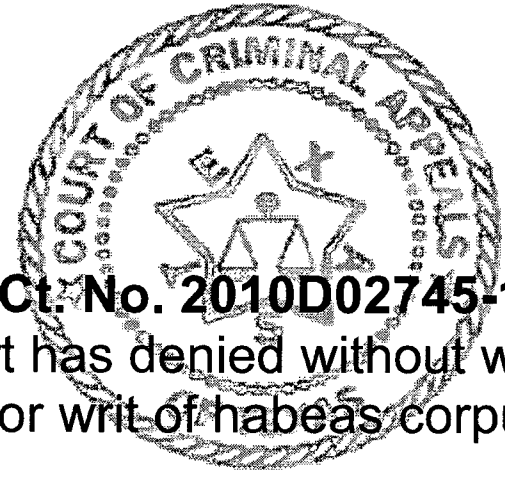
APPENDIX A

WHITE CARD DENIAL FROM THE TEXAS COURT OF CRIMINAL APPEALS.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY



2/24/2021

SANCHEZ, GILBERT **Tr. Ct. No. 2010D02745-120** **WR-84,766-03**

This is to advise that the Court has denied without written order the motion for leave to file the original application for writ of habeas corpus.

Deana Williamson, Clerk

GILBERT SANCHEZ
CLEMENTS UNIT - TDC # 1712910
9601 SPUR 591
AMARILLO, TX 79107-9606

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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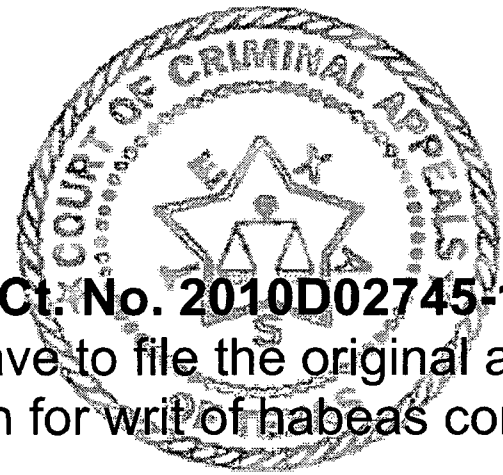

12/28/2020

SANCHEZ, GILBERT **Tr. Ct. No. 2010D02745-120** **WR-84,766-03**

On this day, the motion for leave to file the original application for writ of habeas corpus and original application for writ of habeas corpus has been received and presented to the Court.

Deana Williamson, Clerk

GILBERT SANCHEZ
CLEMENTS UNIT - TDC # 1712910
9601 SPUR 591
AMARILLO, TX 79107-9606

APPENDIX B

Petitioner's "MOTION FOR LEAVE TO FILE EXTRAORDINARY WRIT TO REVIEW THE TRIAL COURT'S ORIGINAL GRANTING OF A NEW TRIAL WITH ATTACHED BRIEF IN SUPPORT.

GILBERT SANCHEZ
TDCJ-CID#1712910
WILLIAM CLEMENTS UNIT
9601 SPUR 591
AMARILLO, TEXAS
79107-9606

HONORABLE CLERK
COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS
78711

Dear Honorable Clerk:

Please find enclosed for presentation to the Honorable Justices, my "MOTION FOR LEAVE TO FILE EXTRAORDINARY WRIT TO REVIEW THE TRIAL COURT'S ORIGINAL GRANTING OF A NEW TRIAL WITH ATTACHED APPLICATION BRIEF IN SUPPORT," for their consideration.

Thank you in advance for your time and attention in this matter.

Sincerely,

_____

Gilbert Sanchez

IN THE TEXAS

COURT OF CRIMINAL APPEALS

****

From a Judgment & Sentence rendered in the

120th District Court from El Paso County

****

Court of Appeals No. 08-11-00137-CR

Court of Criminal Appeals No. WR-84,766-01

****

IN RE:

GILBERT SANCHEZ, RELATOR

****

MOTION FOR LEAVE TO FILE EXTRAORDINARY WRIT TO REVIEW THE TRIAL COURT'S ORIGINAL GRANTING OF A NEW TRIAL WITH ATTACHED APPLICATION BRIEF IN SUPPORT

****

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now, **Gilbert Sanchez,** (herein after "Relator"), under Rule 72.1 of the Texas Rules of Appellate Procedure, and Article V., §5 of the Texas Constitution. Relator submits his Application for Extraordinary Writ,

asking this Court to review the trial court's original decision to grant Relator a new trial which was ultimately denied by the Eighth Court of Appeals resulting in Relator serving an illegal sentence (actual innocence), denial of due process. Under any exception to the procedural default, Relator's claim demonstrates that he is actually innocent of the underlying claim, Relator's claim represents a fundamental miscarriage of justice resulting in a fundamentally unjust incarceration. Relator will show this Court the following in support of same.

