for a writ of habeas corpus sentencing claim must request a change of either the fact or the length of confinement. ***Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].**

HABEAS CORPUS—DEATH PENALTY WRITS

A death-penalty writ application is not appropriate if it does not challenge the validity of the underlying judgment and which, even if meritorious, would not result in immediate relief from a capital murder conviction or death sentence. ***Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].**

DEATH PENALTY—METHOD

When a defendant is sentenced to death, the sentence shall be executed at any time after 6 p.m. on the day set for execution. Execution shall be by intravenous injection of a

substance or substances in a lethal quantity sufficient to cause death, until the defendant is dead. The specific execution procedure is determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice (TDCJ). *Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].

DEATH PENALTY—METHOD

If a specific lethal injection mixture is determined unconstitutional under the Eight Amendment, a defendant is still not entitled to release or retrial because he would still subject to the same sentence. The execution would simply be carried out by using a different mixture as decided by TDCJ. *Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].

HABEAS CORPUS—DEATH PENALTY WRITS

Habeas corpus serves to remedy existing constitutional violations, it is not for claims that a statute may *potentially* be applied in a way that may possibly be determined to be unconstitutional in the future. Habeas relief is not granted on an abstract proposition. *Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].

HABEAS CORPUS—DEATH PENALTY WRITS

A claim attacking the method by which the death penalty carried out is not a cognizable claim for habeas relief. Such a claim, however, may be cognizable under federal civil rights statutes. *Ex Parte Alba*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,510, 06/10/08].

Williams v. State, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

Keller, P.J., *delivered the opinion of the Court in which* Womack, Keasler, Hervey, Holcomb, and Cochran, JJ., *joined*. Meyers, J., *filed a dissenting opinion*. Price, J., *filed a concurring opinion*. Johnson, J., *filed a concurring and dissenting opinion*.

FACTS: A jury convicted defendant of capital murder and he was sentenced to death. On automatic direct appeal, defendant raised eleven points of error. The CCA affirmed defendant's conviction and sentence holding that: 1) evidence of defendant's future dangerousness was sufficient, in support of death sentence; 2) the trial court erred when it refused to allow defendant to waive submission of the mitigation special issue and, as a result, admitted victim-related evidence; 3) the error was subject to harm analysis because it was not "structural"; 4) the error in admitting victim-related evidence was harmless; 5) the

trial court did not abuse its discretion when it excluded, as hearsay, accomplice's audiotaped statement to police; and 6) the prosecutor's remarks, inviting jury to disregard minimum parole eligibility when considering future dangerousness special issue, was not improper.

FUTURE DANGEROUSNESS ISSUE- JURY'S ASSESSMENT OF DEFENDANT

In practical effect, the future dangerousness special issue turns on the jury's assessment of what kind of person the defendant is: Is the defendant someone who is likely to commit criminal acts of violence in the future? When the defendant knows the victim, and (it may be inferred) is aware of the victim's character or of the relationships the victim has with others, the victim's character and relationships necessarily become relevant to the future dangerousness determination. Such evidence shows that the defendant is the kind of person who would kill someone of that character or with that particular network of relationships. The extent the defendant's knowledge of the victim's relationships give rise to the ability to reasonably foresee the harmful effects the victim's death would have on others, the jury can likewise consider that information with respect to the defendant's future dangerousness. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

FUTURE DANGEROUSNESS ISSUE- REVIEW- LEGAL SUFFICIENCY

In reviewing the legal sufficiency of evidence used to support a jury's answer to the future dangerousness special issue, the reviewing court views the evidence in the light most favorable to the verdict and determines whether any rational fact finder could have found beyond a reasonable doubt that there was a probability that the defendant would commit further criminal acts of violence that constitute continuing threats to society. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE-ADMISSIBILITY- FUTURE DANGEROUSNESS

Victim-related evidence is relevant to show that mitigating circumstances are not sufficient to warrant imposing a life sentence. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE- MITIGATION SPECIAL ISSUE-ADMISSIBILITY

