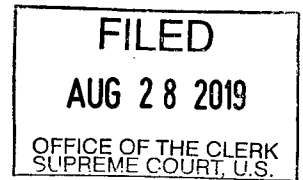


No. 19-7347



IN THE
SUPREME COURT OF THE UNITED STATES

BRODERICK G. MARSHALL
PRO SE PETITIONER

v.

LORIE DAVES, TDCJ DIRECTOR
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

PRO SE APPELLANT
BRODERICK G. MARSHALL
TDCJ-ID # 02165619
1697 Fm 980
HUNTSVILLE, TX 77343

QUESTIONS PRESENTED

DOES TEXAS SEVERANCE POLICY
SATISFY ANDERS PROPHETIC
FRAMEWORK?

PARTIES

APPELLANT : BRODERICK GLENN MARSHALL

TDCS - ID # 02165619

1697 FM 980

HUNTSVILLE, TX 77343

APPELLATE COUNSEL : CHERI DUNCAN

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HOUSTON, TX 77002

DISTRICT ATTORNEY : DANIEL MCCRORY

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JUSTICES : RUSSELL LLOYD

PETER KELLY

RICHARD HIGHTOWER

301 FANNIN STREET

HOUSTON, TX 77002


TEXAS DEPARTMENT OF

CRIMINAL JUSTICE

(TDCS) DIRECTOR : LORIE DAVIS

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THE 1ST DIST. COURT OF APPEALS FOR ALABAMA
ROBBY APPEALS AT APPENDIX "F"

THE 1ST DIST. CT. OF APPEALS FOR ALABAMA
MOTOR VEHICLE APPEALS AT APPENDIX "E"

THE PETITION FOR DISCRETIONARY REVIEW (PDR) FOR
ALB. ROBBY APPEALS AT "C"

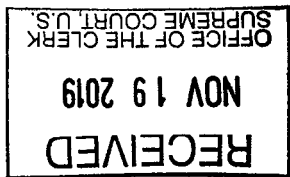
THE DISMISSAL OF APPELLANT'S MOTION FOR EXPANSION
OF RECORD APPEALS AT "B"

THE PETITION FOR DISCRETIONARY REVIEW (PDR) FOR
EVALUATION A MOTOR VEHICLE APPEALS AT "A"

JUAS DICTIO

THE PETITIONER seeks review of two different decisions
from THE SAME lower court pursuant Rule 12.4. The document
AT APPENDIX "C" IN CASE NUMBER 01-17-00929-CR IS OUT-OF-TIME
BUT A SPECIAL Petition for a writ of CERTIORARI TO THE
JUDICIAL SUFFICES. THE DOCUMENT AT APPENDIX "A" IN CASE
NUMBER 01-17-00928 IS TIMELY filed giving this court
jurisdiction pursuant Rule 13.

1



OPTIONS BELOW

THE 1ST DIST. COURT OF APPEALS FOR AGGRAVATED ROBBERY APPEARS AT APPENDIX "F"

THE 1ST DIST. CT. OF APPEALS FOR EVADING IN A MOTOR VEHICLE APPEARS AT APPENDIX "E"

THE PETITION FOR DISCRETIONARY REVIEW (PDR) FOR AGG. ROBBERY APPEARS AT "C"

THE DISMISSAL OF APPELLANT'S MOTION FOR EXPANSION OF RECORD APPEARS AT "B"

THE PETITION FOR DISCRETIONARY REVIEW (PDR) FOR EVADING IN A MOTOR VEHICLE APPEARS AT "A"

JURISDICTION

THE PETITIONER SEEKS REVIEW OF TWO DIFFERENT DECISIONS FROM THE SAME LOWER COURT PURSUANT RULE 12.4. THE DOCUMENT AT APPENDIX "C" IN CASE NUMBER 01-17-00929-CR IS OUT-OF-TIME BUT A SINGLE PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT SUFFICES. THE DOCUMENT AT APPENDIX "A" IN CASE NUMBER 01-17-00928 IS TIMELY FILED GIVING THIS COURT JURISDICTION PURSUANT RULE 13.

CONSTITUTIONAL AND STATUTORY
PROVISIONS

TEXAS RULES OF APPELLATE PROCEDURE 25.2 (c), (h)
FORM AND SUFFICIENCY OF NOTICE:

- (1) NOTICE MUST BE GIVEN IN WRITING AND FILED WITH THE TRIAL COURT IF THE NOTICE OF APPEAL IS RECEIVED IN THE COURT OF APPEALS, THE CLERK OF THAT COURT SHALL IMMEDIATELY RECORD ON THE NOTICE THE DATE THAT IT WAS RECEIVED AND SEND THE NOTICE TO THE TRIAL COURT CLERK.
 - (2) NOTICE IS SUFFICIENT IF IT SHOWS THE PARTY'S DESIRE TO APPEAL FROM THE JUDGMENT OR OTHER APPEALABLE ORDER, AND, IF THE STATE IS THE APPELLANT, THE NOTICE COMPLIES WITH CODE OF CRIMINAL PROCEDURE ARTICLE 44.01.
- (h) WHEN A COURT ENTERS A JUDGMENT OR OTHER APPEALABLE ORDER AND THE DEFENDANT HAS A RIGHT OF APPEAL, THE COURT (ORALLY OR IN WRITING) SHALL ADVISE THE DEFENDANT OF HIS RIGHT OF APPEAL AND OF THE REQUIREMENTS FOR TIMELY FILING A

SUFFICIENT NOTICE OF APPEAL.

TEXAS RULE OF APPELLATE PROCEDURE (TRAP) 68.2 (a)
FILING PETITION FOR DISCRETIONARY REVIEW PDZ :

- (a) THE PETITION MUST BE FILED WITHIN
30 DAYS AFTER EITHER THE DAY THE COURT
OF APPEALS' JUDGMENT WAS RENDERED OR
THE DAY THE LAST TIMELY MOTION FOR
REHEARING OR TIMELY MOTION FOR
EN BANC RECONSIDERATION WAS
OVERRULED BY THE COURT OF APPEALS.

TEXAS PENAL CODE § 3.02 (a), (b) CONSOLIDATION :

- (a) A DEFENDANT MAY BE PROSECUTED IN A
SINGLE CRIMINAL ACTION FOR ALL
OFFENSES ARISING OUT OF THE SAME
CRIMINAL EPISODE.

- (b) WHEN A SINGLE CRIMINAL ACTION IS
BASED ON MORE THAN ONE CHARGING
INSTRUMENT WITHIN THE JURISDICTION
OF THE TRIAL COURT, THE STATE SHALL
FILE WRITTEN NOTICE OF THE ACTION
NOT LESS THAN 30 DAYS PRIOR TO THE
TRIAL.