INTRODUCTION

In 1978, the Legislature amended the Texas Constitution to broaden this Court's power to grant extraordinary relief in cases involving criminal matter. The Texas Legislature expanded the writ power of this Court to include among other Writ powers, motions that are extraordinary in character. In determining the specific nature of the extraordinary relief sought, the Court will not be limited by the denomination of the pleadings, but will look to the essence of the pleadings, including prayers, as well as the record. See ***Wade v Mays, 689 S.W.2d 893 (Tex.Crim.App.1985).***

JURISDICTION OF THE CASE

This Court is empowered by Article V., §5 of the Texas Constitution to issue extraordinary writs in all criminal matters.

STATEMENT OF THE CASE

A jury found Relator guilty of aggravated sexual assault and sentenced to sixty-five years' imprisonment. Relator appealed. While Relator's appeal was pending, the trial court granted Relator a new trial. However, the State appealed, and the Eighth Court of Appeals reversed the lower court's grant of a new trial and reinstated Relator's conviction. See ***State v Sanchez, 393 S.W. 3d 798 (Tex.App.El Paso 2012).***

STATEMENT OF THE CLAIM

Due to the procedural posture of this case, this writ must be entertained extraordinarily. Relator claims, and the trial court agreed, that he was only legally eligible upon conviction to be sentenced under a second-degree felony of 2-20 years. Instead, Relator was sentenced to sixty-five years imprisonment under a first-degree felony. However, the trial court conceded that she failed to properly charge the jury by omitting a specific

element of the charge. This is a clear denial of Relator's rights to due process under the fourteenth amendment to the United States Constitution.

STATEMENT OF THE FACTS

This is not the type of error that can be waived. Due to the trial court's omitting an element of the charged offense, the trial court conceded that she had misdirected the jury. Relator was therefor not legally eligible for the sentence he received. See ***Haley v Cockrell, 306 F. 3d 257 (5th Cir. 2002).*** Relator could only be sentenced upon conviction to a second-degree felony, not a first-degree felony. See ***Mizell v State, 119 S. W. 3d 804 (Tex.Crim.App.2003)("A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal and, unlike most trial errors which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence").***

Relator establishes his extraordinary writ on the following grounds which he asserts amount to a prima facia showing that indulgence should be conceded to file and set this case for submission and hearing on the

following facts:

FACT ONE. Relator argues he has a well-defined right under the due process clause of the 14th amendment to the United States Constitution to relief based on constitutional error. Relator has exhausted his appellate remedies and filed an initial writ of habeas corpus. He has no adequate remedy at law to redress the unlawfulness committed by the trial court when it misdirected the jury. Relator contends unequivocally that the trial court was statutorily mandated, or, by precedent case law, to properly instruct the jury on every element of the charged offense.

The facts and circumstances taken together with the governing statute and case law but one rational decision under unequivocal, well settled (i.e., extant statutory, constitutional, or case law sources), and clearly controlling legal principles.

FACT TWO. The Court of Appeals' decision to deny relief in this case offends any notion of due process of law. The United States Constitution forbids conviction absent proof beyond a reasonable doubt of every fact

necessary to constitute the crime. See ***In re Winship, 90 S.Ct. 1068 (1970).***

FACT THREE. In the interest of justice, this Court may enforce jurisdictional powers to rectify and/or remedy an unlawful sentence to balance Relator's interests in the vindication of his legal right to be sentenced according to the law, and the State's interest in the finality of Relator's litigation to reform the trial court's constitutional error of misdirecting the jury.

The interest of justice confers upon this Court the prerogative to remedy the void portion of the sentence, that is, to sentence Relator as a second-degree felony offender rather that a first-degree felony offender. The only redress ever endeavored for by the Relator was to reform the judgment to reflect a conviction for a second-degree felony.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Relator prays that this Court will grant leave to file an Application For Extraordinary Writ to reform the judgment in this case to reflect a conviction for a second-degree felony because the trial court's jury charge violated Relator's constitutional rights to due process of law.

IN THE TEXAS

COURT OF CRIMINAL APPEALS

****

From a Judgment & Sentence rendered in the

120th District Court from El Paso County

****

Court of Appeals No. 08-11-00137-CR

Court of Criminal Appeals No. WR-84,766-01

****

IN RE:

GILBERT SANCHEZ, RELATOR

****

RELATOR'S APPLICATION FOR EXTRAORDINARY WRIT TO REVIEW THE TRIAL COURT'S ORIGINAL GRANTING OF A NEW TRIAL WITH ATTACHED APPLICATION BRIEF IN SUPPORT

****

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now, **Gilbert Sanchez,** (herein after "Relator"), under Rule 72.1 of the Texas Rules of Appellate Procedure, and Article V., §5 of the Texas Constitution. Relator submits his Application for Extraordinary Writ, asking this Court to review the trial court's original decision to grant Relator a new trial which was ultimately denied by the Eighth Court of Appeals resulting in Relator serving an illegal sentence (actual innocence), denial of due process. Under any exception to the procedural default, Relator's claim demonstrates that he is actually innocent of the underlying claim, Relator's claim represents a fundamental miscarriage of justice resulting in a fundamentally unjust incarceration. Relator will show this Court the following in support of same.

