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VOTING FOR DEATH: LINGERING DOUBTS ABOUT THE CONSTITUTIONALITY OF TEXAS' CAPITAL SENTENCING PROCEDURE

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I. INTRODUCTION

With a series of decisions announced in 1976,[1] the Supreme Court of the United States rejected the contention that the imposition of death as punishment is per se violative of the eighth and fourteenth amendments to the United States Constitution.[2] Although the Court

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1. *See, e.g.,* Jurek v. Texas, 428 U.S. 262, 268 (1976)(argument that imposition of death penalty under any circumstances violates eighth and fourteenth amendments expressly rejected); Proffitt v. Florida, 428 U.S. 242, 247, 259 (1976)(upholding Florida death penalty statute after rejecting argument that capital punishment is unconstitutional per se); Gregg v. Georgia, 428 U.S. 153, 187 (1976)(rejecting contention that death penalty may never be imposed without regard to circumstances of offense, character of offender, or method of imposition); *see also* Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976)(rejected per se unconstitutional argument with regards to capital punishment). The *Roberts* Court declared the Louisiana statute unconstitutional because it established mandatory death sentences for those convicted of first degree murder and provided no procedural safeguards against arbitrary and capricious imposition of death sentences. *See* Roberts, 428 U.S. at 335-36.; *see also* Woodson v. North Carolina, 428 U.S. 280, 299-303 (1976)(North Carolina capital punishment statute held unconstitutional). The *Woodson* Court invalidated the North Carolina statute because it established mandatory death sentences for first-degree murder, allowed unbridled jury discretion, had limited utility as indicator of contemporary values, and failed to require particularized consideration of capital defendant's character and record. *See* Woodson, 428 U.S. at 299-303.

2. *See* U.S. CONST. amend. VIII. The command of the eighth amendment is that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The fourteenth amendment provides, in pertinent part: "No

has subsequently construed the eighth and fourteenth amendments to prohibit the imposition of death as punishment for certain crimes or in certain particularized circumstances,[3] the tenor of its decisions over the course of the last decade unmistakably signals that broad attacks upon the concept of capital punishment are, for the foreseeable future, destined to fail.[4] Given this fact, the focus of capital punishment jurisprudence has necessarily shifted from concern with the overall constitutionality of the death penalty to concern with the procedural integrity of the capital sentencing process.[5]

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 2; *see also* Robinson v. California, 370 U.S. 660, 667 (1962)(eighth amendment applicable to states via due process clause of fourteenth amendment).

3. *See, e.g.*, Ford v. Wainwright, __ U.S. __, __, 106 S. Ct. 2595, 2602, 91 L. Ed. 2d 335, 346 (1986)(eighth amendment prohibits state from inflicting death penalty upon an insane prisoner); Enmund v. Florida, 458 U.S. 782, 801 (1982)(unconstitutional to impose death as punishment on person who aids and abets felony during course of which murder is committed by others, where such person did not kill, attempt to kill, intend to kill, or contemplate that life would be taken); Coker v. Georgia, 433 U.S. 584, 592 (1977)(imposition of death penalty for rape of adult woman was grossly disproportionate and excessive punishment forbidden by eighth amendment); Coker, 433 U.S. at 600 (Brennan, J., concurring)(adhering to position that death penalty repugnant to eighth and fourteenth amendments).

4. *See* McCleskey v. Kemp, __ U.S. __, __, 107 S. Ct. 1756, 1774, 1781, 95 L. Ed. 2d 262, 287 (1987)(concluding that Supreme Court's decisions since *Furman v. Georgia*, 408 U.S. 238 (1972), identify range of constitutionally permissible discretion in imposition of death penalty). Although McCleskey attempted to frame the issue as a broad attack upon the concept of the death penalty because of its allegedly discriminatory application to blacks, and nonwhite defendants whose victims were white, Justice Powell, writing the majority opinion, found "the only question before . . . [the Supreme Court is] . . . whether . . . the law of Georgia was properly applied." *Id.* at __, 107 S. Ct. at 1781, 95 L. Ed. 2d at 296. The *McCleskey* Court, in upholding the Georgia statute, stated that the Supreme Court has neither the responsibility nor the right to define appropriate punishment for crimes. *See id.*

5. *See id.* The shift in emphasis toward ensuring procedural fairness in capital sentencing is evident from the Court's recent scrutinization of the juror selection process. *See e.g.*, Gray v. Mississippi, __ U.S. __, __, 107 S. Ct. 2045, 2056-57, 95 L. Ed. 2d 622, 639 (1987)(improper exclusion of prospective juror from jury panel in death case held reversible constitutional error which cannot be subjected to harmless-error analysis); Darden v. Wainwright, __ U.S. __, __, 106 S. Ct. 2464, 2470-71, 91 L. Ed. 2d 144, 155-56 (1986)(trial court properly excluded venireman from capital jury for cause where prospective juror indicated that he had moral, religious or conscientious principles which would render him unable to recommend death penalty regardless of the facts); Lockhart v. McCree, __ U.S. __, __, 106 S. Ct. 1758, 1766, 90 L. Ed. 2d 137, 149 (1986)(prosecution may properly exclude jurors from guilt-innocence phase of trial who would not, under any circumstances, impose death sentence at punishment phase); Turner v. Murray, __ U.S. __, __, 106 S. Ct. 1683, 1688, 90 L. Ed. 2d 27, 37 (1986)(capital defendant accused of interracial crime is entitled to have prospective jurors informed of victim's race and questioned on issue of racial bias).

This article will describe the jury's statutorily defined role in the punishment phase of a Texas capital murder proceeding and argue that the Texas statute[6] is inherently violative of the eighth and fourteenth amendments because it: (1) misleads jurors by requiring instructions which suggest that the number of juror votes necessary to opt for a sentence of life imprisonment is greater than the actual numerical requirement imposed by state law; (2) impresses jurors with a diminished sense of their individual responsibility for the decision to impose death as punishment; and (3) encourages the jurors to engage in consensus building based upon irrelevant and artificial factors, increasing the risk that a death sentence will be meted out for reasons that bear no relationship to the characteristics of the defendant and the nature of his crime.

II. AN OVERVIEW OF THE TEXAS CAPITAL SENTENCING PROCEDURE

In 1973, the Texas Legislature responded to the United States Supreme Court's decision in *Furman v. Georgia*[7] by instituting a bifurcated procedure for trying capital murder cases.[8] Under the bifurcated system, the jury's role in the initial stage of the proceeding is to determine the defendant's guilt or innocence. If the jury convicts the defendant of capital murder,[9] it then proceeds to address the question

6. *See* TEX. CODE CRIM. P. ANN. art. 37.071 (Vernon 1981 & Supp. 1987).

