No. 21-8286 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS RICHIE MCBRIDE — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS THIRD DISTRICT OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Richie McBride [TDCJ]#02130065
(Your Name)

Coffield Unit 2661 FM 2054
(Address)

Tennessee Colony, Texas 75884
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

[Illegal/Void 1984 Sentence And Judgment]

The questions presented here for the Court,respectfully,are possibly of first impression upon judicial proceedings brought to the Court's attention on appeal of the state's conviction[:]

[1]. Does it constitute [a mistrial] on the trial of punishment— where jury fail to deliver a verdict of either **true** or **not true** to State's special pleas of a repeat-offender alleged and prosecuted pursuant to Sec.12.42(c) of the Texas Penal Code Vernon's Ann., (West Supp.1984); and the trial judge fail to call the informal and incomplete verdict to jury's attention, executed the judgment and sentence according to the informal verdict delivered by jury, and dismissed the jury without requiring jury to deliver a verdict resolving the State's special pleas of a repeat-offender[?]

[2]. Does such unusual and unaccepted course of judicial proceedings, described supra under paragraph [1], offend petitioner's federal/state constitutional right to have the jury determine beyond a reasonable doubt all the facts legally essential to determine his 1984 sentence; thus, offended the Sixth Amendment right to trial by jury[?]

[3]. If thus the trial court proceedings described supra under paragraph [1] constitutes [a mistrial], does such mistrial—

- void the 1984 trial court jurisdiction to execute the judgment and sentence in Cause No.32729[?]

- void the 1984 jury's sentence upon its inception in Cause No.32729[?]
- constitutionally require the Court to dismiss the indictment in Cause No.32729 for want of Due Process of Law[?]
- call on the Court to exercise its discretionary jurisdiction to determine the just and legal redress duly in the Court's oversight of the Due Process of Law[?]

[4]. Did the lack of a jury verdict of either true or not true to the State's special pleas of a repeat-offender alleged and prosecuted in Cause No.32729—thus:

- void jury's assessment of the punishment in Cause No.32729[?]
- void the trial court execution of the judgment and sentence in Cause No.32729[?]
- offend the Sixth Amendment right to trial by jury and/or the Fourteenth Amendment right to due process[?]

[5]. Does it offend the Due Process Clause and/or the Equal Protection Clause of the Fourteenth Amendment to the United State's Constitution—where it is **impossible for the court to legally,duly, and justly determine** whether petitioner's sentence,[operating in effect of substantial collateral consequences in real time suffered by petitioner], is either valid [or] invalid pursuant to the State's remote-laws applicable to the sentence and judgment[?]

question(s) presented continued

[Sequential Finality Charge-Error]

The questions presented here for the Court,respectfully, are[:]

[1]. Does the judgment of the Austin intermediate court, delivered in [03-19-00775-CR], offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[?]

[2]. Does the judgment of the Austin intermediate court, delivered in [03-19-00775-CR], offend the Equal Protection Clause of the Fourteenth Amendment—where it is viewed by the Court that:

- the Texas Amarillo intermediate court's judgment and opinion delivered in the case of **Vidales v. State** legally rendered Petitioner's sentence of [99] years **illegal** in Cause No.76454[.]
- an **illegal sentence** violates Due Process guaranteed under the Fourteenth Amendment to the United States Constitution[.]
- an **illegal sentence** is unenforceable as a matter of federal and state constitutional laws[.]
- an **illegal sentence** rendered the judgment of conviction void in Cause No.76454 and thus Petitioner is **illegally confined** under the terms of the judgment Cause No.76454[.]

[3]. Did the Austin intermediate court judgment and opinion, delivered under the [sequential finality charge-error] ground, so far depart from the usual and accepted course of judicial proceedings, or has sanctioned such a departure by another court, as to call

question(s) presented continued

for an exercise of the Court's discretionary jurisdiction[?]

[Sua Sponte Sec.3(a) Instruction Trial-Court-Error]

The questions presented here for the Court,respectfully, are[:]

[1]. Where it is shown that appellant is subjected to a subsequent trial on the trial of punishment, and the new jury is seated to determine punishment, does it offend defendants' constitutional right to a **fair and impartial trial**—where the trial court fail to give jury a **sua sponte** Sec.3(a) instruction in light of:

- the defendant's guilt implied throughout the new punishment trial;
- the testimony of state witnesses describing an **aggravated assault with a firearm**—same-transaction-contextual evidence;
- the state witnesses' inability to identify defendant as being attributable to the aggravated assault with a firearm offense;
- a prosecution based on blatant inadmissible hearsay offered by police officers in linking defendant to the offense of conviction.