U. S. CONST. 6th AMENDMENT:

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

U. S. CONST. 14th AMENDMENT § 1:

(§ 1) ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF

LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF CASE

BRODERICK MARSHALL WAS CHARGED WITH AGGRAVATED ROBBERY, WITH A DEADLY WEAPON, TO-WIT: A FIREARM. ↓ HE WAS ALSO CHARGED WITH EVADING ARREST IN A MOTOR VEHICLE (CR AT 14). BEFORE TRIAL THE STATE MOVED THE COURT TO CONSOLIDATE BOTH CASES PURSUANT A CRIMINAL EPISODE UNDER TEX. PEN. C. § 3.02. SEE CR AT 35. MARSHALL WAS FOUND GUILTY BY A JURY AND PUNISHMENT WAS ASSESSED AT 40 YEARS IN PRISON FOR AGG. ROBBERY (RECORD OMITTED) AND 20 YEARS IN PRISON FOR EVADING (CR AT 91). IN THIS CONSOLIDATION CASE, ON A SINGLE DOCUMENT, THE TRIAL COURT CERTIFIED MARSHALL'S RIGHT TO APPEAL (CR AT 98). A MOTION FOR NEW TRIAL WAS FILED ON THIS CONSOLIDATED CASE AND

↓ APPELLATE COUNSEL DID NOT SEND APPELLANT A COPY OF THE CLERK'S RECORD FOR THE AGG. ROBBERY.

OVERRULED BY OPERATION OF LAW (CR AT 118 AND 123).

ON JULY 13, 2018 APPELLATE COUNSEL FILED A MERITS BRIEF FOR THE AGG. ROBBERY IN THE FIRST COURT OF APPEALS. TWO DAYS LATER COUNSEL FILED AN ANDERS BRIEF IN THAT SAME COURT. AT APPENDIX "I" IT SHOWS THE APPELLATE COURT STRUCK COUNSEL'S ANDERS BRIEF FOR BEING DEFICIENT IN FORM. ON FEBRUARY 5, 2019 THE APPELLATE COURT AFFIRMED THE AGG. ROBBERY. SEE APPENDIX "F". SUBSEQUENTLY, THAT COURT AFFIRMED THE EVADING CONVECTION AND GRANTED COUNSEL'S MOTION TO WITHDRAW. SEE APPENDIX "E". ON MAY 14, 2019 THE TEXAS COURT OF CRIMINAL APPEALS (TCCA) DISMISSED APPELLANTS' MOTION FOR EXPANSION OF THE RECORD. SEE APPENDIX "B". IN THE AGG. ROBBERY TCCA REFUSED MARSHALL'S PDR MAY 1, 2019.^{↓2} SEE APPENDIX "C". ON JULY 5, 2019 THAT COURT ALSO REFUSED HIS EVADING PDR. SEE APPENDIX "A".^{↓3}

^{↓2} UNDER TEX. R. APP. P. 56.1(C) "REFUSED" MEANS TCCA DETERMINED THE COURT OF APPEALS' JUDGMENT AND LEGAL PRINCIPLES CORRECT.

^{↓3} HEREINAFTER THE AGG. ROBBERY BRIEF WILL BE REFERED TO AS PDR-1 AND THE EVADING BRIEF AS PDR-2

STATEMENT OF FACTS

ON FEBRUARY 6, 2016 A CONSTRUCTION WORKER NAMED ANGEL VASQUEZ WAS ROBBED FOR HIS CLOTHES, MONEY, TOOLS AND HONDA CIVIC WHEN HE ARRIVED TO WORK AT A HOUSE IN HOUSTON TEXAS (4RR AT 24 AND 46). IN COURT MR. VASQUEZ IDENTIFIED MARSHALL AS THE PERSON WHO ASKED HIM IF HE WAS SELLING HIS CAR PRIOR TO THE ROBBERY (4RR AT 25, LINES 22-25; RR AT 26). HE ALSO IDENTIFIED THE WEAPON AS A YELLOW AND BLACK REVOLVER (4RR AT 31).

WHEN HOUSTON POLICE DEPARTMENT (HPD) OFFICER WOOTEN RESPONDED TO THE ROBBERY HE LEARNED VASQUEZ WAS ROBBED FOR HIS CELLPHONE AND HONDA CIVIC (4RR AT 70, LINE 25).

WHEN PATROLLING THE THE SOUTHEAST DIVISION WITH HIS PARTNER HPD OFFICER RODRIGUEZ CONDUCTED A RANDOM LICENSE PLATE CHECK ON A HONDA CIVIC THAT CAME BACK STOLEN FROM AN AGG. ROBBERY (4RR AT 85; RR 90, LINES 3-13). HE SEEN THE DRIVER WAS A BLACK MALE AND THE FRONT SEAT PASSENGER ~~WAS~~ WAS FEMALE WHEN IT BEGAN TO EVADE (4RR AT 86-87). ALSO, IN COURT OFFICER RODRIGUEZ

IDENTIFIED MARSHALL AS THE PERSON WHO EVADED HIM ON FOOT AND SEEN HIS FACE THREE TIMES DURING THAT EVADING (4RR AT 89). THE OFFICER LEARNED THE DRIVER'S NAME FROM THE PASSENGER (4RR AT 91, LINES 24-25).

RECORD SHOWS TRIAL COURT'S CERTIFICATION FOR MARSHALL'S RIGHT TO APPEAL, ADVICE OF HIS RIGHT TO APPEAL AND HIS PAUPER'S OATH ON APPEAL ALL CONTAIN, BOTH AGG. ROBBERY/EVADING AS AN APPEAL FROM A SINGLE TRIAL (CR AT 98-100). BEFORE COUNSEL'S BRIEF WAS STRUCK MARSHALL'S PRO SE RESPONSE AT ii SHOWED FOUR RAISED ARGUMENTS: (A) SUFFICIENCY OF EVIDENCE; (B) INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL (IAC); (C) ABUSE OF DISCRETION; AND (D) IAC AT POST-TRIAL. THE APPELLATE COURT RESPONDED TO MARSHALL PRO SE ACTION, REGARDING A CONSOLIDATED APPEAL, SAYING HE WAS NOT ENTITLED TO "HYBRID REPRESENTATION". SEE APPENDIX "H". AFTER THE STATE RESPONDED TO COUNSEL'S AGG. ROBBERY BRIEF MARSHALL FILED A PRO SE REPLY ARGUING A SUBSTANTIAL RIGHT WOULD BE AFFECTED IF THE COURT DID NOT CONSIDER HIS PRO SE RESPONSE TO COUNSEL'S ANDERS BRIEF. THE AGG. ROBBERY WAS AFFIRMED WITHOUT ANY CONSIDERATION OF MARSHALL'S PRO SE REPLY. SEE

APPENDIX "F". THE APPELLATE COURT SET THE EVADING APPEAL FOR SUBMISSION FEBRUARY 26, 2019. SEE APPENDIX "G". MARSHALL RECEIVED A COPY OF HIS COUNSEL'S CORRECTED BRIEF FEBRUARY 7, 2019. SEE APPENDIX "D".

IN PDR -1 MARSHALL SOUGHT RELIEF FROM TCCA ARGUING, AMONG OTHER THINGS, HE WAS NOT AFFORDED ADEQUATE AND EFFECTIVE APPELLATE REVIEW BECAUSE THE SEVERANCE PROCEDURE ~~REMOVED~~ REMOVED ARGUABLE ISSUES DEALING WITH INSUFFICIENT EXTRANEOUS EVIDENCE ON IDENTITY. SEE PDR-1 AT 3-5. WHEN THE APPELLATE COURT FOUND NO REVERSIBLE ERROR IN THE JUDGMENT AND GRANTED COUNSEL'S MOTION TO WITHDRAW, MARSHALL FILED HIS PDR-2 REITERATING THE SAME ISSUES DEALING WITH THE UNFAIR SEVERANCE POLICY AND CONSTRUCTIVE DENIAL OF COUNSEL.