7. 408 U.S. 238 (1972). The Supreme Court declared the death penalty statutes of Texas and Georgia unconstitutional in the cases of *Branch v. State*, 447 S.W.2d 932 (Tex. Crim. App. 1969), *rev'd, sub nom., Branch v. Texas*, and *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969), *rev'd, sub nom., Jackson v. Georgia*, which were consolidated within the *Furman* decision. *See id.* at 239-40.

8. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972)(declaring Texas' capital punishment procedure unconstitutional); TEX. CODE CRIM. P. ANN. art. 37.071(a) (Vernon 1981 & Supp. 1987)(effective date June 14, 1973)(once defendant's guilt determined, separate sentencing proceeding held). At the sentencing hearing, evidence is presented and argument of counsel is had in much the same manner as in the guilt-determination stage of the trial. *See* TEX. CODE CRIME P. ANN. art 37.071(a) (Vernon 1981 & Supp. 1987).

9. *See* TEX. PENAL CODE ANN. § 19.03 (b) (Vernon 1981 & Supp. 1987)(offenses enumerated in this section classified as capital felonies). "Capital" felonies include any murder: (1) of a peace officer or fireman who is officially discharging his duties and who the defendant knows to be a peace officer or fireman; (2) intentionally committed in the course of committing, or attempting to commit aggravated sexual assault, burglary, robbery, arson, or kidnapping; (3) accomplished by providing, or committed for, remuneration or promise of remuneration; (4) committed while escaping or attempting to escape from any penal institution; (5) of an employee of a penal institution by an inmate; or (6) of more than one person committed by the same person during: (a) the same criminal transaction; or (b) different crimi-

of punishment.[10] Texas law provides that life imprisonment and death are the sole alternative punishments for the crime of capital murder.[11]

During the sentencing phase of a Texas capital murder trial, the jury's function is to respond "yes" or "no" to three separate questions.[12] The jury's responses to each of three punishment phase questions determine the sentence ultimately imposed, leaving the purely ministerial task of pronouncing sentence to the judge. If the jury responds affirmatively to each of the three questions mandated by statute, the trial court judge must sentence the defendant to death.[13] The statute requires the court to instruct the jury that it may respond "yes" to a question only if the jurors are in unanimous agreement that "yes" is the appropriate response,[14] and that it may respond "no" to a question only if ten or more jurors agree that a negative response is appropriate.[15] A negative response to any one of the questions compels the court to impose a sentence of life imprisonment.[16] The Texas statute does not expressly require that jurors be informed of the impact of three affirmative responses; however, as a practical matter, each juror is informed during voir dire that three "yes" responses will automatically result in the trial judge's imposition of the death

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nal transactions, but pursuant to a common scheme or course of conduct. *See id.* § 19.03 (a)(1)-(a)(6)(B). The deaths caused in the above-described situations must satisfy all the requisites for "murder." *See id.* § 19.03 (a); *see also id.* § 19.02 (a)(1) (defining "murder" for purposes of section as death of another committed intentionally or knowingly).

10. *See id.* § 12.31 (a) (Vernon 1974 & Supp. 1987)(person found guilty of capital felony must receive sentence of life imprisonment or death). *But see id.* § 19.03 (c) (defendant can be acquitted of capital murder but found guilty of murder or any lesser included offense).

11. *See id.* 12.31(b). All prospective jurors must be informed that "a sentence of life imprisonment or death is mandatory on conviction of a capital felony." *Id.*

12. *See* TEX. CODE CRIM. P. ANN. art. 38.071 (b) (Vernon 1981 & Supp. 1987). The jury is asked to respond to the following questions:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id.

13. *See id.* at art. 37.07(e) (jury's affirmative answer to all three questions mandates death penalty).

14. *See id.* at art. 37.071(d)(1).

15. *See id.* at art. 37.071(d), (e).

16. *See id.* at art. 37.071(d).

sentence.[17]

Prior to 1981, the Texas capital sentencing statute made no provision for the punishment to be exacted when the jurors were unable to respond either "yes" or "no" to one or more of the three punishment phase questions. Thus, in the pre-1981 period, neither the jury members nor the trial judge had an understanding of the sentence resulting from the jury's failure to satisfy the "12-10 Rule," i.e., the failure to muster either twelve "yes" votes or ten "no" votes in response to any one of the three punishment phase questions.[18] The uncertain result under the pre-1981 law whenever the jury failed to reach a numerical consensus within the parameters of the 12-10 Rule was eliminated by the decision of Texas Court of Criminal Appeals in *Eads v. State*.[19] In *Eads*, the Court of Criminal Appeals held that the jury's failure to respond to any one of the three punishment phase questions resulted in a complete mistrial, necessitating a new trial on both the issues of guilt and punishment.[20]

In 1981, acting in apparent response to the *Eads* decision, the Texas Legislature amended the statute governing procedures in capital cases to provide for the defendant to receive a sentence of life imprisonment if the jury is unable to answer any of the punishment phase questions:

> (e) if the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on *or is unable to answer any issue* sub-

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17. *See, e.g.*, Adams v. Texas, 448 U.S. 38, 46 (1980)("Jurors will characteristically know that affirmative answers to the questions will result in the automatic imposition of the death penalty. . ."); Hovila v. State, 532 S.W.2d 293, 294 (Tex.Crim. App. 1975)(jury will know effects of alternative answers to capital sentencing special issues). *But see* Burns v. State, 556 S.W.2d 270, 279-80 (Tex. Crim. App. 1977)(trial court did not err in refusing to permit counsel to inform prospective jurors of the effect of "yes" and "no" responses to the questions asked the jury at the punishment stage of the trial). In any event, the jurors must be informed that life imprisonment and death are the sole alternative punishments for the crime of capital murder. *See* TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974 & Supp. 1987).

18. *See* Jurek v. Texas, 428 U.S. 262, 269 n.5 (1976). Footnote 5 to the plurality opinion in *Jurek v. Texas* noted that Texas' pre-1981 capital sentencing statute was "unclear as to the procedure to be followed in the event the jury is unable to answer the questions." *See id. But see* Burns v. State, 556 S.W.2d 270, 279-80 (Tex. Crim. App. 1977)(no error in trial court's refusal to explain to prospective juror effect of "yes" or "no" answers to capital sentencing questions). Interestingly, the *Burns* opinion noted that "the precise question raised by appellant's contention that the court erred in not allowing counsel to tell the prospective jurors the effect of "yes" and "no" answers [to the questions asked the jury at the punishment stage of the trial] was not before the United States Supreme Court in *Jurek v. Texas*. . ." *Id.* at 279.

19. 598 S.W.2d 304 (Tex. Crim. App. 1980).