In the context of the mitigation special issue and as rebuttal to the defendant's mitigation evidence, both victim-impact and victim- character evidence are admissible to show: 1) the uniqueness of the victim and 2) the harm caused by the defendant. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE-TRIAL COURT DISCRETION - ADMISSIBILITY

A trial court uses its discretion when admitting victim related evidence; however, it should be mindful that such evidence is subject to limitations under the Rules of Evidence. Victim related evidence is inadmissible when it predominately encourages a comparison based on the greater / lesser worth or morality of the victim. TEX. R. EVID. 403. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE- ADMISSIBILITY- FACTORS

In determining the admissibility or scope of such evidence, the trial court should consider the following factors: 1) the nature of the testimony; 2) the relationship between the witnesses and the victim; 3) the amount of testimony to be introduced; 4) the availability of other testimony relating to the victim impact and character; and 5) the mitigating evidence introduced by the defendant. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE- DEFENDANT UNAWARE OF VICTIM'S CHARACTER

The limitation on victim related evidence applies only to defendants who, at the time of the crime, were not aware of the victim's character or of the impact the victims' death would have on others. TEX. R. EVID. 403. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE- MITIGATION SPECIAL ISSUE

When the defendant is unaware of the victim's character or of the impact the victims' death would have on others, victim-related evidence is "patently irrelevant" to a determination of future dangerousness and would instead relate only to the mitigation special issue. When the victim-related evidence is relevant only to mitigation special issue, the defendant may waive reliance on and submission of the mitigation issue, leaving such evidence irrelevant and not admissible. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE- DEFENDANT AWARE OF VICTIM'S CHARACTER

When the evidence shows that, at the time the crime was committed, the defendant was aware of the victim's character or of the impact the victim's death would have on others, victim-related evidence is relevant to the issue of defendant's future dangerousness and moral culpability. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE-ADMISSIBILITY- FUTURE DANGEROUSNESS

The future dangerousness issue asks whether there is a probability that the defendant will commit further criminal acts of violence that will constitute continuing threats to society. Because the future dangerousness issue is not an all encompassing question, it narrows the evidence the State or defendant may wish to present as “aggravating” or “mitigating.” Such evidence may be given effect through the future dangerousness issue only for the purpose of showing whether or not the defendant constitutes a continuing threat to society. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

VICTIM-RELATED EVIDENCE-REBUTTAL OF MITIGATION EVIDENCE

The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to present by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. Accordingly, the State may conclude that for the jury to meaningfully assess the defendant’s moral culpability and blameworthiness, it should have before it evidence of the specific harm caused by the defendant. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- WAIVER BY DEFENDANT

Generally, a matter may be waived so long as it is not an absolute requirement or prohibition designed to be implemented regardless of the parties’ wishes. By statute, a defendant is permitted to waive any rights secured to him by law with the exception of his right to a jury trial in a death penalty case. As a result, the issue of waiver of the mitigation special issue in a death penalty case turns on whether the defendant’s waiver will be tantamount to waiving his right to a trial by jury. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- WAIVER BY DEFENDANT

A defendant’s waiver of the mitigation special issue is not equivalent to waiving his right to trial by jury because the mitigation special issue is a defensive issue rather than an element of the State’s case. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- WAIVER BY DEFENDANT

Although the mitigation special issue is a defensive issue that cannot be forfeited by the defendant’s inaction, it may be waived; in fact, the defendant has a right to insist upon

its waiver. In other words, the mitigation issue belongs to the defendant, and he should be allowed to exercise the “strategic decision” to forego it, if that is his desire. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- WAIVER BY DEFENDANT

The defendant cannot waive submission of an element of the prosecution’s case to the fact finder. As a strategic decision, however, the defendant is permitted and entitled to waive a defensive issue, including the mitigation special issue. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- WAIVER BY DEFENDANT