INTRODUCTION

In 1978, the Legislature amended the Texas Constitution to broaden this Court's power to grant extraordinary relief in cases involving criminal

matter. The Texas Legislature expanded the writ power of this Court to include among other Writ powers, motions that are extraordinary in character. In determining the specific nature of the extraordinary relief sought, the Court will not be limited by the denomination of the pleadings, but will look to the essence of the pleadings, including prayers, as well as the record. See ***Wade v Mays, 689 S.W.2d 893 (Tex.Crim.App.1985).***

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Due to the procedural posture of this case, this writ must be entertained extraordinarily. Relator claims, and the trial court agreed, that he was only legally eligible upon conviction to be sentenced under a second-degree felony of 2-20 years. Instead, Relator was sentenced to sixty-five years imprisonment under a first-degree felony. However, the trial court conceded that she failed to properly charge the jury by omitting a specific element of the charge. This is a clear denial of Relator's rights to due process under the fourteenth amendment to the United States Constitution.

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This is not the type of error that can be waived. Due to the trial court's omitting an element of the charged offense, the trial court conceded that she had misdirected the jury. Relator was therefor not legally eligible for the sentence he received. See ***Haley v Cockrell, 306 F. 3d 257 (5th Cir. 2002).*** Relator could only be sentenced upon conviction to a second-degree felony, not a first-degree felony. See ***Mizell v State, 119 S. W. 3d 804 (Tex.Crim.App.2003)("A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore***

illegal and, unlike most trial errors which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence").

Relator establishes his extraordinary writ on the following grounds which he asserts amount to a prima facia showing that indulgence should be conceded to file and set this case for submission and hearing on the following facts:

FACT ONE. Relator argues he has a well-defined right under the due process clause of the 14th amendment to the United States Constitution to relief based on constitutional error. Relator has exhausted his appellate remedies and filed an initial writ of habeas corpus. He has no adequate remedy at law to redress the unlawfulness committed by the trial court when it misdirected the jury. Relator contends unequivocally that the trial court was statutorily mandated, or, by precedent case law, to properly instruct the jury on every element of the charged offense.

The facts and circumstances taken together with the governing statute and case law but one rational decision under unequivocal, well settled (i.e.,

extant statutory, constitutional, or case law sources), and clearly controlling legal principles.

FACT TWO. The Court of Appeals' decision to deny relief in this case offends any notion of due process of law. The United States Constitution forbids conviction absent proof beyond a reasonable doubt of every fact necessary to constitute the crime. See ***In re Winship, 90 S.Ct. 1068 (1970).***

FACT THREE. In the interest of justice, this Court may enforce jurisdictional powers to rectify and/or remedy an unlawful sentence to balance Relator's interests in the vindication of his legal right to be sentenced according to the law, and the State's interest in the finality of Relator's litigation to reform the trial court's constitutional error of misdirecting the jury.

The interest of justice confers upon this Court the prerogative to remedy the void portion of the sentence, that is, to sentence Relator as a second-degree felony offender rather that a first-degree felony offender. The only redress ever endeavored for by the Relator was to reform the judgment to

reflect a conviction for a second-degree felony.

ARGUMENTS & AUTHORITIES

This Honorable Court under a trial court's abuse of discretion standard will not reverse an error by the trial court unless it is outside the zone of reasonable disagreement. However, in the instant case, despite the trial court's own admission that she misdirected the jury in Relator's case, this Honorable Court allows Relator's unlawful sentence to stand when the trial court's decision is not outside the zone of reasonable disagreement.

The Court of Appeals Eighth District of Texas at El Paso states that the jury in Relator's case would have found the essential facts (elements) had it been properly instructed.

This statement by the court of appeals is erroneous because it's in direct conflict with the trial court's own words that she misdirected the jury, therefore, anyway you look at this error, the jury could not have been properly instructed and therefore the court of appeals' statement is erroneous.