20. Eads v. State, 598 S.W.2d 304, 308 (Tex. Crim. App. 1980).

> mitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.[21]

Simultaneously, the Legislature added language to the capital sentencing statute expressly prohibiting the trial court, prosecutor and defense counsel from informing jurors of the effect of their failure to agree on either an affirmative or negative response to one of the punishment phase questions. That language is found in Subsection (g) of the Texas capital sentencing statute. Subsection (g) provides:

> [t]he court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.[22]

It is critical to note that the Texas capital sentencing procedure, as amended, renders the ten vote prerequisite to a "no" response irrelevant, for the convicted defendant will receive a sentence of life imprisonment if only *one* juror is persuaded to respond "no" to one of the three questions. The defendant receives a life sentence if he convinces only one juror to register a "no" vote in response to any one of the three punishment questions because one juror's negative response renders the jury as a whole unable to satisfy the unanimity prerequisite for an affirmative response. When presented with the jury's failure to respond affirmatively to the punishment questions, the 1981 amendment requires the trial court to impose a sentence of life imprisonment. For this reason, the Texas Court of Criminal Appeals has expressly recognized that "a jury's inability to answer a punishment question in a capital murder case has the same sentencing effect as a negative answer."[23]

The constitutional dilemma arises from the fact that subsection (g), on its face, prohibits jurors from being informed that a single juror's negative vote will result in the defendant's receiving a sentence of life imprisonment. Thus, even though the 1981 amendment lowered the numerical threshold necessary to impose life imprisonment as punishment, post-1981 jurors are never apprised of this fact. Instead, they receive the same instructions regarding the 12-10 Rule that jurors in pre-1981 capital murder trials received. Arguably, the trial court's inability to advise the jurors that each of them, standing alone, has the

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21. TEX. CODE CRIM. P. ANN. art. 37.071(e) (Vernon 1981 & Supp. 1987)(emphasis supplied).

22. *Id.* at art. 37.071(g).

23. Padgett v. State, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986).

power to opt for a sentence of life imprisonment causes jurors to reach sentencing determinations within a system that creates, in the minds of the jurors, an absolute numerical threshold of ten "no" responses before the defendant can be sentenced to life imprisonment. In essence, the statutory prohibition against informing jurors that each of them has the power to opt for a sentence of life imprisonment places the defendant in imminent danger of being arbitrarily sentenced to death by depriving the jury of accurate information regarding the status of state law; information which has a direct bearing on the sentencing process itself and which might, in at least some cases, be outcome-determinative.

III. THE HEIGHTENED NEED FOR RELIABILITY

As a general matter, the Constitution of the United States guarantees all criminal defendants "a fair trial [but] not a perfect one."[24] The Supreme Court of the United States, however, has required a more stringent standard in death penalty cases, holding on numerous occasions that the eighth and fourteenth amendments demand a heightened degree of reliability where the defendant is facing the ultimate penalty.[25] To this end, the Court has held that the procedures

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24. Lutwak v. United States, 344 U.S. 604, 619 (1953)(Court found that where evidence "fairly shrieks" of defendant's guilt, wrongful admission of single hearsay statement insignificant); *see also* Bruton v. United States, 391 U.S. 123, 135 (1968)(jury will normally follow trial court's instructions to disregard irrelevant or inadmissible matters); *cf.* FED. R. CRIM. P. 52(a) (harmless error rule).

25. *See* Zant v. Stephens, 462 U.S. 862, 884-85 (1983). The Court, in discussing the judicial scrutiny necessary in death penalty cases, stated:

> Two themes have been reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations. On the one hand, as the general comments in the *Gregg* joint opinion indicated . . . and as THE CHIEF JUSTICE explicitly noted in *Lockett v. Ohio*, . . . there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

Id. (citations omitted); *see also* Caldwell v. Mississippi, 472 U.S. 320, 323, (1985)(eighth amendment demands heightened degree of reliability in determining death is appropriate punishment in specific case); Booth v. Maryland, __ U.S. __, __, 107 S. Ct. 2529, 2535-36, 96 L. Ed. 2d 440, 451 (1987)(presence or absence of emotional distress of victim's family and vic-

employed at the sentencing phase of a capital murder proceeding must satisfy the requirements of the due process clause.[26]

The constitutional sufficiency of instructions given to a capital sentencing jury must be tested from the standpoint of "what a reasonable juror could have understood the charge as meaning."[27] Thus, the initial inquiry is whether the instructions typically given in the sentencing phase of a Texas capital murder proceeding might leave reasonable jurors with an incorrect understanding of applicable state law. For purposes of addressing this issue, it is helpful to refer to the fol-

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tim's personal characteristics constitutionally irrelevant considerations in death penalty cases because of unique severity of death penalty); Sumner v. Shuman, __ U.S. __, __, 107 S. Ct. 2716, 2727, 97 L. Ed. 2d 56, 72 (1987)(Constitution mandates "heightened reliability in death penalty determinations through individualized sentencing procedures"). Justice Blackmun's opinion for the Court specifically noted that while individualized sentencing procedures in noncapital cases are mere matters of state policy, such procedures take on a constitutional dimension in the context of a capital case. *See* Sumner, __ U.S. at __, 107 S. Ct. at 2719, 97 L. Ed. 2d at 62.

26. *See, e.g.,* Estelle v. Smith, 451 U.S. 454, 468-69 (1981)(evidence obtained through psychiatric examination ordered by trial court cannot be introduced in sentencing phase of capital murder trial to prove future dangerousness if defendant not properly informed of constitutional rights); Beck v. Alabama, 447 U.S. 625, 627 (1980)(imposition of death penalty in case where jury not given instructions on lesser included offenses denies due process); Presnell v. Georgia, 439 U.S. 14, 16 (1978)(adherence to standards of procedural due process equally important and required in both guilt-determination and sentencing phases of capital murder case); *see also* Gardner v. Florida, 430 U.S. 349, 362 (1976)(due process denied where death sentence imposed in partial reliance upon presentencing report which defendant had no opportunity to rebut). In *Gardner*, the plurality opinion stated:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Id. at 358 (citations omitted). In a concurring opinion, Justice White stated his view that the need for reliability in determining that death is an appropriate punishment derives solely from the eighth amendment's prohibition against cruel and unusual punishments. *See id.* at 361-64. Accordingly, Justice White declined to approve the plurality's use of the due process clause "other than as the vehicle by which the strictures of the eighth amendment are triggered in this case." *Id.* at 364.

