TEXAS LAWYER

Analysis

How Mitigating Are These Mitigating Circumstances?

The centerpiece of the Texas statute turns on the question of future dangerousness.

By **Daniel Pollack and Elisa Reiter** | October 20, 2020 at 04:39 PM

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In late August, the Supreme Court of Florida **affirmed** the denial of postconviction relief and habeas petition of Tina Lasonya Brown. Ms. Brown was one of three people who kidnapped and killed 19-year-old Audreanna

Zimmerman. Zimmerman was gagged, stuffed into the trunk of a car, attacked repeatedly with a stun gun and driven to the woods where she was beaten with a crowbar, doused with gasoline, set on fire and left to die.

At trial, the jury unanimously recommended the death penalty, and the court found that the aggravating circumstances outweighed the mitigating circumstances. It ruled that: "(1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight); (2) the murder was especially heinous, atrocious, or cruel (great weight); and (3) the murder was committed while Brown was engaged in the commission of a kidnapping (significant weight)." (citations omitted).

The trial court found a single mitigating circumstance: "that Brown had no significant history of prior criminal activity." It assigned it minimal weight. Further, the trial court considered but rejected the following four statutory mitigating circumstances: "(1) the crime was committed while Brown was experiencing an extreme emotional disturbance; (2) Brown was an accomplice in the crime and her participation was relatively minor; (3) Brown acted under extreme duress; and (4) the capacity of Brown to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was significantly impaired."

This brief article does not opine on the reasoning or decision of the Supreme Court of Florida or any of the lower courts. Nor does it advocate for or against the death penalty. Rather, it queries whether Texas, or any other state, might want to consider embracing, in statute, some of the 27 nonstatutory mitigating circumstances articulated by the Florida trial court:

Specifically, the [trial] court found that Brown: (1) was the child of a teenage mother (minimal weight); (2) was neglected by both parents (some weight); (3) lost her childhood due to parental neglect (some weight); (4) was abandoned by her mother (some weight); (5) had a history of family violence (some weight); (6) was exposed to drugs during her adolescence (some weight); (7) suffered developmental damage due to her parents' use of and dependence on drugs (some weight); (8) was subjected to sexual violence inflicted by her father; (some weight); (9) was betrayed by a trusted family member (i.e., her grandmother) (some weight); (10) experienced corruptive community influences and exposure to a criminal lifestyle (some weight); (11) experienced chaotic moves and transitions (little weight); (12) was a victim of domestic violence during her adult life (some weight); (13) witnessed a violent homicide and served as a State witness in a murder trial (little weight); (14) lost her family (her parental rights were terminated for her two sons, and she has no relationship with her mother or father) (little weight); (15) suffered repeated trauma throughout her life (little weight); (16) suffered from drug addiction (little weight); (17) suffered from the long term effects of chronic cocaine use on her brain (some weight); (18) was a productive citizen during periods of sobriety (little weight); (19) was living in poverty at the time of the crime (minimal weight); (20) behaved well in jail (little weight); (21) conducted a [B]ible study program (little weight); (22) exhibited good courtroom behavior (little weight); (23) has no possibility of parole (little weight); (24) showed remorse (some weight); (25) received a different sentence than that of her codefendants (some weight); (26) had no history of prior criminal violence (moderate weight); and (27) was using cocaine on the day of the crime (moderate weight). (citations omitted).

On a finding of guilt involving a capital crime, the trier of fact must determine whether the defendant will receive a life sentence or the death penalty. Be it in

Texas or elsewhere, the trier of fact has to weigh opposing factors during the sentencing phase: The prosecution presents aggravating factors, while the defense presents mitigating factors. Were the defendant's acts or omissions particularly heinous? What psychosocial factors in the defendant's background may somehow humanize the defendant in the eyes of the fact-finder? How should the fact-finder weigh those factors?

Pitting aggravating factors against moral culpability is nothing new. Leviticus 24 provides: "Anyone who injures their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury."

The centerpiece of the Texas statute turns on the question of future dangerousness. In doing so, are jurors distracted from the life and death issues inherent at the sentencing phase of a capital case? Texas Code of Criminal Procedure Art. 37.071 Section 2 provides in pertinent part:

The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas.

Rather than giving specific direction, Texas jurors are asked to respond to a series of leading questions, mandating a "yes" or "no" response. When the only

two questions are “future dangerousness” and whether there were “mitigating factors,” the result is often the difference between life and death.

Since 1976, when Texas reinstated the death penalty, there have been 569 executions in Texas—more than five times higher than the number of executions in Virginia or in Oklahoma. By contrast, there was one execution in each of the following states in the same time period: Colorado, Connecticut, New Mexico and Wyoming. According to the Texas Tribune, there are presently 209 people on death row in Texas. Should the result so often be death? Texas and Oregon are the only two states focusing on future dangerousness. Should Texas revise its statute to eliminate the future dangerousness framework? In the alternative, should Texas join 30 other states that focus on mitigating factors? Yes, the punishment should fit the crime. It’s also a matter of life or death.

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