A jury verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime is error. See *Sandstrom v Montana, 99 S.Ct. 2450 (1979). Such error is not corrected merely because an appellate court, upon review, is satisfied that the jury would have found the essential facts had it been properly instructed.* See ***United States v Ben M. Hogan. Inc., 769 F.2d 1293, 1298 (8th Cir. 1985).*** The error cannot be treated as harmless. See ***Connecticut v Johnson, 103 S.Ct. 769, 977-78 (1983);*** see also ***Chapman v California, 87 S.Ct. 824 (1967).***

Despite the above stated, that is exactly what has transpired in Relator's case. This is fully illustrated in the eighth district court of appeals' opinion which is attached as **EXHIBIT #1**, incorporated herein by reference as if fully printed herein in support of this argument for this Honorable Court's review. The question standing before this Honorable Court is will this Court allow this fundamental miscarriage of justice to continue by turning a blind eye due to procedural requirements, or will this Court exercise its supervisory powers and correct this fundamental miscarriage of justice

which case law firmly supports and the court of appeals erroneously denied?

Relator's appellate counsel, Ruben Morales, correctly argued that Realtor was unquestionably denied due process, the right to trial by jury and effective assistance of counsel because he was convicted and sentenced for a charge that was neither alleged in the indictment nor presented to the jury for consideration.

The indictment in Relator's case only allowed upon conviction that Relator be sentenced under a second-degree felony (2-20 years). However, Relator was convicted and sentenced under a first-degree felony to sixth-five years imprisonment.

On April 21st, 2011, Relator's counsel filed a timely Notice of Appeal and Motion for New Trial. The trial court granted Relator a new trial. The trial court held that by submitting a first-degree felony charge to the jury when in fact, Relator was only charged with a second-degree felony, it had misdirected the jury regarding the law and, it allowed Relator to be sentenced incorrectly.

The trial court further expressed its concern that based on the indictment, Relator could only be convicted of sexual assault. The trial court stated she was bothered by the omission of the word "imminent" in the charge because "that language....is the only way that you can be convicted of an aggravated sexual assault as opposed to just sexual assault". The trial court concluded that the charge was incorrect and misdirected the jury. The trial court further noted that the absence of the aggravating factor would change the applicable punishment range. The trial court stated that this omitted element was "a requirement to find aggravation, and it's important because the aggravation changes the punishment range," and "if that's defective, then you have a different punishment range." The trial court then reiterated "the charge was wrong." Based on its concerns with the legality of relator's conviction and sentence, the trial court granted Relator a new trial.

Despite the above stated by the trial court judge who presided over Relator's trial and admitting that she had misdirected the jury, the State appealed and despite conceding the absence of a key element necessary to

convict a person of aggravated sexual assault, the State insisited and, the Eighth Court of Appeals agreed, that because a jury could have found imminence based on the evidence presented, the conviction and sentence were not infirm.

This decision, especially given the trial court's explanations, offends any notion of due process of law under the 14th amendment. The United States Constitution forbids conviction absent proof beyond a reasonable doubt of every fact necessary to constitute the crime. See ***In re Winship, 90 S.Ct. 1068 (1970).*** If the sixth amendment right to have a jury decide guilt and innocence means anything, it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt, not the court of appeals. The question thus follows: If the jury was not given the proper jury instruction that omitted the "imminence" required finding to make the charge a first-degree felony instead of a second-degree felony and the jury was not even able to deliberate on the imminence factor, it is impossible for either the State, or the Court of Appeals to conclude that the

jury found all the facts necessary to convict. Just making this statement, refutes it. The State and the Court of Appeals' erroneous decision flies in the face of Relator's right to due process of law.

The grave error in this case is that the jury never was required to find the necessary nexus between a first-degree and second-degree felony. Instead, it was directed to basically conclude, through a misstatement of law, that an element of the crime had been proved when in actuality, they were never properly instructed on the law regarding the facts of the case.

Relator was charged by indictment with sexual assault. Although the indictment was titled aggravated sexual assault, it did not contain the elements required to prove aggravated sexual assault. Specifically, the indictment did not allege that the complainant was placed in fear that death would be imminently inflicted on her. Under Texas penal Code Section 22.021(a)(2)(A)(ii), to commit aggravated sexual assault a person must commit sexual assault and, "by act or words place the victim in fear that...death...will be imminently inflicted on any person."

Under Texas law, sexual assault is a second-degree felony punishable

by two to twenty years in prison. Texas Penal Code §§22.011; 12.33. Aggravated Sexual Assault is a first -degree felony punishable by five to ninety-nine years, or life in prison. Texas Penal Code §§22.021; 12.32.