27. *See* California v. Brown, __ U.S. __, __, 107 S. Ct. 837, 839, 93 L. Ed. 2d 934, 940 (1987)(quoting Francis v. Franklin, 471 U.S. 307, 315-16 (1985)). In *Brown,* the Court held that a trial court's instruction to ignore "sympathy factors" was not violative of eighth and fourteenth amendments. *See id.* at __, 107 S. Ct. at 840-41, 93 L. Ed. 2d at 940; *see also* Sandstrom v. Montana, 442 U.S. 510, 524 (1979)(jury instruction that person intends "ordinary consequences of his ordinary acts" held constitutionally impermissible where crime charged requires intent).

lowing segment taken from pattern jury instructions published for use in the punishment phase of a Texas capital murder trial:

> The state must prove each issue submitted beyond a reasonable doubt, and the jury *shall return a special verdict of "yes" or "no"* on each issue submitted.
>
> You may not answer any issue 'yes' unless you agree unanimously.
>
> You may not answer 'no' unless ten or more jurors agree.
>
> Now bearing in mind the foregoing instructions, you *will answer* the following issues . . . .[28]

The pattern instructions track the statute faithfully and inform the jurors that they should not respond "yes" to any one of the punishment phase questions unless they are in unanimous agreement on such response.[29] An ambiguity emerges, however, when this instruction is juxtaposed against the earlier admonition that the jury "shall return a special verdict of yes or no" on each of the three punishment phase questions, and against the later charge directing the jury that it "will answer" the three special issues.[30] Superimposing the 12-10 Rule upon instructions mandating a "yes" or "no" response to each question creates, in the minds of the jurors, an ostensibly irreconcilable conflict. A reasonable juror might construe the instructions as requiring the jury to respond affirmatively unless a total of ten jurors are in agreement that "no" is the appropriate response simply because *some* response must be entered.[31]

Instructions which couple the notion that some response must be entered to each of the three questions, with the false implication that at least ten jurors must agree on a negative response to one of the punishment phase questions before the defendant can be sentenced to life in prison, may cause the jurors to return three affirmative re-

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28. MCCORMICK & BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL, § 81.15, 288-91 (9th ed. 1985)(emphasis supplied).

29. *See* TEX. CODE CRIM. P. ANN. art. 37.071(d)(1) (Vernon 1981 & Supp. 1987)(court must instruct jury that unanimity required for "yes" answer).

30. *See supra* notes 7-18 & 21-22 and accompanying text. *Compare id.* at 37.071(c) (stating "jury shall return" "yes" or "no" answer on each special issue) *with id.* at art. 37.071(d) (instructing that court "shall charge" jury on answers to special issues).

31. *Cf.* Cabana v. Bullock, __ U.S. __, __ n.2, 106 S. Ct. 689, 695 n.2, 88 L. Ed. 2d 704, 714 n.2 (1986)(finding inherent ambiguity in jury instructions on elements of capital and felony murder). The *Cabana* Court discussed the confusion jurors face when they are confronted by instructions, one general and one specific, which are in apparent irreconcilable conflict. In the Court's view, a reviewing court presented with such contradictory instructions has no way of determining which instructions the jurors applied in reaching their verdict. *See id.*

sponses for reasons that have absolutely nothing to do with the individual characteristics of the defendant or the nature of his crime.[32] Thus, the risk of an arbitrary result is greatly enhanced because the jurors are not permitted to understand the consequences of their individual votes.[33]

A review of the relevant case authority reveals that Texas' statutory prohibition against informing jurors of the sentencing effect of their *individual* responses to the three punishment phase questions is inconsistent with basic notions of fairness which have long been a part of death penalty jurisprudence in the United States.[34] In *Calton v. Utah*,[35] the Supreme Court of the United States reversed a conviction under the statutes of Utah Territory in which the jury had not been informed of its right under the territorial code to recommend a sentence of imprisonment at hard labor instead of death:

> While in this case the jury were instructed as to what constituted murder in the first and second degrees, they were not informed as to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death. If their attention had been called to that statute, it may be that they would have made such a recommendation, and thereby enabled the court to reduce the punishment to imprisonment for life.[36]

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32. *See* State v. Williams, 392 So.2d 619, 633-35 (La. 1980)(instructions substantially similar to those mandated by Texas statute fundamentally flawed because jury left free to speculate).

33. *See supra* notes 7-21 and accompanying text. If it is reasonable to assume that jurors who convict a defendant of capital murder wish to see him punished, then it is arguable that even the pre-1981 Texas juror voting procedure encouraged jurors to reach a consensus by creating a level of uncertainty regarding the question of punishment unless the jurors voted within the parameters of the 12-10 Rule on each of the three questions. *See* Jurek v. Texas, 428 U.S. 262, 269 n.5 (1976)(procedure unclear in event jury unable to agree on special issues during sentencing phase of Texas capital murder case).

34. *See* Sumner v. Shuman, __ U.S.__, __, 107 S. Ct. 2716, 2722, 97 L. Ed. 2d 56, 71 (1987)(individualized sentencing procedures in noncapital cases matter of state policy, but attain constitutional significance in death penalty cases). Justice Blackmun's majority opinion borrowed from the Supreme Court's historical rationale synthesized in *Woodson*, which concluded that individualized sentencing in capital cases is mandated by the eighth amendment's underlying respect for humanity. *See id.* (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

35. 130 U.S. 83 (1889).

36. *Id.* In his opinion for the Court, the first Justice Harlan adopted the following statement from the dissenting opinion in the lower court, and characterized it as reflecting "the fundamental rules obtaining in the trial of criminal cases involving life":

> [T]he prisoner was deprived of a substantial right. The determination of the question as to whether he should suffer death or imprisonment was one of vital consequence to him.

Thus, *Calton* established the rule that a capital sentencing jury must be fully informed of its statutory right to *recommend* alternative forms of punishment if such a recommendation is a prerequisite to the trial court's ability to impose a sentence other than death.[37] Where, as in Texas, the capital sentencing jury is itself the final sentencing authority, the need for full disclosure of all available sentencing options, and the requirements for selecting each of such options, is, if anything, even more critical.[38]

The Supreme Court next addressed the adequacy of capital sentencing instructions over a half-century after *Calton* in *Andres v. United States*.[39] The Court, in *Andres*, considered the propriety of voting instructions given to a jury in the context of the capital sentencing scheme under a federal statute which required juror unanimity as to both guilt and punishment before the jury could return a verdict.[40] The trial court had instructed the jury that "before you may return a qualified verdict of murder in the first degree without capital punishment, . . . your decision to do so must, like your regular verdict, be unanimous."[41] The *Andres* Court, measuring the adequacy of the

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> The jury, to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility in the matter, so as to require them to exercise their judgment and discretion in relation to it, and, by the verdict they rendered the court had none.

Id. (quoting Territory v. Catton, 16 P. 902, 910 (Utah 1888), *rev'd sub nom.*, Calton v. Utah, 130 U.S. 83 (1889)).

37. *See id.* at 86-87.

38. *Cf.* Hicks v. Oklahoma, 447 U.S. 343, 345-47 (1980)(denial of due process occurred where jury instructed to assess punishment of forty years imprisonment even though the statute authorized jury to impose any sentence of "not less than ten . . . years.").