The mitigation special issue is a defense issue because: 1) the State has no burden of proof on the issue; 2) the mitigating nature of the issue suggests that it is a defense issue since it is framed as a stand-alone punishment mitigation issue, like mental retardation in death penalty cases; 3) the issue is structured to make the defendant benefit from an affirmative answer because the party who benefits from a “yes” answer to an issue is the party who owns the issue; 4) the defensive nature of the issue is indicated by its placement in subsection (e) of the capital sentencing statute, rather than subsection (b) which contains the State’s special issues; and 5) the mitigation special issue was a legislative response to the Supreme Court’s *Penry* decision and was designed to fix a constitutional deficiency in the old Texas capital sentencing scheme. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE-DEFENDANT WAIVER-REVIEW

No error is immune to a harmless error analysis on review, except for certain federal constitutional errors labeled by the United States Supreme Court as “structural.” Therefore, a court’s error in allowing victim-related evidence to aggregate a defendant’s criminal sentence is not a structural error and thus is subject to the harm analysis. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

JURY CHARGE ERROR – ALMANZA ANALYSIS

Preserved jury charge error is evaluated under *Almanza’s* “some harm” standard unless the reviewing court determines that the error is constitutional in nature, in which case the “beyond a reasonable doubt harmless” standard would apply. Evidentiary errors are evaluated under Rule 44.2 of the Rules of Appellate Procedure, with constitutional error evaluated under the “beyond a reasonable doubt standard” and nonconstitutional error

evaluated under the “substantial rights” standard. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE-DEFENDANT WAIVER-REVIEW

Under the harm analysis, a court reviewing an error which admitted victim-related evidence to aggregate criminal sentence should: 1) assess the prejudicial effect of the anti-mitigating evidence that was admitted but that would have been excluded had the mitigation issue not been given; 2) determine whether the defendant had any mitigating evidence that had significant impact under the mitigation special issue apart from its impact under other special issues, and where there is such evidence, assess the relative strength of the evidence and its special mitigating inference; 3) assess the relative strength of the parties positions on other special issues, particularly any issue of future dangerousness; 4) evaluate the parties arguments to determine whether the error has been emphasized or ameliorated; and 5) examine any instructions given by the trial court that may cure or ameliorate the effect of any anti-mitigating evidence that was improperly before the court. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- ADMISSIBLE EVIDENCE- HEARSAY EVIDENCE

The exclusion of hearsay evidence which supports a defendant’s “factual and state-of-mind defense” may, in some cases, amount to a violation of the defendant’s Sixth Amendment right to compel the attendance of a witness in his favor. In such cases, local rules, such as those prohibiting hearsay, should yield to the Sixth Amendment’s protection. There are two scenarios that raise such a constitutional violation: 1) when a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant and reliable evidence which is critical to his defense; and 2) when a trial court’s clearly erroneous ruling excluding otherwise relevant and reliable evidence that forms such a vital portion of the case that the ruling effectively precludes the defendant from presenting a defense. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

MITIGATION SPECIAL ISSUE- ADMISSIBLE EVIDENCE- HEARSAY EVIDENCE

A trial court has the discretion to exclude out-of-court statements that are hearsay and that do not qualify for any hearsay exceptions. *Williams v. State*, _ S.W.3d._ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].

FUTURE DANGEROUSNESS- ADMISSIBLE EVIDENCE

Parole eligibility is not relevant to a jury's determination of a defendant's future dangerousness because when a jury is considering whether a defendant represents a continuing threat to society, the term "society" includes both prison and non-prison populations. Furthermore, the Legislature has not specified whether the parole eligibility instruction should have any effect on a jury's deliberation on special issues. Therefore, a prosecutor may advocate that the jury not consider the defendant's minimum parole eligibility in determining whether he constitutes a future danger to society, and likewise, the defendant's attorney may advocate for the jury to make such considerations. *Williams v. State*, _ S.W.3d. _ (Tex. Crim. App. 2008) [AP-74,391, 6/11/08].