In this case, Relator was never charged with aggravated sexual assault and he was never tried for aggravated sexual assault. The trial court's jury charge simply tracked the indictment. The State conceded that the indictment only charged Relator with sexual assault, an offense that carries a possible sentence of 2 to 20 years in prison. Yet, he was convicted and sentenced for aggravated sexual assault, an offense that carries a possible sentence of 5-99 years or life in prison. Such a result is a clear due process violation under the Fifth and Fourteenth Amendment of the United States Constitution. See ***Dunn v United States, 442 U.S. 100, 106 (1979)("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."); Jackson v Virginia, 443 U.S. 307, 314 (1979)("It is axiomatic***

that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); McCormick v United States, 500 U.S. 257, 270 n.8 (1991)("This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory that was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.") See also ***Wooley v State, 273 S.W. 3d 260, 271 (Tex.Crim.App.2008))("Appellate's due process rights were violated when the court of appeals affirmed his conviction under a theory not submitted to the jury").*** Relator was charged with and tried for a second-degree felony. His conviction and sentence are for a first-degree felony. Therefore, Relator's right to due process have been violated and he is entitled to relief.

It should further be noted that it was stipulated by both parties that if called, trial counsel would testify to the following: "A basic part of representing a criminal defendant is reviewing the charging instrument; in

this case Mr. Sanchez was charged by indictment. In this case, although I did review the indictment, I did not notice that the indictment did not allege the elements of imminence required to elevate the offense to a first-degree felony. Had I noticed the missing element, I would have used that to limit the range of punishment in this case to that of a second-degree felony. My failure to do so or attempt to do so was not a strategic decision; my failure to make any other objections relevant to the issue of the missing element was not a strategic decision."

The unending search for symmetry in the law can cause judges to forget about justice. This should have been a simple case as the very judge who presided over the trial with total recollection granted a new trial based on her belief that the jury had been misdirected on the law, a misstatement of law.

The State, and the Eighth District Court of Appeals all agreed with the trial court judge that the trial court erroneously omitted from the jury charge the aggravating element that the complainant feared her death was imminent, thereby misdirecting the jury about the law. Therefore, Relator

is actually innocent of the underlying offense. However, the State, and Court of Appeals claim that Relator suffered no egregious harm. That statement, however, is contrary to law because this type of error cannot be treated as harmless. Without the factual imminence finding which was not presented to the jury, there is no basis for Relator's conviction for a first-degree felony, it follows inexorably that Relator has been denied due process of law. See ***Thompson v Louisville, 362 U.S. 199 (1960); Jackson v Virginia, 443 u.S. 307 (1979).*** And because that constitutional error clearly and concededly resulted in the imposition of an unauthorized sentence, it also follows that Relator is a "victim of a miscarriage of justice," entitled to relief.

WHEREFORE, PREMISES CONSIDERED, Relator prays this Honorable Court find that he is entitled to the requested relief, that his conviction and sentence be reversed and reformed to reflect a conviction for sexual assault as alleged in the indictment with a jury determination within the prescribed range of 2 to 20 years.

Respectfully submitted,

_____

Gilbert Sanchez

EXHIBIT #1

EXHIBIT #1.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GILBERT SANCHEZ,	§	No. 08-11-00137-CR
Appellant,	§	Appeal from the
v.	§	120th Judicial District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20100D02745)
	§	

OPINION

Gilbert Sanchez appeals his conviction for aggravated sexual assault. In three issues, Appellant maintains that (1) he suffered egregious harm from a defective jury charge that failed to address the critical "imminence of harm" element of aggravated sexual assault, (2) the court should have granted a mistrial during the punishment phase based on a witness's comments that she was "victim number nine," and (3) trial counsel rendered constitutionally ineffective assistance during cross-examination. We affirm.

BACKGROUND

Factual History

In December 2009, Appellant and Jeanette Ribail had been dating for more than a month. During that period of time, Appellant and Ribail had a consensual sexual relationship. However,

Ribail decided to break off her relationship with Appellant after Ribail's cousin recognized Appellant as the ex-husband of a former co-worker. Appellant's cousin warned Ribail that Appellant was "bad news." After Ribail asked Appellant about what her cousin had said, Appellant became very upset. Ribail attempted to gradually distance herself from Appellant, but he continued to try and contact her, wanting to know why she was withdrawing.

On December 30, 2009, Appellant tracked down Ribail at her sister's trailer and told her he wanted to speak with her about their relationship. Ribail stated that Appellant appeared to be intoxicated. While Appellant was outside smoking, Ribail exited through the back door and went back to her own trailer. Ribail testified that Appellant called her numerous times once he realized she had left, and that after she refused to answer, he came to her trailer and broke down the door after banging on her windows and screaming. Ribail further testified that Appellant climbed on top of her and began screaming obscenities at her, and that a physical altercation ensued after she attempted to push him off, with Appellant punching her, attempting to smother her with a pillow, and telling her that he did not care if she died. Appellant then dragged her by her hair to the bathroom, then forced her to clean the blood off her body after threatening her with a pair of scissors, stating that he would use them on her if she attempted to leave and telling her that she and him needed to talk about their relationship. He then told her it was time to go to the bedroom and grabbed her arm. Ribail indicated to Appellant she did not want to have sex by shaking her head no, but Appellant proceeded to have intercourse with her over her protest. Ribail testified that she cried during the rape but did not physically resist because she was afraid for her life.