STANDARD OF REVIEW

THIS COURT IN ANDERS V. CALIFORNIA, 386 U.S. 738 (1967) HELD IN ORDER TO PROTECT INDIGENT DEFENDANTS' CONSTITUTIONAL RIGHT TO APPELLATE COUNSEL, COURTS MUST SAFEGUARD

AGAINST THE RISK OF GRANTING SUCH REQUEST IN CASES WHERE APPEAL IS NOT ACTUALLY FRIVOLOUS. IN SMITH V. ROBBINS, 528 U.S. 259, 273, 120 S.Ct. 746, 757 (2000) THIS COURT EXPLAINED THE ANDERS PROCEDURE IS JUST "A PROPHYLACTIC FRAMEWORK" THAT THIS COURT ESTABLISHED TO VINDICATE THE CONSTITUTIONAL RIGHT TO APPELLATE COUNSEL. WHILE THIS COURT IS NOT A RULE MAKING ORGAN IT HAS THE POWER TO REVIEW SCOTT V. STATE, 235 S.W.3d 255, 257 (TEX. CR. APP. 2007) AND MEASURE WHETHER THE STATE'S SEVERANCE PROCEDURE ON DIRECT APPEAL WAS EQUATABLE WHEN COMPARED WITH IN RE SCHULMAN, 252 S.W.3d 403, 408-09 (TEX. CR. APP. 2008). IN SCHULMAN TEXAS FOLLOWS THE ANDERS PROCEDURE FOR DEALING WITH FRIVOLOUS APPEALS. IT FOLLOWS, A COURT OF APPEALS CAN NOT GRANT A COUNSEL'S MOTION TO WITHDRAW UNDER ANDERS UNTIL:

- 1.) THE ATTORNEY HAS SENT A COPY OF HIS ANDERS BRIEF TO HIS CLIENT ALONG WITH A LETTER EXPLAINING THAT THE DEFENDANT HAS THE RIGHT TO FILE A PRO SE BRIEF WITHIN THIRTY DAYS, AND HE HAS ENSURED THAT HIS CLIENT HAS, AT SOME POINT, BEEN INFORMED OF HIS RIGHT TO FILE A PRO SE PDR;
- 2.) THE ATTORNEY HAS INFORMED THE COURT OF APPEALS THAT HE HAS PERFORMED THE ABOVE

DUTIES;

- 3.) THE DEFENDANT HAS HAD TIME IN WHICH TO FILE A PRO SE RESPONSE; AND
- 4.) THE COURT OF APPEALS HAS ITSELF REVIEWED THE RECORD, THE ANDERS BRIEF, AND ANY PRO SE BRIEF.

FOR A STATES PROCEDURE TO BE "ADEQUATE AND EFFECTIVE" FOR APPELLATE REVIEW, IT MUST "ENSURE THAT AN INDIGENT'S APPEAL WILL BE RESOLVED IN A WAY THAT IS RELATED TO THE MERIT OF THAT APPEAL". ROBBINS 528 U.S., AT 276. FURTHER, FAIRNESS REQUIRE "COUNSEL OR A FULL APPEAL" UP UNTIL "IT IS PROPERLY DETERMINED THAT AN APPEAL IS FRIVOLOUS". ID. AT 280. WHEN REVIEWING STATE PROCEDURE THIS COURT ADDRESSES ONLY WHAT IS CONSTITUTIONALLY COMPELLED. ID. AT 284.

FURTHERMORE, STRICKLAND V. WASHINGTON, 466 U.S. 668, 695, 104 S.Ct. 2052 (1984) IS THE STANDARD FOR EVALUATING APPELLATE COUNSEL'S INEFFECTIVENESS IN NEGLECTING TO FILE A MERITS BRIEF. UNDER THAT STANDARD A PETITIONER MUST FIRST SHOW THAT HIS COUNSEL WAS OBJECTIVELY UNREASONABLE IN FAILING ... TO DISCOVER NONFRIVOLOUS ISSUES AND TO FILE A MERITS

BRIEF RAISING THEM," AND AFTER MAKING THAT SHOWING, "HE THEN HAS THE BURDEN OF DEMONSTRATING PRESUMICE. ID. AT 285. NONETHELESS, "IT IS POSSIBLE TO BRING A STRICKLAND CLAIM WHEN IGNORED ISSUES ARE CLEARLY STRONGER THAN THOSE PRESENTED" AND WILL OVERCOME THE PRESUMPTION OF EFFECTIVE ASSISTANCE OF COUNSEL. ID. AT 288

ARGUMENT

IN THIS PRESENT CASE THE STRENGTH OF THE STATE'S CONVICTION IS GROUNDED ON THE CONSOLIDATION OF AGG. ROBBERY AND EVADING ARREST; THE STRENGTH OF APPELLATE COUNSEL'S ANDERS BRIEF CLAIMED THE EVADING WAS FRIVOLOUS WITHOUT REFERING TO THE AGG. ROBBERY; THE STRENGTH OF MARSHALL'S IN PROPRIA PERSONA BRIEF ARGUED APPELLATE COUNSEL WAS DEFICIENT FOR FAILING TO KEEP THE STATE'S THEORY INTACT BY ATTACKING THE SUFFICIENCY OF PRIOR EXTRANEOUS OFFENSES DURING GUILT/ INNOCENCE PHASE.

IN PDR-1, AT 6 MARSHALL SHOWED THE APPELLATE COURT STRUCK COUNSEL'S FIRST ANDERS

BRIEF FOR FAILING TO MEET THE LEGAL ANALYSIS. HE ALSO SHOWED COUNSEL'S SECOND BRIEF EXTENSIVELY REBUTTED HIS INITIAL PRO SE RESPONSE ON ADMISSIBILITY OF PRIOR EXTRANEIOUS OFFENSES. SEE COUNSEL'S CORRECTED ANDERS BRIEF AT 8-11. ACCORDING TO COUNSEL THE RECORD DID NOT PRESENT "A NON-FRIVOLOUS ARGUMENT THAT THE JUDGE ABUSED HIS DISCRETION IN ADMITTING THE EVIDENCE" TO PROVE IDENTITY, AND, IN HER OPINION TRIAL COURT'S DENIAL OF THE DIRECTED VERDICT MOTION DID NOT PROVIDE A VALID ISSUE FOR APPEAL. *Id.*; E.G. WALDER V. STATE, 85 S.W.3D ~~824~~ 824, 828 (TEX. APP. WACO 2002, NO PET.). AT PAGE 11 IN THE SECOND PARAGRAPH SHE SAID IDENTITY APPLIES TO BOTH CONSOLIDATED OFFENSES. ON DIRECT MARSHALL'S INITIAL PRO SE RESPONSE URGED THE APPELLATE COURT NOT TO SEPARATE THE CONSOLIDATED CASES BECAUSE THERE WAS A NEXUS BETWEEN THE COMBINATION OF THE PRIOR EXTRANEIOUS OFFENSES AND THE PRESENT COMBINATION OF ROBBERY/EVADING. HE CLAIMED THE PROBATIVE VALUE OF THE EXTRANEIOUS OFFENSES WERE OUTWEIGHED BY UNFAIR PRESUDICE BECAUSE THEY WERE DISSIMILAR SHOWING ONLY HIS PROPENSITY TO BE A CRIMINAL GENERALLY AND NOT HIS MODUS

OPERANDI.