[2]. Did the Austin intermediate court judgment and opinion,delivered under the [sua sponte Sec.3(a) instruction] ground, so far depart from the usual and accepted course of judicial proceedings,or has sanctioned such a departure by another court, as to call for an exercise of the Court's discretionary jurisdiction[?]

LIST OF PARTIES

[■] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000)

illegal/void sentence and judgment

Bogany v. State, 661 S.W.2d 957 (Tex.Crim.App.1984)
Essery v. State, 163 S.W. 17,72 (Tex.Cr.App.1913)
Huseman v. State, 17 S.W.3d 794 (Tex.App.—Amarillo 1999)
Plessinger v. State, 530 S.W.2d 380 (Tex.Crim.App.1976)
Ex parte Augusta, 639 S.W.2d 481 (Tex.Crim.App.1982)

sequential finality charge-error

Bogany v. State, 661 S.W.2d 957 (Tex.Crim.App.1984)
Jordan v. State, 256 S.W.3d 286,290-91 (Tex.Crim.App.2008)
State v. Marroguin, 253 S.W.3d 783 (Tex.App.—Amarillo 2008)
Vidale v. State, 474 S.W.3d 274,283 (Tex.App.—Amarillo 2015)

sua sponte Sec.3(a) instruction error

Field v. State, 1 S.W.3d 687 (Tex.Crim.App.1999)
Huizar v. State, 12 S.W.3d 479 (Tex.Crim.App.2000)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

■ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at [03-19-00775-CR]; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

The opinion of the Court of Appeals Third District, Texas court appears at Appendix A to the petition and is

[ ] reported at [03-19-00775-CR]; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

■ For cases from **state courts:**

The date on which the highest state court decided my case was 03/02/2022.
A copy of that decision appears at Appendix C.

■ A timely petition for rehearing was thereafter denied on the following date: April 27th,2022, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution [Right to Trial by Jury].

Fourteenth Amendment to the United States Constitution [Due Process of Law and Equal Protection of the Law].

The Constitutional Right to a Fair and Impartial Trial per se Defendants' Fundamental Rights Protected Under the Federal Constitutional Laws of the United States.

Article I, Section 10 of the Texas Constitution [Right to Trial by Jury].

Article I, Section 19 of the Texas Constitution [Due Course of the Law and Equal Protection of the Law].

Rule 44.2(a),Tex.R.App.Proc..

Article 37.10(a),Tex.Code Crim.Proc..

Article 37.07(1)(a),Tex.Code Crim.Proc..

Article 37.07,Sec.3(a),Tex.Code Crim.Proc..

Section 12.33(a),Tex.Penal Code.

Section 12.42(d),Tex.Penal Code.

Section 12.32,Tex.Penal Code Vernon's Ann.(West Supp.1984).

Section 12.42(c),Tex.Penal Code Vernon's Ann.(West Supp.1984).

STATEMENT OF THE CASE

Petitioner Thomas Richie McBride [pro se litigant] appeals this case from the intermediate Court of Appeals Third District of Texas,(hereinafter refered to respectfully—Austin intermediate court),in the matter of The State of Texas v. Thomas Ritchie McBride [Cause No.76454] in the 27th Judicial District Court of Bell County,Texas.

This is Petitioner's second appeal in this case to the Austin intermediate court [03-19-00775-CR]. Petitioner's first appeal [03-17-00271-CR] resulted in the Austin intermediate court judgment affirming the trial court judgment of conviction, and reversed and remanded the case on the trial of punishment. [See] 03-17-00271-CR (Fedruary 13th,2019)(unpublished opinion). The Austin intermediate court issued its Mandate in this appeal May 21st,2019, and the trial court conducted the new trial on punishment (seating the new jury on September 30th,2019) and the presentment of the evidence commenced on October 1st,2019. During this trial on punishment, the State pursued the course it took in the first trial on guilt or innocence. The jury then deliberated and delivered a verdict of true to the habitual offender special pleas the State alleged, and assessed Petitioner's punishment at a term of [99] years in the Texas Department of Criminal Justice. Petitioner thus timely appealed [03-19-00775-CR].