39. 333 U.S. 740 (1948).

40. *See id.* at 752 (instructions improper where they fail to convey that jury's decision to refuse to qualify verdict by adding words "without capital punishment" must be unanimous). The litigants in *Andres* urged differing views as to the requirement of unanimity both as to guilt and the refusal to qualify the verdict by adding the words "without capital punishment":

> The Government argues . . . that the jury [must] first unanimously decide the guilt of the accused and, then, with the same unanimity decide whether a qualified verdict shall be returned. As the statute requires the death penalty on a verdict of guilty, the contention is that the jury acts unanimously in finding guilt and the law exacts the penalty. It follows, that if all twelve of the jurors cannot agree to add the words "without capital punishment," the original verdict of guilt stands and the punishment of death must be imposed. The petitioner contends that . . . unanimity [is required] in respect to both guilt and punishment before a verdict can be returned. It follows that one juror can prevent a verdict which requires the death penalty, although there is unanimity in finding the accused guilty of murder in the first degree.

Id. at 746. The Court adopted the petitioner's reading of the statute. *See id.* at 752.

41. *Id.* at 751.

trial court's instructions from the standpoint of whether they clearly conveyed to the jury the requirement of unanimity with respect to punishment, found them deficient because they "might" have caused the jury to reasonably conclude that if all jurors could not agree to opt for mercy by returning a qualified verdict, then the jury *must* render an unqualified verdict.[42] The Court indicated, however, that the instructions would have passed muster if they had informed the jurors that they should not return a verdict of guilty without qualification if they were convinced that capital punishment should not be inflicted.[43]

The decisions in *Calton* and *Andres* reflect the Supreme Court's early adoption of the principle that sentencing instructions in death cases must be both complete and free of ambiguity. Although the rationale underlying the Court's holdings in *Calton* and *Andres* was not expressed as constitutional doctrine, the cases provide unequivocal authority for the proposition that, in capital cases, minimum standards of due process require instructions which inform the sentencing jury of all punishment options available under law, and which leave no room for jurors to speculate as to what they should do, or what sentence will be imposed, in the event that the jury is unable to agree on one of the available sentencing alternatives.[44] Since the Texas stat-

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42. *See id.* at 752. The Court stated:

> It seems to us, however, that where a jury is told first that their verdict must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, the jury might reasonably conclude that, if they cannot agree to grant mercy, the verdict of guilt must stand unqualified. That reasonable men might derive a meaning from the instructions given other than the proper meaning of Section 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.

Id.

43. *See id.* The *Andres* Court explained that an instruction, informing a juror that he should not join a verdict of guilty without qualification unless convinced that the defendant should receive the death penalty, would have satisfied the statute. Alternatively, the Court suggested that an instruction directing the jury that its "conclusion on both guilt and punishment must be unanimous before any verdict could be found" would have been acceptable. *See id.*

44. *See* Winston v. United States, 172 U.S. 303, 312 (1899). The *Winston* Court stated that *Calton* illustrates "the steadfastness with which the full and free exercise by the jury of powers . . . conferred upon them by statute . . . has been upheld and guarded by this court as against the possible effect of any restriction or omission in the rulings and instructions of the judge presiding at the trial." *Id.*; *see also* Webb v. State, 242 S.W. 380, 383 (1922)(opinion on rehearing). In *Webb*, the Supreme Court of Arkansas recognized the reasoning of *Calton* as the premise for a state rule requiring the jury to be fully informed of its sentencing options in a capital case. Unless the jury is informed of all available sentencing options, the defendant is

ute expressly prohibits the jury's receipt of information which would explain the sentencing effect of the jury's inability to respond to one of the punishment phase questions, the principles outlined in *Calton* and *Andres* suggest that instructions given in conformity with the terms of the statute fall short of the minimum standards of constitutional due process.

The pattern instructions quoted above produce the same concerns present in *Andres*. Although the pattern instructions accurately inform the jury that "it may not answer any issue 'yes' unless it agrees unanimously,"[45] they are similar to the instructions found wanting in *Andres* because they direct the jury that it "shall" respond either affirmatively or negatively to each of the three questions.[46] This latter instruction incorrectly suggests that a life sentence may be imposed only if ten jurors agree to respond negatively to one of the questions. Like the jurors in *Andres*, Texas jurors commence deliberations on the question of punishment believing that ten of them must agree on a "no" response before the jury can enter the negative response to a punishment phase question which, in the minds of the jurors, is the key to the defendant's receiving a life sentence. Thus, individual jurors are not made aware that they each possess the power to impose a sentence of life imprisonment.

In *State v. Williams*,[47] the Supreme Court of Louisiana addressed the constitutional sufficiency of instructions given to a capital murder jury which, in form and substance, were directly analogous to those required by the current Texas statute.[48] As in Texas, the Louisiana capital sentencing procedure at issue in *Williams* required the jury to first determine the defendant's guilt. Following conviction, in a separate punishment hearing, the jury would decide which of two possible sentences should be applied in the defendant's case—death or life imprisonment without benefit of probation, parole or suspension of sentence. Similar to the current Texas statute, the Louisiana law then in

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deprived of a "substantial right" because a properly informed jury may have opted to exercise the undisclosed discretion to spare the defendant's life. *See id.*

45. TEX. CODE CRIM. P. ANN. art. 37.071(d)(1) (Vernon 1981 & Supp. 1987).

46. *See id.* at art. 37.071 (d)(1)-(2) (instructing that the "court shall charge the jury").

47. 392 So.2d 619 (La. 1980).

48. *See id.* at 633 (opinion on rehearing). The defendant brought an assignment of error for the failure of the trial court to inform the jurors that their inability to unanimously agree upon a sentence recommendation required the court to impose a life sentence without the benefit of probation, parole or suspension of sentence. *See id.*

effect provided that the convicted defendant could only be sentenced to death upon the unanimous recommendation of the jury, and that any vote short of unanimity would automatically result in the defendant's receiving a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.[49] In *Williams*, the jury deliberated for three hours at the penalty stage of the trial before emerging to inquire if the jury's recommendation had to be unanimous.[50] The trial judge informed the jury that its "recommendation, whatever, as to the two, either death or life imprisonment without benefit—must be unanimous. Must."[51]

On rehearing, the Supreme Court of Louisiana framed the issue as follows:

> The trial judge did not inform the jury either in his general or additional instructions that its inability unanimously to agree on a recommendation would require the court to impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. The issue presented is whether the jurors in a capital sentence hearing must be informed by the trial judge that the defendant will be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, if they are unable to be unanimous on a recommendation.[52]

The Louisiana court held that the instructions were fundamentally flawed because they left the sentencing body free to "speculate as to what the outcome would be in the event there was not unanimity."[53] In the court's view, the instructions were constitutionally unacceptable because they left jurors with the false impression that their failure to unanimously agree on either a sentence of death, or a sentence of life imprisonment without benefit of probation, parole or suspension, might require a new sentencing hearing or perhaps a new trial before

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49. *See id.* Recognizing that the Constitution forbids the imposition of capital punishment in an arbitrary and capricious manner, the Louisiana Supreme Court stated that where sentence is to be imposed by the jury, rather than the judge, the jury must be completely informed of the consequences to the defendant of its decisions. *See id.* at 634. The Court reasoned that this information is necessary for the jury to fulfill its role as the rational link between the criminal justice system and contemporary community values. *See id.*; *see also supra* notes 7-18 and accompanying text discussing Texas law.