CONTINUELY, IN PDR-1, AT 2-3 MARSHALL ARGUED THAT IF HIS APPEAL IS TO BE EVALUATED UNDER ANDERS, THEN TCCA SHOULD REMAND THE ROBBERY SO THE APPELLATE COURT COULD REVIEW THE WHOLE RECORD AND NOT SEPARATE HIS APPEAL FOR A PARTIAL REVIEW. THE STATE'S SEVERANCE PROCEDURE IS UNREASONABLE APPLICATION OF ANDERS PROPHYLACTIC FRAMEWORK BECAUSE IT "PROVID[E] [A] ONE-SIDED BRIEFING BY COUNSEL AGAINST H[ER] OWN CLIENT'S BEST CLAIMS, AND PROBABLY MADE A COURT MORE LIKELY TO RULE AGAINST" HIM. SEE ROBBINS AT 757. CONSTRUCTIVELY, THIS ALLOWED THE COURT TO REVIEW A RECORD ON APPEAL WITHOUT THE ASSISTANCE OF COUNSEL [WHERE] THE RECORD [DID] NOT ACCURATELY AND UNAMBIGUOUSLY REFLECT ALL THAT OCCURED AT TRIAL". SEE PENSON V. OHIO, 109 S. CT. 346, 351 N5 (1988). WHILE THIS COURT IS NOT A RULE-MAKING ORGAN, IT SHOULD EVALUATE WHETHER TEXAS HAS SATISFIED THE REQUIREMENT OF THE CONSTITUTION.

IN THIS INSTANT CASE TEXAS DOES NOT PROVIDE ANY STATE PROCEDURE THAT ALLOWS SEVERANCE AT APPEAL FROM A CONSOLIDATED TRIAL FOR A SCHULMAN REVIEW. IN LAW, WHEN

EVALUATING SCHULMAN AT 410-11 N 32 "A MOTION TO WITHDRAW WILL NOT BE GRANTED UNTIL THE APPELLATE COURT DECIDES WHETHER THE APPEAL IS, [I], WHOLLY FRIVOLOUS". THIS POLICY IS FIRMLY ESTABLISHED. SEE WILSON V. STATE, 40 S.W.3D 192, 198 TEX. APP. - TEXARKANA 2001) (ANDERS REQUIRE AN APPELLATE COURT CONDUCT "A FULL EXAMINATION OF ALL THE PROCEEDINGS, TO DECIDE WHETHER THE CASE IS WHOLLY FRIVOLOUS."); OR EADEN V. STATE, 161 S.W.3D 173, 175 (TEX. APP. - EASTLAND 2005) ("A WHOLLY FRIVOLOUS APPEAL IS ONE THAT LACKS ANY BASIS IN LAW OR IN FACT.")

IN APPELLATE COUNSEL'S ANDERS BRIEF AT 2 N1 SHE INFORMED THE COURT THE MERITS BRIEF FOR THE AGG. ROBBERY WAS NOT WAIVED. IN APPENDIX "E" AT 2, THIRD PARAGRAPH, THE APPELLATE COURT SAID MARSHALL WAS ADVISED OF HIS RIGHT TO RESPOND TO COUNSEL'S CORRECTED BRIEF BUT HE DID NOT FILE ONE. LOOKING TO PDR-2, AT 2 MARSHALL SHOWED, VIA APPENDICIES, HE CONTACTED HIS COUNSEL REQUESTING A COPY OF HER CORRECTED BRIEF AROUND JANUARY 12, 2019 AND RECEIVED IT ABOUT FEBRUARY 13, 2019. IN APPENDIX "D" AT 2 BELOW THE BOLD PRINT IT SHOWS COUNSEL'S DILATORY IN SENDING A COPY OF HER BRIEF. THE ANDERS PROCEEDING WAS SET

FOR SUBMISSION FEBRUARY 26, 2019. SEE APPENDIX "G".

HERE, THE STATE'S EXPERIMENT TO SEVERE GOES AGAINST THE PROPHYLACTIC MEANS OF ANDERS IN TWO WAYS, FIRST BECAUSE COUNSEL DELAYED IN SENDING A COPY OF HER CORRECTED ANDERS BRIEF LEAVING MARSHALL WITH, AT MOST, EIGHTEEN DAYS TO FILE A PRO SE BRIEF IN RESPONSE. CE.

SCHULMAN AT 409. ALSO, THE COURT ERRONEOUSLY DETERMINED MARSHALL WAS ADVISED OF HIS RIGHT TO RESPOND BECAUSE IT WAS NOT INFORMED BY COUNSEL THAT HE WAS ADVISED. ALTHOUGH COUNSEL ADVISED MARSHALL THAT HE COULD FILE A PRO SE MOTION FOR EXTENSION OF TIME TO FILE A PRO SE RESPONSE TO HER ANDERS BRIEF, THE APPELLATE COURT HAD ALREADY TOLD HIM HE WAS NOT ENTITLED TO HYBRID REPRESENTATION. SEE APPENDIX "H".

SECONDLY, MARSHALL WAS UNABLE TO PRESENT HIS CLAIMS FULLY AND FAIRLY ON APPEAL BECAUSE THE AGG. ROBBERY WAS BEING PURSUED PRO SE DURING THE TIME TO FILE A RESPONSE TO THE ANDERS BRIEF.⁴ VIRTUALLY, SINCE THE APPELLATE COURT FAILED TO PROVIDE TCCA THE FULL APPELLATE RECORD WITHIN 15 DAYS OF RECEIVING NOTICE OF PDR-1'S FILING, ITS OPINION ISSUED IN THE ANDERS BRIEF ON MARCH 26,

⁴ PDR'S ARE SUBJECT TO 30-DAY TIME CONSTRAINT TRAP 68.2

2019 WAS UNTIMELY AND UNAUTHORIZED UNDER TRAP 68.7 IF THIS COURT LOOK AT THE WHOLE RECORD. SEE EX PARTE NYABWA, 366 S.W.3d 710, 710-11 (TEX. CR. APP. 2012). IF THE AGG. ROBBERY IS MERITORIOUS FOR ANY REASON LESS THAN THE NATURE OF TRIAL RECORD, THEN IT IS WHOLLY MERITORIOUS WHEN CONSOLIDATED WITH EVADING. THE PENSON COURT CONDEMNED THESE TYPE OF EX PARTE PROCEEDINGS ON DIRECT APPEAL BECAUSE THEY ARE INADEQUATE AND INEFFECTIVE. 109 S.Ct. AT 354. PRESENTLY, THE STATE IS CONFINED TO "UNREASONED DISTINCTION". ROBBINS AT 759.