An investigator who performed a rape kit testified that initial forensic testing indicated the presumptive presence of seminal fluid on Ribail's body. However, further testing

demonstrated that no spermatozoa cells were contained inside the seminal fluid.

Procedural History

A jury found Appellant guilty of aggravated sexual assault, and he was sentenced to 65 years' in prison. Sanchez appealed to this Court. Sanchez also moved for a new trial in the trial court, asserting that the jury charge was defective, the evidence on the issue of imminence was legally insufficient, and that the court should have granted a mistrial on punishment due to Ribail's prejudicial comments. While Sanchez's appeal was pending, the trial court granted Sanchez a new trial, but did not specify in writing which ground it relied on in granting the motion, nor did it provide findings of fact or conclusions of law when requested. The State appealed, and we abated Sanchez's appeal pending the outcome of the State's appeal. On State's appeal, we reversed the lower court's grant of a new trial and reinstated Sanchez's conviction. *State v. Sanchez*, 393 S.W.3d 798 (Tex.App.--El Paso 2012, pet. ref'd). The Court of Criminal Appeals refused to grant Sanchez's petition for discretionary review. On October 7, 2013, the United States Supreme Court denied certiorari, making Sanchez's conviction final. *Sanchez v. State*, 134 S.Ct. 221, 187 L.Ed.2d 144 (2013). Mandate issued in *Sanchez I*, and we reinstated Sanchez's original appeal. This opinion addressing the merits of Sanchez's original points as follows.

DISCUSSION

Jury Charge Error

In Issue One, Appellant contends that the jury charge erroneously failed to specify that Ribail's fear of death was imminent, thereby allowing the jury to find him guilty of an aggravated offense without first assessing whether proof beyond a reasonable doubt existed on the improperly articulated aggravating element. The State concedes that failure to include an

imminence component as part of the aggravating element was error, but argues that our previous decision in the State's appeal that Appellant suffered no resultant egregious harm governs under the law of the case. We agree.

Law of the case is a court-created doctrine providing that, absent exceptional circumstances, our resolution of an issue in an initial appeal generally controls our disposition of the same issue in subsequent appeals arising from the same case. *Howlett v. State*, 994 S.W.2d 663, 666 (Tex.Crim.App. 1999); *Ojeda v. State*, 08-02-00404-CR, 2004 WL 2137653, at *8 (Tex.App.--El Paso Sept. 24, 2004, pet. ref'd)(not designated for publication); *cf. York v. State*, 342 S.W.3d 528, 553 (Tex.Crim.App. 2011)(Womack, J., concurring)(noting, in double jeopardy context, that similar estoppel concept of issue preclusion prevents "a party from relitigating an issue . . . that was previously determined in a suit between the same parties"). The rule promotes consistency over time and "eliminates the need for appellate courts to prepare opinions discussing previously resolved matters" while still giving us the flexibility to "reconsider [our] earlier disposition of a point of law" in light of "circumstances that mitigate against relying on [our] prior decision." *Howlett*, 994 S.W.2d at 666. Such circumstances may include, *inter alia*, recognition that our previous ruling was "clearly erroneous," *id.*, or situations where "there has been a change in the controlling law" in the time period between our first decision and the subsequent appeal. *Carroll v. State*, 42 S.W.3d 129, 131 (Tex.Crim.App. 2001).

In our initial decision in the State's appeal, *State v. Sanchez*, 393 S.W.3d 798 (Tex.App.--El Paso 2012, pet. ref'd), *cert. denied*, 134 S.Ct. 221, 187 L.Ed.2d 144 (2013), we reversed the trial court's grant of a new trial and reinstated Sanchez's conviction, holding that he failed to establish that he suffered "egregious harm" from the unpreserved jury charge error as required

under *Almanza*.[1] *See Sanchez*, 393 S.W.3d at 803-06. We rejected Sanchez's contention that the charge was egregiously harmful *per se* under *Flores v. State*, 48 S.W.3d 397, 402 (Tex.App.--Waco 2001, pet. ref'd), because the jury charge did not authorize the jury to convict Sanchez for "conduct that is not an offense." *Sanchez*, 393 S.W.3d at 805-06. In weighing harm, we noted that although the jury charge language weighed in favor of a harm finding for failing to include all relevant statutory language, any harm was cured by references to imminence in voir dire and counsels' closing arguments contextually referencing Ribail's belief that her death was imminent after Sanchez tried to smother her with a pillow. *Id.* at 804-05. We also held that the jury could have found the three sub-elements comprising the "imminent death" element beyond a reasonable doubt. *Id.*

Here, Appellant largely rehashes the same arguments as before. Given that we have previously passed judgment on this exact issue, we find that law of the case governs and rely on our previous ruling. Appellant did not suffer egregious harm from the erroneous jury charge.