50. *See* Williams, 392 So.2d at 633 n.1.

51. *Id.* at 633-34 & n.1.

52. *Id.* at 634.

53. *Id.*

a new jury.[54] This, in turn, might have swayed a single juror to join the majority "rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings."[55] The court held that the existence of this possibility was inconsistent with the constitutional requirement that juror discretion be channeled so as to minimize the risk of arbitrary and capricious action and with the eighth amendment need to satisfy a heightened standard of reliability in the determination to impose death as punishment.[56]

The Texas capital sentencing statute mandates instructions which naturally create *Williams*-type situations. Texas jurors are told that twelve votes are required for a "yes" response and that ten votes are required for a "no" response, but cannot be informed that their failure to agree on either a "yes" or "no" response to each of the three questions will result in the defendant's receiving a life sentence. Accordingly, a reasonable juror might conclude that the same defendant he just agreed to convict of capital murder will be entitled to a new trial or a new sentencing hearing unless the jury returns an affirmative or negative response to each of the three questions by reaching a consensus decision within the numerical boundaries established by the 12-10 Rule. Thus, as the *Williams* court recognized in the context of a Louisiana proceeding, Texas' statutory ban against informing jurors that a life sentence will be imposed if they cannot agree on a response to one of the questions causes the sentencing jurors to focus on reaching a consensus decision which may be based on irrelevant factors, and not on the characteristics of the particular defendant and the nature of his crime. In essence, the jury's attention is diverted from the individualized sentencing task that the Supreme Court of the United States has held to be a constitutional imperative.[57]

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54. *See id.*

55. *Id.* The court concluded that, by allowing the jurors to remain ignorant of the consequences of their failure to unanimously agree upon one response, "the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action." *Id.* at 634-35.

56. *Id.*

57. *See, e.g.*, Sumner v. Shuman, __ U.S. __, __, 107 S.Ct. 2716, 2727, 97 L.Ed.2d 56, 71 (1987)(eighth amendment's underlying respect for humanity requires opportunity for defendant to present any relevant mitigating evidence that could possibly justify lesser sentence); Hitchcock v. Dugger, __ U.S. __, __, 107 S. Ct. 1821, 1824, 95 L. Ed. 2d 347, 353 (1987)(constitutional error to instruct jury to consider only mitigating factors enumerated by statute rather than those urged by defendant); Skipper v. South Carolina, __ U.S. __, __, 106 S. Ct.

Even assuming, arguendo, that consensus building premised upon an irrelevant factor such as the perceived need to satisfy the 12-10 Rule is consistent with current notions of due process, there remains the separate question of whether the Texas system produces the degree of reliability which the eighth and fourteenth amendments demand in death cases. Arguably, the rationale of the Texas Court of Criminal Appeals, in *Padgett v. State*,[58] demonstrates that Texas' statutory prohibition against informing the jury of the sentence resulting from its failure to respond to one of the punishment phase questions yields sentencing results which are inherently unreliable.[59] In *Padgett*, the defendant, who had been charged separately with the simultaneous commission of two capital murders, argued that the jury's failure to respond to one of the three special issues in the sentencing phase following his first trial for one capital murder precluded the state from seeking the death penalty for the second capital murder.[60] Specifically, the defendant argued that because the first jury failed to respond to one of the punishment phase questions, the double jeopardy clause of United States Constitution prevented the state from seeking the death penalty in the sentencing hearing following his second capital murder conviction.[61] The court held that the double jeopardy clause did not protect the defendant against the state's second attempt to procure a death sentence because the jury's nonanswer to one of the punishment phase questions in defendant's first capital murder trial did not amount to an "actual determination" of the issue raised by that question.[62] This conclusion was premised, in part, upon the statutory prohibition against informing the jury of the actual effect of its failure to answer one of the three special issues:

> Additionally, the legislature provided that "[t]he court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted . . . ." Therefore, the jury's inability to answer Special Issue No. 2 in appellant's first capital murder trial could not be interpreted as

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1669, 1673, 90 L. Ed. 2d 1, 9 (1986)(reversed death sentence where trial court impeded jury's ability to consider all relevant facets of defendant's character and record).

58. 717 S.W. 55 (Tex. Crim. App. 1986).

59. *See id.* at 58 (jury's inability to answer special issues not equivalent to a "no" answer for purposes of collateral estoppel).

60. *See id.* at 56 & n.1.

61. *See id.* at 57.

62. *See id.* at 58 (state not estopped from relitigating issue of defendant's future dangerousness to society since absence of jury finding cannot be actual determination of issue).

anything more than a nonanswer.[63]

By relying upon the first jury's inability to comprehend the consequences of its nonanswer to conclude that no "actual determination" was made, the *Padgett* court implicitly conceded that the jury's understanding of the effect of its response, or nonresponse, to a sentencing question has a direct bearing on how the jury ultimately deals with that question.[64] This same reasoning, however, begs the parallel conclusion that the sentencing outcome in a case where the jury responds affirmatively to each of the three questions may have been dramatically different if the jury had been accurately informed that a nonanswer would result in the defendant's receiving a sentence of life imprisonment. In essence, the statute's express prohibition against informing jurors of the effect of their failure to agree on a response ensures that the jury's responses to the punishment phase questions will yield an arbitrary and unreliable result.[65]

In two recent cases, the Supreme Court of the United States has considered whether the jury's receipt of information regarding state post-sentencing procedures might impact the reliability of its sentencing determination. First, in *California v. Ramos*,[66] the Court held that a state law requiring that jurors in a capital case be instructed that a sentence of life imprisonment without possibility of parole may be commuted by the governor to a sentence including the possibility of parole did not violate the eighth and fourteenth amendments.[67] The Court's conclusion was expressly premised on its finding that the instruction provided the jury with *accurate* information regarding the governor's power to commute, that such information was relevant to

63. *Id.*

64. *See id.* at 59 (Clinton, J., dissenting)(failure of jury to answer special issue should trigger legislatively mandated life sentence precluding state from seeking second death sentence rather than "incomplete verdict").