AT PAGE 4 OF COUNSEL'S ANDERS BRIEF SHE SAID "THERE WAS NO ADVERSE PRETRIAL RULING ON THE CONSOLIDATION ISSUE". ALTHOUGH THE AGG. ROBBERY/EVADING WERE ASSIGNED SEPARATE DOCKET NUMBERS THEY WERE RELATED IN A SINGLE CRIMINAL ACTION BECAUSE THE STATE MOVED THE TRIAL COURT TO CONSOLIDATED UNDER TEX. PEN. C. § 3.02(b).^{↓5} WHEN LOOKING AT MARSHALL'S PAUPER'S OATH, CERTIFICATION AND ADVICE FOR

^{↓5} THE CLERK'S RECORD AT 35 SHOWS THE STATE INCORRECTLY PURSUED TEX. PEN. C. § 3.02 (C) IN ITS MOTION. THE APPELLANT WILL BASE HIS ARGUMENT ON CORRECT LAW.

HIS RIGHT TO APPEAL HE HAD A RIGHT TO A CONSOLIDATED APPEAL (CR 98-100). IT WAS ERROR FOR THE COURT OF APPEALS TO DISMISS MARSHALL'S EVADING APPEAL AS FRIVOLOUS BECAUSE IT WAS CONSOLIDATED AT TRIAL AND COUNSEL FAILED TO FILE AN AMENDED NOTICE INCLUDING BOTH CASES. SEE GONZALES V. STATE, 421 S.W.3d 674, 674-75 (TEX. CR. APP. 2014).

IN COUNSEL'S ANDERS BRIEF AT 11, SECOND PARAGRAPH, SHE EXCLUSIVELY SAID THERE WERE NO NONFRIVOLOUS ISSUES FOR EVADING — THIS CLEARLY RAISED A CONSOLIDATION ISSUE ON APPEAL — THUS HER FAILURE TO PRESENT ANYTHING FOR REVIEW BY OMITTING CITATION TO THE RECORD OR LEGAL AUTHORITIES REGARDING THIS POINT OF ERROR WAS INADEQUATE AND INEFFECTIVE. SEE BUFKIN V. STATE, 179 S.W.3d 166, 173-74 (TEX. APP. — HOUSTON [14th DIST.] 2005); AFF'D 207 S.W.3d 779 (TEX. CR. APP. 2006); TRAP 38.9. IT IS NOTED THAT "IF CONCRETE DATA NECESSARY TO CONDUCT A HARM ANALYSIS IS ABSENT, A HARMLESS ERROR TEST MUST NEVERTHELESS BE CONDUCTED". SEE LLAMAS V. STATE, 12 S.W.3d 469, 470 (TEX. CR. APP. 2000). THE APPELLATE COURT IN THIS CASE FAILED TO TAKE INTO ACCOUNT IN DETERMINING WHETHER SEVERING THE APPEAL WOULD DENY IT

AND MARSHALL THE BENEFIT OF A FULL EXAMINATION. IN ESSENCE IT WAS MISSING DATA. SINCE "THE LEGISLATURE INTENDED A SINGLE CRIMINAL ACTION TO REFER TO A SINGLE TRIAL" [LAPORTE V. STATE, 840 S.W.2d 412, 414-15 (TEX. CR. APP. 1992)] (INTERNAL QUOTATION MARKS OMITTED) AND COUNSEL EXPRESSED NO RIGHT TO A SEVERANCE, THERE WAS NO MANDATORY RIGHT TO A SEVERANCE FOR APPELLATE REVIEW. IN ALL, COUNSEL AFFECTED MARSHALL'S SUBSTANTIAL RIGHT TO HAVE THE APPELLATE COURT CONSIDER EVERYTHING IN RECORD INCLUDING ALL THE EVIDENCE ADMITTED. Cf. SCOTT V. STATE, 235 S.W.3d 255, 257 (TEX. CR. APP. 2007); TRAP 38.1.

THE STATE URGED THE FACTS OF PRIOR EXTRANEOUS OFFENSES WERE SIMILAR TO THE PRESENT CONSOLIDATED ROBBERY/EVADING BECAUSE IT INVOLVED A HISPANIC MAN BEING PISTOL WHIPPED, ROBBED FOR A CELLPHONE AND HONDA CIVIC, AND SHOWS MARSHALL EVADING A FEW DAYS LATER IN THE STOLEN CAR AND ON FOOT (5 RR AT 30, LINE 1-13). WHILE THE RIGHT TO COUNSEL ON FIRST APPEAL DOES NOT INCLUDE THE RIGHT TO COUNSEL FOR BRINGING A FRIVOLOUS APPEAL, IT CANNOT BE SAID THAT THE COUNSEL ON THIS APPEAL ZEALOUSLY DISCERNED THE NONFRIVOLOUS SUFFICIENCY OF IDENTITY EVIDENCE

APART FROM ADMISSIBILITY OF CHARACTER EVIDENCE. SEE SEGUNDO V. STATE, 270 S.W. 3d 79, 88 (TEX. CR. APP.); ALSO MELGAZ V. STATE, 236 S.W. 3d 302, 306-07 (TEX. APP. - HOUSTON [1ST. DIST.] 2007, PET. REF'D). HERE, COUNSEL ALSO FAILED TO MAKE REFERENCE TO THE RECORD OR LEGAL AUTHORITIES.

IN ADDITION TO ALL THESE LEGAL AND FACTUAL ISSUES, RECORD SHOWS IN COUNSEL'S BRIEF FOR AGG. ROBBERY AT 1 SHE SAID:

* THE RECORD IS INCOMPLETE AT THE TIME OF FILING THIS BRIEF. SPECIFICALLY, IT IS MISSING THE COURT'S CHARGE TO THE JURY ON GUILT/INNOCENCE. SEE CR AT 3. COUNSEL HAS CONTACTED THE CLERK'S OFFICE IN WRITING TO REQUEST A SUPPLEMENTAL RECORD.

THIS PORTION OF THE RECORD IMPLIES COUNSEL PREDISPOSED THE EVADING BEFORE THE AGG. ROBBERY IMPLICATING A FAILURE TO EXAMINE THE WHOLE RECORD. IN COUNSEL'S ~~ANDERS~~ BRIEF AT 13 SHE SAID THE ONLY ERROR FOUND IN THE JURY INSTRUCTION DEALT WITH VARIANCE BETWEEN THE INDICTMENT AND INSTRUCTION. AS DISCUSSED INFRA AT 26-28 THE TRIAL COURTS LIMITED INSTRUCTION WAS SUGGESTIVE AND THE JURY CHARGE CONTAINED INACCURATE STATEMENT OF LAW AND FAILED TO SET OUT ALL THE ESSENTIAL ELEMENTS OF LAW. SEE

VASQUEZ V. STATE, 389 S.W.3d 361, 366 (TEX. CR. APP. 2012);
BROWN V. STATE, 122 S.W.3d 794, 802-03 (TEX. CR. APP. 2003);
YOUNG V. STATE, 382 S.W.3d 414, 423 (TEX. APP. - TEX ARKANA
2012); MCINTOSH V. STATE, 297 S.W.3d 536, 542-43 (TEX.
APP. - HOUSTON [1ST DIST.] 2009). THE FACT THAT THIS
WAS A CONSOLIDATED CASE AND COUNSEL FAILED TO
FULFILL HER DUTY IN SENDING MARSHALL A COPY OF
THIS PORTION OF THE RECORD, SO HE COULD FILE A PRO
SE RESPONSE, HE WAS DENIED A SUBSTANTIAL RIGHT.

