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TO: House Criminal Jurisprudence Committee
FR: Christi Dean, Assistant Public Defender
Chief, Capital Murder Division
RE: Concerns relating to Interim Charge 4
DA: November 5, 2020

Interim Charge 4: Review trial court procedures in capital sentencing, and implementation of applicable law in direct appeal and writ proceedings in capital cases, for compliance with constitutional protections and conflict of interest rules.

Since late 2018, there have been no death penalty trials in Dallas County, although two are currently set for spring 2021 trial dates. The issues pervading death penalty jurisprudence have not changed significantly from last session. The most critical issues in Texas' death penalty jurisprudence remain (1) the absence of pre-trial procedures for determining intellectual disability (and therefore eligibility for execution), (2) the misleading 10-12 rule contained in Texas Code of Criminal Procedure Article 37.071, (3) the application of parties' charges to capital murder (negating specific intent and leading to disproportionate sentencing), (4) the eligibility of the severely mentally ill for execution, and (5) transparency in the process of appointing private counsel to indigent defendants.

Create pre-trial procedures for determining intellectual disability in the capital context. The single most critical omission in Texas' death penalty jurisprudence remains the omission of statutory governance concerning a pre-trial procedure for determining intellectual disability in the death penalty context. In 2002, the United States Supreme Court categorically excluded persons with intellectual disability from execution; persons within the class categorically "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Atkins v. Virginia*, 536 U.S. 304 (2002). The state of the law in Texas is no different than it was 18 years ago when the Supreme Court issued *Atkins*: "The Texas Legislature has not yet enacted legislation to carry out the *Atkins* mandate." *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004); *see also Ex parte Woods*, 296 S.W.3d 587, 589 (Tex. Crim. App. 2009) (stating that "Legislature has not enacted legislation to carry out the *Atkins* mandate"); *Ex parte Hearn*, 310 S.W.3d 424, 427 (Tex. Crim. App. 2010). "[T]here is no extant Texas statute for a jury determination of [intellectual disability] in a criminal trial, so there is no current statutory right involved at any stage of the proceedings." *Briseno*, 135

S.W.3d at 11, n.42. The United States Supreme Court has, in recent years (2017 and 2019), twice reversed the Texas Court of Criminal Appeals for applying outdated standards for determining intellectual disability. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019). Yet there remains no statutory governance over a proper procedure for determining intellectual disability pre-trial.

Last session's HB 1139 sought to remediate Texas law concerning pre-trial determination of intellectual disability but appeared to meet with concern over the pre-trial factfinder: judge or separately impaneled jury. It is imperative that the Legislature again attempt to pass a pre-trial procedure for determining intellectual disability. The Dallas County Public Defender's Office litigated this issue via mandamus to the Court of Criminal Appeals more than five years ago. *See In re Allen*, 462 S.W.3d 47 (Tex. Crim. App. 2015). At that time, we argued that a pretrial judicial determination of intellectual disability would adhere to the procedural guidelines announced in *Atkins* and echoed in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and specifically address the Supreme Court's concerns related to intellectually disabled defendants' impairments in testifying and meaningfully assisting counsel, the increased risk that a jury will impose the death penalty despite factors calling for a lesser sentence, and the double-edged nature of intellectual disability and the jury's potential consideration of it as an aggravator. *Atkins*, 536 U.S. at 306-07, 320, 321. A pre-trial determination of intellectual disability ensures fair process by an educated and experienced factfinder; it promotes clinical accuracy outside of the trappings of trial; and it avoids a prolonged and costly voir dire and litigation, both at trial and following. A pre-trial judicial determination also comports with national consensus and judicial economy. As of December 2015, the majority of states (24 of 32) that specified the timing of an intellectual disability determination required or authorized a pretrial determination.[1] Twenty-five of the 32 states authorized judicial determinations.[2] Moreover, a pretrial hearing would save the State significant resources on an extensive capital sentencing procedure and lessen the burden of uncertainty on the victim's family. Postponing the determination of intellectual disability imposes an unnecessary fiscal burden on the parties and the State, a burden that a pre-

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[1]These citations have not been updated since December 2015. *Byrd v. State*, 78 So.3d 445, 457 (Ala. Crim. App. 2009); Ariz. Rev. Stat. Ann. § 13-753; Ark. Code Ann. § 5-4-618; Cal. Penal Code § 1376; Colo. Rev. Stat. Ann. § 18-1.3-1102; Fla. R. Crim. P. 3.203; *Hodges v. State*, 55 So.3d 515, 526 (Fla. 2010); Idaho Code Ann. § 19-2515A; Ind. Code Ann. § 35-36-9-5; Ky. Rev. Stat. Ann. § 532.135; La. Code Crim. Proc. Ann. art. 905.5.1; *Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004); Mo. Ann. Stat. § 565.030; 2014 Mo. Legis. Serv. H.B. 1064; R.R.S. Neb. § 28-105.01(4); Nev. Rev. Stat. Ann. § 174.098; N.C. Gen. Stat. § 15A-2005; ORC Ann. 2929.04(b)(4); *State v. Lott*, 779 N.E.2d 1011, 1016 (Ohio 2002); Okla. Stat. tit. 21 § 701.10bE–F; *Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006); *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011); *Franklin v. Maynard*, 588 S.E. 2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3; Tenn. Code Ann. 39.13.203; *Ex parte Briseno*, 135 S.W.3d 1; Utah Code Ann. § 77-15a-104; Rev. Code Wash § 10.95.030(2).