65. In enacting the 1981 amendment which included the express prohibition against informing jurors of the effect of their inability to respond to one of the punishment phase questions, the Texas Legislature satisfied two goals. First, it eliminated the possibility that a mistrial would be declared for failure to reach a verdict. Second, it minimized the chance that individual jurors would block the imposition of the death penalty by keeping jurors in the dark regarding their unilateral ability to dictate a life sentence. *See* Ex parte Santellana, 606 S.W.2d 331, 333 (Tex. Crim. App. 1980)(legislature presumed to have intended logical consequences of its enactments).

66. 463 U.S. 992 (1983).

67. *See id.* at 1009 (accurately apprising jury of possibility of commuted sentence, not violate Constitution).

the sentencing determination and that the possibility of commutation was not so speculative that it should be eliminated as a factor for the jury's consideration.[68]

In the course of upholding the substance of the instructions at issue, the *Ramos* Court clearly indicated that inaccurate, misleading and irrelevant information regarding the sentencing process has no place in a capital sentencing proceeding.[69] This conclusion, in turn, raises the question of whether a Texas jury's receipt of instructions describing the 12-10 Rule, when coupled with the statutory prohibition against informing jurors of the effect of their inability to respond to a punishment phase question, constitutes a denial of due process because such instructions are, on the whole, inaccurate and materially misleading.

This question has become even more provocative since the Supreme Court elaborated on its *Ramos* analysis in *Caldwell v. Mississippi*.[70] In *Caldwell*, the Court overturned a sentence of death because the prosecutor's closing argument impermissibly led the jury to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Specifically, the prosecutor misled the jury by stating that the jury's decision to impose death as punishment would be automatically reviewed by an appellate court and, accordingly, that its decision on the question of life or death would not be "the final decision."[71] The Court held that the prosecutor's argument was constitutionally impermissible because it led jurors to believe that "the responsibility for any ultimate determination of death will rest with others," thereby creating a risk that the defendant's death sentence was imposed for reasons entirely unrelated to legitimate sentencing concerns.[72]

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68. *See id.* at 1013. *But see id.* at 1015 (Marshall, J., dissenting)(instruction given by trial court constitutionally infirm because it is misleading, irrelevant, and invites jurors' speculation).

69. *See id.*

70. 472 U.S. 320 (1985).

71. *See id* at 328-29 (misleading jury by indicating responsibility for appropriateness of death penalty lies elsewhere, constitutionally impermissible); *see also id.* at 326-27 (prosecutor informed jury that "the decision you render is automatically reviewable by the Supreme Court.").

72. *Id.* at 330-332 (informing jury of automatic appellate review could make jury receptive to prosecutor's argument that jury may more freely "err because the error may be corrected on appeal") (citing Maggio v. Williams, 464 U.S. 46, 54-55 (1983)). The *Caldwell* Court noted that the premise for all capital punishment cases before the Court has been that "a

The Texas statute is inconsistent with the principles enunciated in *Ramos* and *Caldwell* in at least two respects. First, the requirement that the jury not be informed that a single juror's vote will result in a sentence of life imprisonment offers individual jurors the opportunity to psychologically disclaim personal responsibility for the decision to impose the death sentence. Just as the supposed availability of unrestricted appellate review allowed the *Caldwell* jurors to shift responsibility for the decision to impose death to the appellate court, Texas jurors may be impressed with a diminished sense of responsibility by virtue of the fact that they perceive ten votes as the statutory prerequisite to a life sentence. Thus, the lone juror holding firm for a "no" response may ultimately shift his vote to "yes" simply to satisfy the numerical requirements perceived as being necessary to ensure that the defendant will receive some punishment, and can rationalize his shift by observing that the defendant would never have garnered the nine additional votes necessary to receive a life sentence.

Second, *Ramos* and *Caldwell* teach that jury instructions must impart accurate and complete information regarding the sentencing process. The instructions mandated by the Texas statute are inaccurate and misleading, not only because they suggest that ten jurors must respond "no" before the defendant can receive a life sentence when, in fact, any individual juror can cause the defendant to receive a life sentence, but also because the court's instructions cannot, as a matter of Texas law, provide jurors with an explanation of what sentencing result obtains when the jury fails to respond to one of the punishment phase questions.[73] This missing information is material to the sentencing process, for, as noted in *Williams*, jurors who are left to speculate as to any particular sentencing result may vote to ensure punishment merely to avoid the possibility that the defendant they just convicted of capital murder will have to be retried or resentenced.[74] Where instructions are insufficient to convey a clear sense of

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capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " *Id.* at 341.

73. *See* TEX. CODE CRIM. P. ANN. art. 37.071(g) (Vernon 1981 & Supp. 1987)(no juror nor prospective juror may be informed of effect of failure to agree on response to special issues).

74. *See* State v. Williams, 392 So.2d 619, 634 (La. 1980) (opinion on rehearing)(speculation that retrial may be necessary if jury fails to respond to sentencing question could cause reasonable juror to change vote to avoid such result); *see also* Eads v. State, 598 S.W.2d 304, 308 (1980)(mistrial resulted where jury failed to answer special issues during sentencing phase of capital murder trial). The 1981 amendment to Article 37.071 of the Texas Code of Criminal

how a particular sentencing result is achieved, the defendant may be sentenced to death, not on the basis of his characteristics or the nature of his crime, but merely because jurors are fearful that he will escape punishment altogether at some imagined subsequent trial or sentencing hearing.[75] Thus, the Texas statute is flawed in two respects: (i) it creates a misimpression as the number of "no" votes required to sentence the defendant to life imprisonment and (ii) it prohibits jurors from receiving relevant information which would eliminate any uncertainty regarding the consequences of their failure to respond to one of the punishment phase questions.

The common thread underlying the decisions in *Ramos* and *Caldwell* is that all information received by a capital sentencing jury regarding the status of state law, and the jurors' role in the capital sentencing scheme, must be accurate and free of misleading inferences.[76] A corollary to the *Caldwell-Ramos* principle is that the state may not limit "the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."[77]

The significance of the Supreme Court's insistence on the defendant's right to have the capital sentencing authority fully and accurately apprised of any "relevant circumstance" which might result in the defendant's avoiding the death penalty is apparent from the recent decision of the United States Court of Appeals for the Fifth Circuit in *King v. Lynaugh*.[78] In *King*, the court first examined the defendant's contention that error was committed by the trial judge in failing to allow voir dire to discover whether veniremen harbored serious mis-

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Procedure was apparently enacted to avoid the possibility that a mistrial would result where the jury is deadlocked on the issue of punishment. *See* TEX. CODE CRIM. P. ANN. art. 37.071(e) (Vernon 1981 & Supp. 1987)(single negative response on required three special issues during punishment phase mandates court to impose life sentence).