THE PROBLEM WITH THE SEVERANCE PROCEDURE IS
THAT IT PERMITS AN APPELLATE COURT TO ALLOW
COUNSEL "TO WITHDRAW BEFORE THE COURT HAD
DETERMINED WHETHER COUNSEL'S EVALUATION OF THE
CASE WAS ACCURATE". SEE ROBBINS 528 U.S. AT 280.
IT FOLLOWS, THE APPELLATE COURT ERRED WHEN IT
SEVERED AND AFFIRMED THE AGG. ROBBERY BEFORE
DECIDING COUNSEL'S EVALUATION OF THE WHOLE CASE.
COUNSEL EXPLICITLY SAID SHE WOULD NOT ASSIST
MARSHALL IN ~~FILE~~ FILING HIS PDR FOR THE
ROBBERY DURING THE PENDENCY OF THE EVADING. ⁶
BOTH ROBBINS AND FINLEY ARE CLEAR, "THE PERSON

⁶ LAW PROVIDE DEFENDANTS HAVE NO CONSTITUTIONAL
RIGHT TO COUNSEL DURING THE PDR STAGE. SEE
PENNSYLVANIA V. FINLEY, 107 S.Ct. 1990, 1993, 481 U.S. 551, 555 (1987).

PROCEDURE PERMITTED A BASIC VIOLATION OF THE DOUGLAS RIGHT TO HAVE COUNSEL UNTIL A CASE IS DETERMINED TO BE FRIVOLOUS", *Id.*, AND "STATE CANNOT PENALIZE A CRIMINAL DEFENDANT BY DISMISSING HIS FIRST APPEAL AS OF RIGHT WHEN HIS APPOINTED COUNSEL HAS FAILED TO FOLLOW MANDATORY APPELLATE RULES". *FINLEY* 481 U.S. 557 AT 557. SINCE COUNSEL'S BARE CONCLUSION BRIEF DEVIATED FROM LAW AND FACTS DIVERTING THE APPELLATE COURT'S ATTENTION FROM MARSHALL'S STRONGER ARGUMENTS, THE 14TH AMENDMENT COMPELS THE STATE TO WARRANT A MERITS BRIEF FROM COUNSEL WHEN ARGUABLE ISSUES EXIST IN THE NORMAL SENSE. *ROBBINS* 528 U.S. AT 285.

ADDRESSING STRICKLAND'S PRESUDCE PRONG FIRST THERE IS A REASONABLE PROBABILITY THAT HAD COUNSEL MADE A THOROUGH REVIEW OF THE RECORD POINTING TO THE STRONGEST AVAILABLE ARGUMENTS TO SUPPORT THE APPEAL MARSHALL WOULD HAVE PREVAILED. RECORD SHOWS THE TRIAL COURT QUESTIONED THE ADMISSIBILITY OF THE STATES EXTRANEOUS OFFENSE.

THE COURT : YOU WANT TO TAKE A CHANCE PUTTING THAT IN ? YOU THINK YOU NEED IT ? I THINK ITS ADMISSIBLE ...

4RR AT 106, LINES 13-17

IT IS ARGUABLE THAT THE TRIAL COURT WAS CONCERNED WITH THE ADMISSIBILITY OF THIS EVIDENCE BECAUSE IT TREK THE GROUND OF CHARACTER EVIDENCE. AT THE EXTRANEONS OFFENSE HEARING, DEFENSE ATTORNEY ARGUED THE EVIDENCE SHOULD NOT BE ADMITTED UNDER TEX. R. EVID. 404(b) BECAUSE THE STATE MADE A BIG ISSUE OF THE ONE-WITNESS RULE AND THERE WAS DIRECT EVIDENCE OF IDENTITY FROM TWO ~~WITNESSES~~ WITNESSES (5RR AT 40-46). SEE MONTGOMERY V. STATE, 810 S.W.2D 372, 375 (TEX. CR. APP. 1991). ALSO, THE MORE DIRECT EVIDENCE THAT EXIST THE LESS PROBATIVE VALUE MAY BE ATTACHED TO THE EXTRANEONS OFFENSE. SEE GEGLIOBIANCO V. STATE, ~~210~~ 210 S.W.3D 637, 641-42 (TEX. CR. APP. 2006) (CITING MONTGOMERY AT 390).

RECORD ALSO SHOW TRIAL COUNSEL OBJECTED TO THE EXTRANEONS EVIDENCE ADMISSION FOR BEING IMMATERIAL TO IDENTITY WHERE IT HAPPENED "TEN YEARS ~~EARLIER~~ EARLIER UNDER VERY DIFFERENT CIRCUMSTANCES IN A DIFFERENT AREA OF HOUSTON." THE TEN YEAR HEATUS BETWEEN THE CASES CAUSED THE PROBATIVE VALUE TO BE SUBSTANTIALLY OUTWEIGHED BY POTENTIAL UNFAIR PREJUDICE UNDER 403 (5RR AT 48). REMOTENESS IS IMPORTANT TO RELEVANCE AND PROBATIVE VALUE WHICH MAY BE RAISED ON APPEAL EVEN IF NOT RAISED AT TRIAL. SEE LEWIS V. STATE, 674 S.W.2D 423, 427 (TEX. APP., DALLAS 1984); ALSO TEMPLIN V. STATE, 711 S.W.2D

30, 34 (TEX. CR. APP. 1986). THE PROFFERED EXTRANEOUS EVIDENCE FROM 2008 SHOWED CONFORMITY INSTEAD OF IDENTITY DIMINISHING ITS VALUE TO UNFAIR PRESUDICIAL EVIDENCE BECAUSE THERE ARE NO INTERVENING ACTS OF MISCONDUCT BY MARSHALL TO BE ADMITTED. SEE BACHOFFER V. STATE, 633 S.W.2D 869, 872 (TEX. CR. APP. 1982) (TWO YEARS NINE MONTHS TO REMOTE).

ASIDE FROM REMOTENESS TRIAL COUNSEL ARGUED THERE WAS NO MODUS OPERANDI BETWEEN THE PRIOR AND CURRENT OFFENSES (5RR AT 49). AS ENUMERATED BELOW, THE DISSEMBLARITIES ARE: ↓⁷

CURRENT OFFENSES

DAY TIME ROBBERY (4RR AT 29 LINE 22) [REDACTED]
1 ROBBER (4RR 40, LINES 21-23)
REVOLVER FIREARM (4RR AT 31, LINE 10)
ASK VICTIM TO SELL CAR (4RR 25, LINE 22-23)
STRIPPED VICTIM (4RR 30, LINE 16)
ROBBERY INSIDE HOUSE (4RR 30, LINE 3)
ROBBERY SOUTHEAST HOUSTON (4RR 71 LINE 10)
1 PERSON EVADED (4RR 88, LINES 2-7)
EVADING SOUTHEAST HOUSTON (4RR AT 84, LINE 3)

↓⁷ DEFENSE COUNSEL ALSO URGED THE PRIOR EVADING WAS SO WEAK THAT MARSHALL WAS NOT CHARGED WITH IT. IBID.