Issue One is overruled.

Mistrial

In Issue Two, Appellant asserts that the trial court abused its discretion by failing to grant a mistrial at punishment after a witness twice gave non-responsive testimony in which she referred to herself as being "victim number nine." We disagree.

Standard of Review and Applicable Law

"A mistrial is the trial court's remedy for improper conduct that is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex.Crim.App. 2004)[Internal quotation marks omitted]. We review the trial

[1] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787 (Tex.Crim.App. 1988); *see also Igo v. State*, 210 S.W.3d 645, 646-47 (Tex.Crim.App. 2006)(applying *Almanza* to jury charge errors presented in motion for new trial).

court's mistrial ruling for abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 292 (Tex.Crim.App. 2010). "[A] mistrial should be granted only in cases where the reference was clearly calculated to inflame the minds of the jury or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jurors' minds." *Young v. State*, 283 S.W.3d 854, 878 (Tex.Crim.App. 2009)[Internal citation and quotation marks omitted]. "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins*, 135 S.W.3d at 77.

Witness comments or outbursts "which interfere[] with the normal proceedings of a trial will not result in reversible error" unless there is a reasonable probability "that the conduct interfered with the jury's verdict." *Coble*, 330 S.W.3d at 292. "An instruction to disregard ordinarily renders testimony referring to or implying extraneous offenses harmless." *Brown v. State*, 08-11-00347-CR, 2013 WL 1281917, at *2 (Tex.App.--El Paso Mar. 28, 2013, pet. ref'd)(not designated for publication). In assessing prejudice, we balance three factors: (1) "the magnitude of the [remark's] prejudicial effect[;]" (2) any curative measures adopted at the trial level; and (3) the certainty of the punishment outcome, including the strength of the evidence underlying the punishment. *Archie v. State*, 221 S.W.3d 695, 700 (Tex.Crim.App. 2007); *see also Brown*, 2013 WL 1281917, at *2.

Analysis

During her testimony at the punishment phase of trial, Ribail twice made references to her status as "victim number nine." The first reference came during prosecution questioning about Ribail's feelings toward Appellant:

[PROSECUTION]:	How do you feel about men now? Well, not men, just him. How do you feel about him?
[RIBAIL]:	I feel sorry for him because now he's going

to get what he deserves.

[DEFENSE COUNSEL]: I'm sorry. I didn't get that response, Judge.

[RIBAIL]: I feel sorry for him and he's going to get what he deserves, because it took -- I'm victim number nine, and it took --

[DEFENSE COUNSEL]: At this point, Judge, objection. My [sic] we approach?

The second reference came during re-direct examination, when the State asked Ribail if she wanted Appellant to get probation, and she responded, "No. I'm victim number nine." Defense counsel objected again, and the court admonished the State to speak with the witness and have her only answer the question asked. The trial court also issued an instruction to disregard *sua sponte*.

The State advances a three-fold argument against mistrial. First, the State contends that it proved up the existence of at least nine people who Appellant victimized "physically, sexually, emotionally, and/or financially," rendering Ribail's comment about being victim number nine factually accurate. Second, the State argues Ribail's comment regarding other bad acts could have been cured by an instruction to disregard. Third, the State maintains that the overwhelming weight of other punishment evidence shows that the jury did not rely on those comments in reaching its verdict.

We question whether the jury actually took Ribail's comments to mean that she was Appellant's ninth rape victim and not merely someone in a line of people he victimized generally, and we acknowledge the gravity of such a remark at the sentencing stage. *See Archie*, 221 S.W.3d at 700 (taking gravity of comment as factor in assessing mistrial ruling). However, we agree with the State that in this instance, the instruction to disregard and the cumulative weight of the punishment evidence rendered the comments' prejudice minimal.

In *Williams v. State*, 14-11-00148-CR, 2013 WL 1187426 (Tex.App.--Houston [14th Dist.] Mar. 21, 2013, no pet.)(mem. op., not designated for publication), the Houston Fourteenth Court of Appeals held that the trial court's instruction to disregard cured any prejudice arising from a witness's comment that the defendant "murdered people[.]" *Id.* at *8-*9. It also held that the amount of evidence of other bad acts presented at punishment made it unlikely that the jury's verdict was unduly swayed by the stray comment referencing other bad acts. *Id.* at *10-*1. Here, the factual circumstances are very similar. The trial court issued an instruction to the jury to disregard both comments and admonished the State to control the witness and only have her answer the question asked, evidencing curative measures. The trial court's corrective actions mitigated any prejudice under the second *Archie* factor. *See Archie*, 221 S.W.3d at 700; *Young*, 283 S.W.3d at 878. Further, the State presented a large corpus of evidence demonstrating that Appellant had *inter alia* been previously convicted of assault, filed a false police report to have someone arrested, stolen $4,100 from his own mother, and physically and sexually abused prior girlfriends. Given the strength of the underlying punishment evidence, we are satisfied after balancing the *Archie* factors that Ribail's comments did not substantially affect the jury's punishment verdict. The trial court properly exercised its discretion in denying Appellant's motion for a mistrial.

