

LETHALLY DEFICIENT: DIRECT APPEALS IN TEXAS DEATH PENALTY CASES – SECTION V(B)
FREQUENT RE-USE OF BOILERPLATE ARGUMENTS

²⁴⁸ Misc. Dkt. 99-9912 (Feb. 1, 1999) (Order of the Supreme Court of Texas and the Texas Court of Criminal Appeals adopting the Standards of Appellate Conduct), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/99/99-9012.pdf.

²⁴⁹ *Lohan v. Perez*, 924 F. Supp.2d 447 (E.D.N.Y., 2013) (sanctioning a lawyer for submitting a motion in opposition that was based, almost entirely, on unattributed articles), *Iowa Sup. Ct. Att’y Disc. Bd. v. Cannon*, 789 N.W.2d 756, 759 (Iowa 2010) (reprimanding a lawyer for “wholesale copying” a law review article into his case brief and suspending his license for six months for this conduct and his lack of candor in the proceedings); *Columbus B. Ass’n v. Farmer*, 855 N.E.2d 462, 465 (Ohio 2006), *reinstatement granted*, 884 N.E.2d 1098 (Ohio 2008); and *In re White*, Nos. C045684, C046271, C046677, slip op. (Ca. Ct. App. 2004) (sanctioning an attorney for filing three frivolous habeas petitions that he did not review and two of which were substantially similar to or “plagiarized” from previous submissions in the clients’ cases).

²⁵⁰ *Farmer*, 855 N.E.2d at 465.

²⁵¹ *Id.*

²⁵² [Brief for the Appellant at 95-96, Cargill v. State, No. AP-76,819 \(Tex. Crim. App. Nov. 5, 2013\)](#) (text in multiple fonts); [Brief of Appellant at 77, Robinson v. State, No. AP-76,535 \(Tex. Crim. App. Mar. 19, 2012\)](#) (page numbers from unidentified documents); [Appellant’s Original Brief at 36-44, Rockwell v. State, No. AP-76,737 \(Tex. Crim. App. Jan. 17, 2012\)](#) (citing the wrong capital murder sentencing statute); [Brief for Appellant at 113, Green v. State, No. AP-76,458 \(Tex. Crim. App. Aug. 23, 2011\)](#) (listing issue 34 as Issue 44 in text that is identical to Issue 44 in the appellate brief filed for James Broadnax); [Brief of Appellant at 119-39, Miller v. State, No. AP-76,270 \(Tex. Crim. App. Feb. 23, 2011\)](#) (using different spacing for constitutional arguments than for the rest of the brief); [Brief on Appeal at 203, Devoe v. State, No. AP-76,289 \(Tex. Crim. App. Nov. 8, 2010\)](#) (incorrect citations to the capital murder statute); [Appellant’s Brief at iii & 96, Martinez v. State \(Tex. Crim. App. Dec. 30, 2009\)](#) (listing the capital murder statute as CCP 37.0721 instead of 37.071 in its heading and entry in the Table of Contents for point of error seven); [Brief of Appellant at vi, Williams v. Texas, No. AP-75,811 \(Tex. Crim. App. Nov. 17, 2008\)](#) (listing point of error 15 twice in the Table of Contents); [Brief of Appellant at 15, Russeau v. State, No. AP-74,466 \(Tex. Crim. App. July 14, 2008\)](#) (skipping issues 13-15); [Brief for Appellant at 45-48, Smith \(Demetrius\) v. State, No. AP-75,47, \(Tex. Crim. App. Jan. 31, 2008\)](#) (arguing that the CCA should sustain the appellant’s 18th, 19th and 20th points of error at the conclusion of a section that discusses issues 18 and 19).

²⁵³ [Brief of Appellant at 6-10, Devoe v. State, No. AP-76,289 \(Tex. Crim. App. Nov. 8, 2010\)](#).

²⁵⁴ *Devoe v. State*, 354 S.W.3d 457, 461 (Tex. Crim. App. 2011) (“Consequently, we affirm the trial court’s judgment and sentence of death.”).

²⁵⁵ [Amended Brief for Appellant at 55-57, Johnson v. State, No. AP-77,030 \(Tex. Crim. App. Aug. 1, 2014\)](#).