PRIOR EXTRANEOUS OFFENSES

NIGHTTIME ROBBERY (5 RR AT 59, LINES 14-16)
2 ROBBERIES (5 RR AT 68, LINE 8-16)
SEMI-AUTOMATIC FIREARM (5 RR AT 68, LINES 17-20)
NOT ASKED TO SELL CAR (5 RR AT 68)
VICTIM NOT ASKED TO STRIP (5 RR AT 68)
ROBBERY OUTSIDE APARTMENTS (5 RR AT 68)
ROBBERY SOUTHWEST HOUSTON (5 RR AT 68, LINE 22)
2 PEOPLE EVADED (5 RR 58, LINES 24-25)

COMPARISON ON SIMILARITIES OF THE OFFENSE CANNOT
ARISE FROM THE TYPE OF OFFENSE COMMITTED. SEE
MARTIN V. STATE, 722 S.W.2d 172 (TEX. APP. - BEAUMONT
1986). IN WYSNER V. STATE, 763 S.W.2d 790, 793 (TEX.
APP., DALLAS 1987) IT REJECTED THE USE OF
EXTRANEOUS OFFENSES TO PROVE IDENTITY BECAUSE
THE DIFFERENCES IN THE NUMBER OF PARTIES, USE OF
WEAPON, AREA, MODE OF COMMISSION AND TIME OF
OFFENSE. ALSO, THE STATE HAD THE BURDEN OF PROVING
IT WAS MARSHALL, "IN FACT, [AS] THE PERSON WHO
COMMITTED THE OTHER ACT." SEE JOHNSTON V. STATE,
145 S.W.3d 215, 221 (TEX. CR. APP. 2004). WHILE THERE
ARE NO RIGID RULES DICTAT[ING] WHAT CONSTITUTES
SUFFICIENT SIMILARITIES, THE DISSIMILARITIES
CHART ABOVE NEGATE THE RELEVANCY THEORY THAT
THIS WAS MARSHALL'S HANDIWORK OR MODUS OPERANDI.
SUPRA, SEGUNDO 270 S.W.3d, AT 88. A HISPANIC MAN
BEING ROBBED WITH A GUN FOR HIS CAR IS TOO
GENERIC TO CONSTITUTE A SIGNATURE. Id.

WITH RESPECT TO IDENTITY IT IS ARGUABLE IN THE NORMAL SENSE OF BEING NONFRIVOLOUS THAT THE TRIAL COURT MADE A SUGGESTIVE COMMENT IN ITS LIMITING INSTRUCTION. IT READ IN RELEVANT PARTS:

THE DEFENDANT IS ON TRIAL SOLELY ON THE CHARGE CONTAINED IN THE INDICTMENT. IN REFERENCE TO EVIDENCE, IF ANY, THAT THE DEFENDANT HAS PREVIOUSLY PARTICIPATED IN RECENT TRANSACTION OR ACTS OTHER THAN BUT SIMILAR TO THAT WHICH IS CHARGED IN THE INDICTMENT IN THIS CASE, YOU ARE INSTRUCTED THAT YOU CANNOT CONSIDER SUCH OTHER TRANSACTION OR ACTS, IF ANY, FOR ANY PURPOSE UNLESS YOU FIND AND BELIEVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT PARTICIPATED IN SUCH TRANSACTIONS OR COMMITTED SUCH ACTS, IF ANY, AND EVEN THEN YOU MAY ONLY CONSIDER THE SAME FOR THE PURPOSE OF DETERMINING IDENTITY, IF IT DOES, AND FOR NO OTHER PURPOSE.

(5 RR AT 51, LINES 23-25; RR 52)

SINCE COUNSEL FAILED TO OBJECT TO THE INSTRUCTION MARSHALL MUST SHOW "EGREGIOUS HARM". SUPRA, MCINTOSH. AS A WHOLE WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT "PREVIOUSLY PARTICIPATED IN RECENT TRANSACTIONS" COULD BE USED FOR IDENTITY, IT WAS ~~WAS~~ CALCULATED TO INJURE MARSHALL'S RIGHTS BECAUSE IT EXPRESSED AN OPINION TO THE WEIGHT OF THE EVIDENCE. SUPRA, YOUNG. THE "INSTRUCTION" MARGINALLY FALLS ON THE WRONG SIDE OF THE IMPROPER - JUDICIAL - COMMENT

SCALE BECAUSE IT FAILS TO CLARIFY THE LAW FOR THE JURY". SUPRA, BROWN. THE INSTRUCTION TOLD THE JURY TO CONSIDER THE TEN YEAR OLD CASE AS A RECENT TRANSACTION FOR IDENTITY PURPOSES AFTER IT OVERRULED COUNSEL'S OBJECTION TO THE REMOTENESS. SUPRA, BALCHOFFER.

MARSHALL'S IDENTITY IS A QUESTION OF FACT THAT MUST BE DETERMINED BY THE JURY. A MODUS OPERANDI CANNOT BE PRESUMED AS A MATTER OF LAW. CF. BROWN AT 800. WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT PREVIOUSLY PARTICIPATED COULD BE INFERRED FROM THE REMOTE EXTRANEOUS EVIDENCE IT PRESUMED ONLY ONE POSSIBLE INFERENCE OF AN ELEMENT FROM THAT EVIDENCE, WHICH WAS, THAT MARSHALL WAS A CRIMINAL BECAUSE OF THE COMPARED SIMILARITIES IN THE TYPE OF OFFENSES COMMITTED. THE INSTRUCTION WAS IMPROPER BECAUSE THERE IS NO EVIDENCE IN RECORD ESTABLISHING A SINGLE PERSON'S SIGNATURE. ALSO, IT IMPERMISSIBLY DELIVERED ITS OPINION THAT IDENTITY COULD BE FOUND ~~TO~~ IF MARSHALL PARTICIPATED IN THE PRIOR EXTRANEOUS OFFENSES WITH OTHER PARTIES. THIS ALLOWED THE STATE TO MAKE SPECULATIVE ARGUMENTS ON REMOTE BAD ACTS INVOLVING OTHER PARTIES BEYOND THE RELEVANCY THEORY OF IDENTITY TO CONVINCE A

LAY JURY FROM A COMMON KNOWLEDGE POINT OF VIEW. E.g. BROWN AT 801. THE JURY WAS IMPROPERLY TOLD HOW TO CONSIDER THE EVIDENCE. NOT ONLY WAS THIS AN INCORRECT STATEMENT UNDER 404(b), IT ALSO MAGNIFIED THE FACT OF MARSHALL'S CHARACTER GIVING UNFAIR EMPHASIS TO THAT FACT. SUPRA SEGUNDO; ALSO SUPRA MELGAR.

AS ARGUED ABOVE AND EXPLAINED IN VASQUEZ AT 367, THE RELEVANCY THEORY DOES NOT SET OUT THE APPLICATION IN THE LIMITING INSTRUCTION. THE ARGUMENT FOR THE CHARGE TO THE JURY IS THE SAME, IT FAILS TO DEFINE IDENTITY BY EXCLUDING 404(d)(1) SO A JURY COULD DRAW AN ~~INFERENCE~~ INFERENCE ON CHARACTER EVIDENCE AND REJECT IT IF IT FAILED TO SHOW MARSHALL'S IDENTITY.