Issue Two is overruled.

Ineffective Assistance of Counsel

In Issue Three, Appellant argues that trial counsel rendered constitutionally ineffective assistance by making remarks that undermined the defense theory that Appellant did not sexually penetrate Ribail. Specifically, Appellant contends trial counsel's statement during Ribail's cross-examination that Appellant had a vasectomy provided the jury with an explanation as to

why investigators found seminal fluid with no spermatozoa cells during Ribail's sexual assault examination. The State counters that Appellant failed to show sufficient evidence to rebut the presumption of competence. We agree.

Standard of Review and Applicable Law

"For a claim of ineffective assistance of counsel to succeed, the record must demonstrate[,]" by a preponderance of the evidence, "both deficient performance by counsel and prejudice suffered by the defendant." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex.Crim.App. 2012); *see also Perez v. State*, 310 S.W.3d 890, 892-93 (Tex.Crim.App. 2010). Counsel's representation is constitutionally deficient where it falls "below an objective standard of reasonableness based unpon prevailing professional norms." *Id.*, *citing Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). To demonstrate prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Perez*, 310 S.W.3d at 893. "The two prongs of *Strickland* need not be analyzed in a particular order-the prejudice prong may be analyzed first and the performance prong second." *Ex parte Martinez*, 330 S.W.3d 891, 900 n.19 (Tex.Crim.App. 2011).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Holland v. State*, 761 S.W.2d 307, 320 (Tex.Crim.App. 1988). We strongly presume that counsel is competent, and that his actions were strategic and fell within the scope of reasonable professional assistance. *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). Appellant may rebut that presumption where he shows, by a preponderance of the evidence, "that there is, in fact, no plausible professional reason for a

specific act or omission." *Bone*, 77 S.W.3d at 836. "Ordinarily on direct appeal, the record is too underdeveloped to sustain the serious charge of ineffective assistance absent examination of counsel at a motion for new trial hearing." *Murray v. State*, 08-12-00062-CR, 2014 WL 340384, at *3 (Tex.App.--El Paso Jan. 29, 2014, no pet.)(not designated for publication). Thus, we generally do not reverse for ineffectiveness on direct appeal absent an explanation from trial counsel "unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App. 2005)[Internal quotation marks omitted]. While a "single egregious error of omission" by counsel could theoretically rise to the level of ineffective assistance, *Ex parte Harrington*, 310 S.W.3d 452, 459 (Tex.Crim.App. 2010), generally speaking, "[e]ffectiveness is judged by the record as a whole and not by isolated errors." *Murray*, 2014 WL 340384, at *3. "If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Garza v. State*, 213 S.W.3d 338, 348 (Tex.Crim.App. 2007).

Analysis

Here, Appellant has failed to demonstrate that counsel's trial actions fell below an objective standard of reasonableness as required by *Strickland*. Trial counsel referred to Appellant's vasectomy while he cross-examined Ribail about her prior sexual activity with Appellant, asking her, in an apparent attempt to attack her general credibility as a witness, why she requested Appellant pull out prior to ejaculation as their usual form of birth control if she knew he had a vasectomy. He also contrasted that usual practice with her claim that on this occasion, Appellant ejaculated inside her. This method of impeachment on witness credibility

was not "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392; *see, e.g.*, *Ex parte Harrington*, 310 S.W.3d at 459 (no reasonable strategy behind counsel's advice to client to plead guilty to felony DWI following failure to investigate client's truthful claim that a prior conviction used for felony enhancement erroneously identified him as the convicted party). Nor was the error – assuming *arguendo* it was, indeed, an error and not deliberate – so egregious that it "had a seriously deleterious impact on the balance of the representation." *Frangias v. State*, 392 S.W.3d 642, 653 (Tex.Crim.App. 2013). As such, we apply the presumption that trial counsel was competent and his moves strategic. Further, since the record is silent as to what trial counsel's motivations were in engaging in this line of questioning, and since questioning on this topic could have conceivably been calculated to impeach Ribail's credibility, we find that Appellant has failed to proffer sufficient evidence to rebut the presumption. *Garza*, 213 S.W.3d at 348. Thus, his claim for ineffective assistance of counsel is without merit.

Issue Three is overruled. We affirm Appellant's conviction.

June 20, 2014

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rivera, and Rodriguez, JJ.

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