[2]*See* footnote 5, *supra*, and Kan. Stat. Ann. § 21-6622.

trial finding of intellectual disability would reduce--limiting the need for extensive pretrial investigation (including a preliminary social history report), consultations with mitigation experts, individual voir dire, and the preparation of a complete record in anticipation of potential post-conviction claims.

Abolish the 12-10 rule. Texas Code of Criminal Procedure Article 37.071(2)(d) and (e) require that judges expressly mislead jurors about the effect of their individual answers to the required questions at the conclusion of the sentencing phase. Under Article 37.071, the jury must consider up to three "yes" or "no" special issue questions at the conclusion of the sentencing phase. The answers to these questions determine whether the defendant receives a sentence of death or life without the possibility of parole. A trial court must currently instruct the jury that, in considering its answers to these questions, the jury "may not answer any issue [in favor of death] unless it agrees unanimously and it may not answer any issue [in favor of life without parole] unless 10 or more jurors agree." This is untrue. The truth is that any vote less than a unanimous vote for death will result in the imposition of a sentence of life without the possibility of parole. There are no "hung" juries at the conclusion of the sentencing phase of a capital murder trial in which the State is seeking the death penalty. Any verdict less than a unanimous death verdict results in the imposition of a sentence of life without the possibility of parole. "A trial judge's duty is to give instructions sufficient to explain the law." *Kelly v. South Carolina,* 534 U.S. 246, 257 (2002). The currently mandated instructions do not.

Abolish parties' charges in the capital context. A conviction under Texas Penal Code section 7.02's law of parties permits, in some instances, a jury to convict a defendant for less than specific intent to kill. It also leads to disproportionate sentences for less culpable parties. In Dallas County, this disparity has been most evident in the sentences of the surviving members of the "Texas Seven," all of whom received death sentences without regard to their specific culpability. The Texas Defender Service has listed similar examples on its website. *See* https://www.texasdefender.org/wp-content/uploads/2020/06/Law-of-Parties-2.pdf.

Create a severe mental illness exemption to the death penalty. The Supreme Court has stated that the scope of the Eighth Amendment is not "static" but instead must reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, a previously acceptable and constitutionally adequate punishment may become constitutionally impermissible if it can be shown that contemporary "standards of decency" reject it. Applying this principle, the Supreme Court has held that "evolving standards of decency" bar the execution of certain distinct classes of offenders either (1) because the death penalty would be "grossly out of proportion" to the severity of the crime, *see*, *e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate to the crime of rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate to non-triggerperson);

Kennedy v. Louisiana, 554 U.S. 407 (2008) (death penalty disproportionate to the crime of raping a child); or (2) because offenders in the class categorically "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with intellectual disability); *see Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders). A growing consensus exists that offenders with severe mental illness likewise should not be subject to execution. Severe mental illness, in the same way as intellectual disability, renders offenders less morally culpable and more vulnerable to the imposition of a death sentence "in spite of factors which may call for a less severe penalty." *Atkins*, 536 U.S. at 320-21. Severe mental illness is, therefore, functionally—and constitutionally—indistinguishable from the condition whose features led the Supreme Court to hold that people with intellectual disability cannot be subject to the death penalty. *Id*. at 321. In the context of a defendant's competency to be executed, the Supreme Court has held, "The Eighth Amendment . . . prohibits the execution of a prisoner whose mental illness prevents him from 'rational[ly] understanding' why the State seeks to impose that punishment." *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (citing *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007)). This same rationale should apply to all stages of trial. The exemption for individuals with severe mental illness could apply on a case-by-case basis, require proof, and apply only to a narrow set of illnesses. Defendants who qualify for the exemption would be subject to criminal prosecution and, upon conviction, would serve terms of life without the possibility of parole.

Promote transparency in appointment of private counsel in the capital context. Texas Code of Criminal Procedure Article 26.052 governs the qualifications for appointing private attorneys to represent indigent defendants in death penalty cases. Several features of the statute are unclear and seem to lead to consequences like the repeated appointment of the same private attorneys to death penalty cases and a local selection committee heavily weighted with the attorneys who are repeatedly receiving appointments. The particular features that lack transparency include (1) eligibility for appointment to the local selection committee that adopts the standards for qualification and (2) the qualifications for appointment.

In order to qualify for appointment, the statute requires that counsel measure years of experience and nebulous qualifications like "[e]xhibit proficiency and commitment to providing quality representation." It does not include, for instance, substantial written legal work product; any written itemization of experience or proficiencies, including proficiencies in pre-trial settlement; or any measure of quality advocacy. The American Bar Association's (ABA) guidelines are much more concrete; they require rigorous preservation of error, investigation, and settlement negotiation, all of which applicants to the appointment list could quantify. The Commentary to the ABA's Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.8, "The Duty to Assert Legal Claims," states, "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all

conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." [Citation omitted]. It notes that:

> Because "[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial," [citation omitted] counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion. [Citation omitted]. In accordance with Subsection B(2), counsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties.

Id. The ABA also requires meaningful investigation and settlement negotiation: "The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt." ABA Standards § 4–4.1(b); *see also* ABA's Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.7. "Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise." *Id*. § 4–4.1(c). Under the ABA's Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.9.1, "Duty to Seek Agreed-Upon Disposition," the ABA further requires that "[i]f a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest."

The current incarnation of Article 26.052 does not account for these considerations, among others.