²⁵⁶ [Amended Brief for Appellant at 65-67, Johnson v. State, No. AP-77,030 \(Tex. Crim. App. Aug. 21, 2014\)](#); [Brief for Appellant at 23-26, Muhammad v. State, No. AP-77,021 \(Tex. Crim. App. Aug. 21, 2014\)](#); [Brief for Appellant at 58-59, Harris v. State, No. AP-76,810 \(Tex. Crim. App. Sept. 3, 2013\)](#); [Brief for Appellant at 33-34, Bess v. State, No. AP-76,377 \(Tex. Crim. App. July 5, 2011\)](#); [Brief for Appellant at 29-30, Green v. State, No. AP-76,458 \(Tex. Crim. App. Aug. 23, 2011\)](#); [Brief for Appellant at 44-45, Broadnax v. State, No. AP-76,207 \(Tex. Crim. App. Feb. 9, 2011\)](#).

²⁵⁷ 832 S.W.2d 762 (Tex. App.—Houston [1st Dist.] 1992). This is the section from *Nelson* that the appellant’s brief quoted:

It is fundamental that in all criminal prosecutions, an accused is entitled to an impartial jury composed of people who are unprejudiced, disinterested, equitable, and just who have not prejudged the merits of the case. *Shaver v. State*, 280 S.W.2d 740, 742 (Tex.Crim.App.1955); Tex.

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Const. art. I, § 10. The *voir dire* process is intended to ensure empanelment of an impartial jury. *Salazar v. State*, 562 S.W.2d 480, 482 (Tex.Crim.App.1978).

Article 35.16(c)(2) of the Texas Code of Criminal Procedure, allows the defense to challenge for cause any prospective juror who has a bias or prejudice against any law applicable to the case upon which the defense is entitled to rely, either as a defense to the offense being prosecuted or as mitigation of the punishment therefor. *Clark v. State*, 717 S.W.2d 910, 916–17 (Tex.Crim.App.1986); TEX. CODE CRIM. P. art. 35.16(c)(2) (Vernon Supp.1992). When a prospective juror is biased against the law, or shown to be biased as a matter of law, he must be excused when challenged, even if he states that he can set his bias aside and be a fair and impartial juror. *Clark*, 717 S.W.2d at 917; *Anderson v. State*, 633 S.W.2d 851, 854 (Tex.Crim.App.1982).

Id. at 765.

²⁵⁸ *Cumbo v. State*, 760 S.W.2d 251 (Tex. Crim. App. 1988).

²⁵⁹ 146 S.W.3d 654, 667-70 (Tex. Crim. App. 2004) (holding that the trial court did not err in denying the defense’s challenge to a panel member who stated in her juror questionnaire that “no one be allowed to live for killing someone else” and emotionally responded to questions about her brother-in-law’s murder by stating that she would not want someone with her mind set on the jury if she were on trial for murder, because she also stated during *voir dire* that she could be fair and impartial, would listen to the evidence in answering issues, and when asked by the trial court if she would follow the law and base her decision solely on the evidence, she agreed she would).

²⁶⁰ 71 S.W.3d 738 (Tex. Crim. App. 2002), *overruled by statute on other grounds*, *Coleman v. State*, No. AP-75,478, 2009 WL 4696064 (Tex. Crim. App. Dec. 9, 2009) (per curiam).

²⁶¹ [State’s Brief at 40, Muhammad v. State, No. AP-77,021 \(Tex. Crim. App. Feb. 3, 2015\)](#); [Amended Brief for Appellant at 65-66, Johnson v. State, No. AP-77,030 \(Tex. Crim. App. Aug. 1, 2014\)](#); [State’s Brief at 53-54, Harris v. State, No. AP-76,810 \(Tex. Crim. App. Jan. 28, 2014\)](#); [State’s Brief at 34-35, Green v. State, No. AP-76,458 \(Tex. Crim. App. Feb. 1, 2012\)](#); [State’s Brief at 54, Bess v. State, No. AP-76,377 \(Tex. Crim. App. Jan. 5, 2012\)](#); [State’s Brief at 45, Broadnax v. State, No. AP-76,207 \(Tex. Crim. App. Aug. 5, 2011\)](#); [State’s Brief at 106, Medina v. State, No. AP-76,036 \(Tex. Crim. App. Jun 21, 2010\)](#).

