

Recent cases in the Court of Criminal Appeals of Texas

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In the last issue of the *Journal*, Helen O'Hara drew attention to the extraordinary high death sentence rate in Harris County. In *Allen v. The State* 108 S.W. 3d 281, an appeal from Harris County the Court of Criminal Appeals of Texas (CCA) had to consider a claim that the death penalty was applied arbitrarily in violation of the Eighth and Fourteenth Amendments to the Federal Constitution. The basis of this claim was that the death penalty is applied differently in similar cases dependent on where the offence takes place and whether the county can afford to prosecute a capital case.

It was claimed that the cost to the Texas taxpayer of a capital case is \$2.3 million. This may strike readers as surprisingly high, bearing in mind the low levels of fees allowed to defence attorneys. It was argued that whilst a large and wealthy county such as Harris County, which covers most of the

Houston metropolitan area, can afford to prosecute such cases, many of the poorer counties in the more rural parts of Texas cannot afford the cost. Consequently, the argument went, whether a defendant faces a capital trial depends not on the heinous nature of their alleged offence or other legitimate considerations but simply on whether the offence was committed in a wealthy or poor county.

The judgment of the CCA notes that similar claims have been raised in previous cases – *Bell v. The State* 938 S.W. 2d 35 (Tex. Crim. App. 1996); *King v. The State* 953 S.W. 2d 266 (Tex. Crim. App. 1997). Those claims were rejected for lack of any empirical data to substantiate the claim about budgets. In the *Allen* case some effort had been made by the appellant to provide more information to the court. However, this appeared to go no further than to provide the court with information from the website of the Texas Department of Criminal Justice (www.tdcj.state.tx.us) showing the number of offenders sentenced to death and the numbers executed from each county in Texas and a couple of articles from the *Houston Chronicle*. The tables produced from the website of the TDCJ do indeed confirm that more people receive the death penalty and are executed from Harris

County than from any other county in the state.

In dismissing the appeal on this point, the CCA noted that no budgetary data had been submitted to enable the court to decide whether finances were the crucial factor in the decision whether to prosecute capital trials. The reasons the figure for Harris County are so high may be more complicated than being solely due to financial considerations, but there would appear to be scope for further research into this issue so that the court could at least have the necessary data presented to it. That would

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at least strengthen the argument that the death penalty is applied arbitrarily in Harris County.

A further claim raised in *Allen* argued that the mitigation special issue,¹ which is crucial in determining whether a death sentence is to be imposed is

unconstitutional because it fails to place on the state the burden of proving aggravated circumstances beyond a reasonable doubt. As the CCA pointed out in another recent case that also raised this issue, *Blue v. The State* (No. 72,106, 22 October 2003) neither party bears a burden of proof on the mitigation special issue. The apparent justification for this opinion is that at this stage of the proceedings the parties can introduce any matter which is relevant to mitigation. The appellant's argument in *Allen* was based on the decision of the Supreme Court in *Apprendi v. New Jersey* 530 U.S. 466 (2001), which held that it was a breach of the due process clause of the Fourteenth Amendment for a sentence to be increased when this is based on a finding of fact by a judge rather than a jury beyond a reasonable doubt.

In *Blue v. The State*, decided after *Allen*, the appellant relied on the decision of the Supreme Court in *Ring v. Arizona* 122 S.Ct. 2428,² in which the Supreme Court followed its earlier decision in *Apprendi*. He argued that Article 37.071 of the Texas Code of Criminal Procedure is unconstitutional because it does not require the prosecution 'to prove beyond a reasonable doubt that that the answer to the mitigation special issue should be

"No" – i.e. there are no mitigating circumstances that would warrant a life sentence rather than a death sentence.

In *Jones v. The State*, (No. 74,060, 5 November 2003) the appellant argued, also relying on *Apprendi*, that on the mitigation special issue the burden of proof was implicitly placed on the defence rather than requiring that a jury make a finding on that issue beyond a reasonable doubt. There would seem to be a lot of force in that argument. It is after all, surely disingenuous of the court to suggest that this issue is 'burden neutral' bearing in mind that by this stage of the trial process the jury have (a) convicted the defendant of capital murder, thereby demonstrating the defendant's eligibility for a death sentence, and (b) in answering the first of the two special issues, accepted that there is a probability that he will commit criminal acts of violence in the future so that he represents a continuing danger to society.³ So the appellant's argument was that, in order to comply with *Apprendi v. New Jersey* and *Ring v. Arizona*, the burden of proof should be on the state to prove beyond a reasonable doubt that the mitigating circumstances do not warrant a life sentence rather than death.

In all three cases the CCA rejected these claims on the basis that neither *Apprendi* nor *Ring* applied to Article 37.071 since they could only have affect where the sentence may be increased beyond the statutory maximum by the presence of aggravating features. Under the Texas Penal Code, sections 12.31 and 19.03, the 'prescribed statutory maximum' for capital murder is fixed at death. 'Nothing the judge or jury decided during the punishment phase could have enhanced the appellants' sentence beyond the prescribed range.'⁴

A further issue raised in *Allen* is the claim that the Texas capital murder sentencing scheme is unconstitutional because there is no meaningful appellate review of the

findings on the special issues. The majority opinion of the Court stated that the Court does 'not review the sufficiency of the evidence' on the mitigation special issue. Meyers J. filed a concurring opinion in which he agreed with the decision of the majority but, interestingly, added that in the light of the decision of the Supreme Court in *Atkins v. Virginia* 536 U.S. 304 (2002) that the Court will in future

'be forced to conduct both legal and factual sufficiency reviews for the mitigation special issue. Prior to *Atkins*, the weight that was given to a particular piece of evidence depended upon the influence it had on each juror. Now, however, jurors are required to consider evidence of mental retardation offered in mitigation of punishment. The Court can no longer summarily dismiss requests to review the sufficiency of the evidence in support of the jury's answers to the special issues.'

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The impact of the decision in *Atkins* may extend even further than this, since Meyers J. added:

'There are also possible situations where this court should conduct a factual sufficiency review of the future dangerousness special issue. If a defendant is granted a retrial after serving several years as a model prisoner, this Court should be able to conduct a factual sufficiency review of the future dangerousness special issue.'

This opinion could be of valuable assistance to appellants, since those who are fortunate enough to obtain a retrial have invariably already been on death row for a number of years. Evidence of good behaviour whilst in custody ought therefore to be admissible in seeking to persuade the jury at the punishment phase that the state cannot prove beyond a reasonable doubt that the defendant *at that time* 'constitutes a continuing threat to society'.

¹ 'Taking into consideration all the evidence, including the circumstances of the offence, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?' – Texas Code of Criminal Procedure, Art. 37.071, para. 2(e).

² Federal constitutional right to jury trial is violated by allowing 'a sentencing judge, sitting without a jury, to find an aggravating circumstance' that increases the authorised punishment for a crime.

³ Texas Code of Criminal Procedure, Art. 37.071, para. 2(b).

⁴ *Allen v. The State* at 281, 285. *Jones v. The State*: 'A jury finding on the mitigation issue does not have the potential of increasing the penalty beyond the prescribed statutory maximum, rather it has the potential for *reducing* the prescribed statutory maximum to a sentence of life imprisonment', at 14.

⁵ It needs to be remembered however that 'society' includes society within the Department of Corrections – see *Rougeau v. The State* 738 S.W.2d 651 (Tx. Crim. App. 1987).