IT IS CLEAR THE APPELLATE COURT ONLY REVIEWED THE PART OF THE RECORD CITED BY COUNSEL WHEN IT DECIDED MARSHALL'S CASE. NOTHING ELSE SUGGEST IT DREW A LINE AT FRIVOLETY BY DEFINING ARGUABLE ISSUES THAT COULD BE BASED ON THE RECORD CITED BY MARSHALL. WHILE SCHULMAN PROVIDES THE SAME TWO TIER REVIEW AS DISCUSSED IN ROBBINS 528 U.S., AT 281-82, THERE IS A DISTINCTION HERE IN MARSHALL'S CASE WHERE

COUNSEL'S ONE-SIDED BRIEF FITS THE DESCRIPTION OF A ~~NO~~ "NO MERIT" BRIEF. THE SEPARATION PROCEDURE IN MARSHALL'S CASE "ARGUABLY EXACERBATED THE ETHICAL PROBLEM [I] PRESENTED IN THE ANDERS PROCEDURE" BECAUSE THE APPELLATE COURT WAS NOT DIRECTED TO PARTICULAR LEGAL ISSUES BY COUNSEL. THE DIRECT COURTS DECISION WAS UNRELIABLE FOR THESE REASONS. ↓⁸

THIS COURT IN ROBBINS AT 286 EXPLAINED THAT ITS HOLDING IN PENSION WAS CONSISTENT WITH STRICKLAND ITSELF, WHERE [IT] SAID THAT [IT] WOULD PRESUME PREJUDICE WHEN A DEFENDANT HAD SUFFERED AN ACTUAL OR CONSTRUCTIVE DENIAL OF THE ASSISTANCE OF COUNSEL ALTOGETHER. (CITATIONS OMITTED). HERE, THIS COURT SHOULD PRESUME PREJUDICE BECAUSE IN THIS IDENTITY CASE EVADING, CANNOT BE FAIRLY APPEALED WITHOUT RAISING IDENTITY ISSUES ON HOW IT WAS PRESENTED AT TRIAL. THE STATE SAYS, AS A CRIMINAL EPISODE, IT IS MARSHALL'S MODUS OPERANDI TO ROB HISPANIC MEN FOR THEIR HONDA

↓⁸ APPELLANT DOES NOT WAIVE ANY OF HIS CLAIMS IN HIS PRO SE RESPONSE TO COUNSEL'S ANDERS BRIEF THAT WERE NOT ARGUED IN THIS WRIT.

CIVIL'S, CELLPHONES AND EVADE ARREST FROM POLICE IN THE STOLEN HONDA'S. THE APPEAL SHOULD NOT DEVIATE FROM THAT THEORY IN LAW OR FACT. LOOKING AT THE RECORD AS A WHOLE THE EVIDENCE IS TOO GENERIC TO SUPPORT THIS CRIME AS MARSHALL'S HANDWORK MAKING IT UNFAIRLY PRESUDICIAL. PRESUMABLY, THE STATE'S SEPARATION PROCEDURE STRIPPED MARSHALL OF HIS RIGHT TO EFFECTIVE ASSISTANCE DURING THE APPELLATE PROCESS IN TWO WAYS. ONE WAY IS BECAUSE HIS COUNSEL FAILED TO FILE A MERITS BRIEF, THE OTHER WAY IS GROUNDED ON COUNSEL'S FAILURE TO RAISE THE STRONGER ARGUMENTS FROM THE RECORD WITH LEGAL AUTHORITIES TO SUPPORT THEIR ANDERS BRIEF.

IN THIS INSTANT CASE THE SEVERANCE POLICY CANNOT BE EVALUATED AS REASONABLE UNDER THE PROPHYLACTIC MEANS OF ANDERS BECAUSE THE "STATE HAS BOLT[ED] THE DOOR TO EQUAL JUSTICE" BY REMOVING PORTIONS OF LAW AND FACTS FROM THE RECORD TO DETERMINE A CASE WHOLLY FREVOLOUS. E.G. ROBBINS AT 274. THE APPELLANT HAS SEARCHED THOROUGHLY THROUGH THE TRAP FOR A RULE THAT ALLOWS AN APPELLATE COURT TO A SEVERANCE AND HAS FOUND NONE. HOWEVER, THERE IS A SEVERANCE PROCEDURE UNDER TEX. PEN. C. § 3.04 THAT DEALS WITH AN APPELLATE COURTS' CONSIDERATION ON A TRIAL

COURTS FAILURE TO GRANT A MANDATORY SEVERANCE.
SEE SCOTT, SUPRA; ALSO GRAHAM V. STATE, 19 S.W.3D 851,
853 (TEX. CR. APP. 2000); LAPORTE V. STATE, 840 S.W.2D 412,
414-15 (TEX. CR. APP. 1992).

"TRUTH - AS WELL AS FAIRNESS - IS 'BEST
DESCOVERED BY POWERFUL STATEMENTS ON BOTH SIDES OF
THE QUESTION'." PENSON AT 352. TO SATISFY STRICKLANDS
FIRST PRONG MARSHALL ARGUES A REASONABLY
COMPETENT ATTORNEY WOULD NOT HAVE LESSEDED THE
LIKELIHOOD OF SUCCESS ON APPEAL BY SELECTING
FROM THE RECORD THE WEAKEST AVAILABLE
ARGUMENTS. AS URGED IN MARSHALL'S PDR-1 AT 4,
THERE IS AT MINIMUM ONE NON FRIVOLOUS CLAIM,
WHICH IS, THAT THE JURY SPECULATED ON LEGAL
AND FACTUAL PRESUDICIAL INFERENCES TO SUPPORT
THIS CONSOLIDATED CONVICTION. IF THE AGG. ROBBERY
IS MERITORIOUS FOR ANY REASON LESSER THAN HOW
IT WAS APPLIED AT TRIAL, THEN THE EVADING IS
MERITORIOUS FOR A FULL EXAMINATION ON
INSUFFICIENT PROOF OF PRIOR EXTRANEOUS EVIDENCE.
AS NOTED IN APPELLATE COUNSEL ANDERS BRIEF
MARSHALL DID NOT OBJECT TO THE NATURE OF THE
[REDACTED] CONSOLIDATION OF BOTH CASES AT TRIAL,
HOWEVER, IN HIS PRO SE RESPONSE HE DOES OBJECT
TO THE SEVERANCE OF BOTH CASES [REDACTED] FOR
APPELLATE REVIEW. SUPPORTING HIS ARGUMENT THE

RECORD SHOWS HE SIGNED THE PAUPER'S OATH, CERTIFICATION AND ADVICE ON HIS RIGHT TO APPEAL, FOR BOTH CASES, AS A SINGLE APPEAL. IT IS CLEAR THAT APPELLATE COUNSEL'S ONE-SIDED BRIEF PREEMPT THE DISCOVERY OF TRUTH AND FAIRNESS TO THIS CONSOLIDATED APPEAL QUESTION.

CONCLUSION

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED ~~BECAUSE~~ BECAUSE THE STATE HAS REFUSED THE SEVERANCE POLICY QUESTION DENYING THE APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL ON HIS FIRST APPEAL.

PROOF OF SERVICE

I BRODERICK MARSHALL, THE PRO SE APPELLANT DO DECLARE THAT ON AUGUST 28TH 2019 DID SERVE THE ENCLOSED PETITION FOR CERTIORARI ON EACH PARTY BY PLACING IT IN A PERSON DEPOSITORY TO THE U.S. SUPREME COURT CLERK