75. *See* State v. Williams, 392 So.2d 619, 634 (La. 1980)(opinion on rehearing)(jurors, not completely informed of consequences of answers to capital sentencing issues, may reasonably assume that new trial necessary if unanimity not achieved).

76. *See id.* at 341. (O'Conner, J., concurring). The connection between *Ramos* and *Caldwell* is apparent from Justice O'Connner's concurrence in *Caldwell*, where she explained that her opinion for the Court in *Ramos* should not be read to imply that "the giving of *non-misleading* and *accurate* information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." *Id.* (emphasis in original). Rather, what she found offensive in *Caldwell* was the fact that the information imparted to the jury was "inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *See id.* at 342.

77. McCleskey v. Kemp, __ U.S. __, __, 107 S. Ct. 1756, 1774, 95 L. Ed. 2d 262, 287 (1987).

78. 828 F.2d 257 (5th Cir.1987).

conceptions regarding Texas' parole law that might have biased them in favor of capital punishment.[79] The panel majority held that the trial court's refusal to permit such voir dire violated due process by interfering with the defendant's ability to exercise peremptory challenges to strike veniremen whose misconceptions regarding the effect of parole laws on a life sentence created a substantial risk that the defendant would receive a death sentence "largely on the basis of mistaken notions of parole law."[80] Among the factors cited by the court in support of its conclusion was the fact that the Texas law then in effect expressly prohibited jury instructions on parole:

> In this case, however, both the voir dire and the trial judge's instructions were inadequate to dispel biasing misconceptions about parole law, in part because Texas law prohibits jury instructions on parole. This prohibition makes adequate voir dire all the more important.[81]

In light of this reasoning, it is difficult to understand how subsection (g) of the Texas capital sentencing statute can withstand constitutional scrutiny when it expressly bars all participants at all stages of the proceeding from providing the jury with accurate information regarding the effect of juror votes on punishment. As we have seen, such information is necessary to dispel misconceptions created by the 12-10 Rule, but is effectively and completely kept from the jury by virtue of subsection (g)'s prohibition.

The *King* opinion also addressed the defendant's additional contention that he was entitled to a jury instruction concerning the minimum duration of a life sentence in Texas, and that the trial court's failure to give such instruction violated both the due process clause and the eighth amendment. Foreclosed from upholding the defendant's contention by the contrary ruling of an earlier Fifth Circuit panel,[82] the court nevertheless engaged in a protracted discussion of the principles of eighth amendment jurisprudence supporting the defendant's argument. Specifically, the court cited the Supreme Court's

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79. *See id.* at 258.

80. *Id.* at 260.

81. *Id.* at 261.

82. *See* O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984). The *King* court agreed that the prior panel decision in *O'Bryan* prohibited it from upholding defendant's contention that the trial court's alleged refusal to charge the jury regarding the impact of parole laws constituted a violation of due process and the eighth amendment. *See* King, 828 F.2d at 264.

recent decision in *McCleskey v. Kemp*[83] for the proposition that the states may not "limit the sentencer's consideration of *any relevant circumstance* that could cause it to decline to impose the [death] penalty."[84] Finding merit in the defendant's contention that the impact of parole law on a life sentence is a "relevant circumstance," the majority concluded that, absent the prior panel decision, it would declare the trial court's failure to give the "minimum duration" instruction violative of the Constitution.[85]

Speaking for the majority in support of his conclusion, Judge Rubin captured the essence of the argument presented in this article:

> If due process ensures that a judge must fully understand his sentencing options, the necessity of providing such information to a jury exists a fortiori. For Texas to deny a defendant the opportunity to present information about parole eligibility is, therefore, to limit his decision to bring to the sentencer's consideration relevant information and circumstances that might cause the jury to decline capital punishment. The practice is unconstitutional both because it denies him due process and because it subjects him to what amounts to arbitrary infliction of the death penalty.[86]

Similarly, Texas' statutory prohibition against informing jurors of the effect of their individual votes denies a capital defendant the opportunity to present to the jury relevant and accurate information that might cause his life to be spared. For the reasons expressed by Judge Rubin, the prohibition should be declared unconstitutional.

IV. CONCLUSION

The Texas capital sentencing procedure falls short of constitutional requirements in several respects. First, when jurors are informed that they are to respond "yes" or "no" to the three punishment phase questions, a reasonable juror might conclude that the jury must re-

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83. __ U.S. __, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *see also, e.g.,* Anderson v. Jones, 743 F.2d 306, 308 (5th Cir. 1984)(imposition of sentence without awareness of sentencing alternatives by judge or jury violates due process); Williams v. Maggio, 730 F.2d 1048, 1049 (5th Cir. 1984)(ignorance of sentencing alternatives by sentencer requires reversal and remand for resentencing to cure due process violation); Hickerson v. Maggio, 691 F.2d 792, 794-95 (5th Cir. 1982)(violation of defendant's liberty interest in proper exercise of sentencer's discretion in imposition of sentence requires reversal for sentencing rehearing).

84. King v. Lynaugh, 828 F.2d 257, 263 (1987)(quoting McCleskey v. Kemp, __ U.S. __, __, 107 S. Ct. 1756, 1774, 95 L. Ed. 2d 262, 287 (1987))(emphasis added by *King* court).

85. *See id.* at 264.

86. *Id.*

spond either "yes" or "no" to *each* of the three questions. Thus, a reasonable juror may be encouraged to shift his position simply to satisfy the numerical requirements of the 12-10 Rule.

Second, the statutory prohibition against informing jurors of the impact of their *individual* votes relieves jurors of psychological responsibility for the jury's collective decision to impose death as punishment. Since Texas law affords each individual juror the power to opt for a sentence of life imprisonment, the statutorily induced belief that ten jurors must be in agreement before life imprisonment is a viable option provides individual jurors with a convenient mechanism for diffusing responsibility for the jury's decision to impose the death penalty. Just as the prosecutor's remarks in *Caldwell* allowed the jurors to believe that an appellate court would bear ultimate responsibility for the decision to impose death, Texas jurors focus on the ten-vote prerequisite to a "no" response as a means of shifting responsibility for the decision to impose the death penalty away from themselves and onto the shoulders of their fellow jurors.

Finally, since the sentencing result is the same whether the jury responds "no" to a punishment phase question or simply fails to respond to such question, the statutory ten-vote prerequisite to a "no" response establishes an artificial numerical threshold which bears absolutely no relationship to the conditions established by Texas law for the imposition of a life sentence. The injection of this irrelevant ten-vote requirement into the sentencing process, coupled with Texas' statutory prohibition against providing jurors with accurate information regarding the effect of the jury's inability to return twelve "yes" votes or ten "no" votes, creates an ideal environment for arbitrary and capricious capital sentencing results.