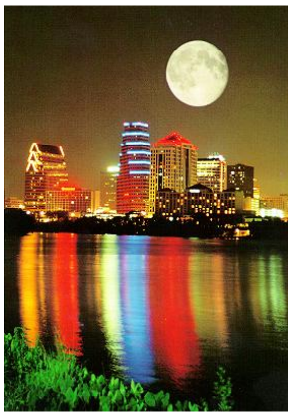
One Fabulous Skyline

TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

G&S Vol. 6, No. 26 - July 6, 1998

APPELLANT'S NAME: DaRoyce Lamont Mosely

- OFFENSE: Capital Murder - Death Sentence
- COUNTY: Gregg
- CRIM. APPEALS No. 72,281
- DATE OF OPINION: July 1, 1998
- JUDGE: Keller, J.
- DISPOSITION: Conviction and Sentence Affirmed

Case Note: The Court originally affirmed this conviction and sentence on May 20th of this year (see Greenwood & Schulman, Vol. 6, No. 20; May 25, 1998), then, in an unprecedented move, granted rehearing on its own motion two weeks later (see Greenwood & Schulman, Vol. 6, No. 22; June 8, 1998). Originally, the Court addressed (and we summarized) the sufficiency of the evidence (G/S 536.01); Gregg County's method of selecting the foremen of its grand juries (G/S 234); the qualification of the trial court judge to sit in a case in which one of the testify witnesses was related to him within the third degree of consanguinity (G/S 202); the legality of a statement (confession) taken by a federal agent during a State criminal investigation (G/S 41); the right of a defendant to present evidence in the form of a statement made to a third party by a co-defendant that he had been the shooter and the defendant had been merely present (G/S 309.05); and allegedly improper argument by the State (G/S 334); the admission of both "victim impact" evidence and evidence of the decedent's good character (G/S 447); the permissible scope of expert testimony regarding the probability of "future dangerousness" (G/S 301.04); and the Court's action in summarily rejecting 64 points of error as "inadequately briefed" (G/S 517). Although I haven't compared the two opinions word for word, they appear to be more or less the same as to the holdings on every issue. Additionally, the Court still refused to address the 64 points of error it had previously determined to be "inadequately briefed." Because of the concurring and dissenting opinions on the victim impact / character evidence issue, it is summarized again.

G/S 447 Evidence at Punishment Phase / Victim Impact Evidence: In points of error 1 through 4, Appellant argued that the trial court erred in admitting evidence concerning the good character of victims of the offense. He argues that victim character evidence is inadmissible under United States and Texas precedent. In Smith v. State, 919 S.W.2d 96

(Tex.Cr.App. 1996), a majority of the Court of Criminal Appeals held that testimony concerning the victim's good character was inadmissible.

Holding: Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence. Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim. When the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony. In this case, the evidence appears to serve the function of humanizing the victims rather than drawing unwarranted comparisons between them and other members of society. The State introduced just three witnesses to give testimony concerning the four victims of the incident, and the entire, combined testimony of these witnesses takes up a mere 34 pages in the court reporter's record. We find that admission of this testimony did not violate Rule 403.

Notes: The Court noted that, if Smith were the final word on the subject, Appellant's argument that all victim character evidence is inadmissible would have some force. It went on to note, however, that in Johnson v. State, No. 72046, April 30, 1997)(see Greenwood & Schulman, Vol. 5, No. 17; May 5, 1997), a majority of the Court approved the introduction of victim character evidence. Saying that "Our jurisprudence in this area has been somewhat inconsistent and confusing at times. We take this opportunity to announce a consistent, if not always clear-cut rule to be followed in future cases." As they did in the May 20th opinion, the Court recognized that "this standard does not draw a bright and easy line for determining when evidence concerning the victim is admissible and when it is not . . .," and cautioned trial judges to "exercise their sound discretion in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony." This time, Judge McCormick delivered a concurring opinion in which he argued that in Johnson v. State, No. 72046, April 30, 1997)(see Greenwood & Schulman, Vol. 5, No. 17; May 5, 1997), a majority of the Court "agreed upon the broad proposition that <u>all</u> 'victim impact' evidence--that is, evidence relating to the emotional impact of the capital crime on the victim's family and evidence relating to the victim's character and background--is admissible at the punishment phase of a capital murder trial." He commented that Article 37.071(2) "clearly, unequivocally, and unambiguously" provides that "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the [trial] court deems relevant to sentence," and asked, "How much clearer can 'as to any matter that the court deems relevant to sentence' get?" Judge Mansfield again filed a concurring opinion in which he opined that "Evidence of the victim's character and background is . . . equally relevant in the context of the mitigation special issue." Judge Meyers delivered a dissenting opinion, in which he was joined by Judge Baird, and in which he argued that the statutorily required mitigation issue does not permit introduction of aggravating evidence such as victim impact and victim character evidence. He argued that the Legislature was free to change this situation, the Court is not, and that"the evidence at issue here is not relevant to the mitigation special issue.

Comment: (David A. Schulman) The majority opinion here, at least the holding, is a verbatim restatement of the May 20th opinion. It was problematic then, it's problematic now. Because the majority fails to set out a "bright line" rule, we can expect more and more confusion.