²⁶² *Johnson v. State*, No. AP-77,030, 2015 WL 7354609, at *20-29 (Tex. Crim. App. Nov. 18, 2015) (denying the defendant’s points of error twenty to twenty-seven and citing *Feldman*); *Muhammad v. State*, No. AP-77,021, 2015 WL 6749922, at *6-22 (Tex. Crim. App. Nov. 4, 2015) (citing *Threadgill* and stating that “appellant has not shown that the trial court erroneously denied his challenges for cause to at least three prospective jurors,” the CCA “need not address his points of error one and eight, concerning his challenges to *voir dire* members Milton Powell and Anthony Morrison. Points of error one and eight are overruled[.]”); *Harris v. State*, No. AP-76,810, 2014 WL 2155395, at *10 (Tex. Crim. App. May 21, 2014) (citing *Threadgill and Feldman* and denying the appellant’s points of error five to ten because *inter alia* did not establish that the trial judge erred denying any of his challenges for cause); *Bess v. State*, No. AP-76377, 2013 WL 827479, at *25 (Tex. Crim. App. Mar. 6, 2013) (citing *Threadgill* and denying the appellant’s second point of error due to the prospective juror’s statements that “she would keep an open mind and consider all evidence”); *Green v. State*, No. AP-76,458, 2012 WL 4673756, at *4-21 (Tex. Crim. App. Oct. 3, 2012) (citing *Threadgill and Feldman* and denying the defendant’s points of error one through fourteen); *Broadnax v. State*, No. AP-76,207, 2011 WL 6225399, at *5-9 (Tex. Crim. App. Dec. 14, 2011) (citing *Threadgill and Feldman* and denying the appellant’s arguments that the trial court erred in denying his challenges to sixteen jury panel members); and *Medina v. State*, No. AP-76,036, 2011 WL 378785, at *4-13 (Tex. Crim. App. Jan. 12, 2011) (overruling the appellant’s points of error concerning 18 veniremen and citing *Threadgill and Feldman*).

²⁶³ *Johnson*, 2015 WL 7354609, at *1; *Muhammad*, 2015 WL 6749922, at *1; *Harris*, 2014 WL 2155395, at *1; *Bess*, No. 2013 WL 827479, at *1; *Green*, 2012 WL 4673756, at *1; *Broadnax*, 2011 WL 6225399, at *1; *Medina*, 2011 WL 378785, at *1.

²⁶⁴ [Brief of Appellant, Robinson v. State, No. AP-76,535 \(Tex. Crim. App. Mar. 19, 2012\)](#).

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²⁶⁵ *Id.* at 70. Lawyers often raise issues on direct appeal that the CCA has rejected in other cases so that the issues are preserved for litigation in later proceedings. In these situations, lawyers frequently cite case-specific facts or cite to recently decided cases to explain why they are briefing an argument that the court previously has rejected. However, in this case, the lawyer utilized this disclaimer to disown over 80% of the errors raised, thus giving the impression that there were no worthwhile claims to be made on direct appeal.

²⁶⁶ The fifth constitutional challenge was discussed separately. It argued that the defendant's sentence was unconstitutional due to his age—just over 18 years—at the time of the offense. Although the lawyer did not state that the argument was pulled from another source, he acknowledged in a footnote that the CCA had rejected the argument he was making.

²⁶⁷ *Id.* at 71.

²⁶⁸ *Id.* at 77.

²⁶⁹ *Robinson v. State*, No. AP-76,535, 2013 WL 2424133 (Tex. Crim. App. June 6, 2013).

²⁷⁰ Counsel for Cortne Robinson and the lawyer who represented Donald Bess, James Broadnax, Gary Green, Roderick Harris, Matthew Johnson, and Naim Muhammad are on the [FIRST ADMINISTRATIVE JUDICIAL REGION'S LIST OF ATTORNEYS QUALIFIED TO REPRESENT INDIGENT DEFENDANTS IN DEATH PENALTY CASES \(Feb. 26, 2016\)](http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf), <http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf>.

²⁷¹ [Memorandum from Amanda Marzullo to File \(Apr. 6, 2016\) \(copy on file with author\)](#).