In this particular appeal to the Austin intermediate court,Petitioner represents himself and respectfully submitted five grounds asserting trial court error on the trial of punishment. Petitioner, however, only argued three of such grounds on rehearing and in this petition[:] [an illegal/void remote 1984 sentence and judgment relied on to enhance his second-degree-felony conviction], [sequential finality

charge-error], and [sua sponte Sec.3(a) instruction trial court-error].

On September 22nd,2021, the case was submitted to the Austin intermediate court for disposition of appeal [03-19-00775-CR]. And on the 28th of October, 2021, the Austin intermediate court overruled each of the five grounds submitted by pro se Petitioner, and affirmed the judgment of the trial court. (Appendix A)(Memorandum Opinion).

Petitioner sought a rehearing by the court and argued rigorously—pointing out the Austin intermediate court errors,respectfully, related to the three grounds Petitioner continued to argue on appeal.

On December 2nd,2021, the Austin intermediate court denied Petitioner's motion for rehearing. (Appendix B). Petitioner timely filed a Petition For Discretionary Review by the Texas Court of Criminal Appeals—submitted by Petitioner on December 27th,2021. And on March 2nd,2022, the Court of Criminal Appeals denied the Petitioner's[PDR]. Petitioner sought a rehearing by the court en banc, and on April 27th, 2022, the Texas Court of Criminal Appeals denied the Petitioner's motion for rehearing. (Appendix D).

The State of Texas has thus obtained the Petitioner's conviction in violation of the United States Constitution, and its Texas Constitution on the basis of the grounds argued in this petition.

Thus, Petitioner seeks a Petition For Writ of Certiorari to the Texas intermediate Court of Appeals Third District—[03-19-00775-CR].

REASONS FOR GRANTING THE PETITION

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed;..." Article 1, Sec.2.[3],Constitution of the United States.

A long time ago, in the case of Powell v. Alabama, 287 U.S. 45(1932), the Court referenced to: "Procedural rules thus play a crucial role in ensuring the fair and efficient processing of cases, as well as the perception of the public and defendants that the criminal justice system has acted in a reliable and fair manner.

Even today, there are numerous obstacles to the fair handling of criminal investigations and prosecutions..."

"At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law',and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury'. Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt'." [See] **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

The Court in **Apprendi** also made it clear "that the jury find beyond a reasonable doubt not only these facts that prove the defendant's guilt, but also those facts that would enhance the defendant's sentence beyond the ordinary statutory maximum."

Continuing the **Apprendi** movement, the Supreme Court held that an Apprendi standard applies when a factual finding triggers a sentence

beyond the standard sentencing range.

> "It is impecative, for the safe of the inviolability of the Constitution of this great Nation,that men incarcerated in flagrant violation of their constitutional rights have a remedy." Herman v. Claudy, 350 U.S. 116,123 (1956).

In Petitioner's case, it is the basis of trial court errors that the fact-finder-role of the jury was compromised; and the jury's duty to determine the facts in issue was obstructed by the lack of the rudiment of the trial's compliance with procedural rules.

[The trial on punishment in this case has transgressed fundamental and deeply rooted principles of fairness and justice.] Petterson v. New York, 432 U.S. 197,208 (1977).

[1]. [Illegal/Void 1984 Sentence And Judgment]

In this case [03-19-00775-CR],the indictment in Cause No.76454 alleges the second-degree-felon offense burglary of a habitation by theft of jewelry; and also alleged that Petitioner had been previously convicted of a felony in Cause No.32729 on June 12th,1984, and also in Cause No. 28276 on December 5th,1979. Thus the State sought an habitual offender enhancement of Petitioner's punishment in this case. [See] Indictment (2019—Clerk's Record Vol.I,pg.6).

On October 3rd,2019, on the trial of punishment in this case, a jury found the State's habitual offender allegations true and assessed the Petitioner's punishment at [99] years confinement. [Tex.Penal Code §12.42(d)]. However, Petitioner was initially convicted by another jury in Cause No.76454 on March 30th,2017 on charges of second-degree burglary of a habitation. [Tex.Penal Code §30.02(a)(3),(c)(2)]. In the State of Texas, a second-degree felony is punishable by no less than 2-years or no more than 20-years imprisonment. [Tex.Penal Code §12.33(a)]. Thus, the State of Texas relied on [Cause No.32729] to enhance Petitioner's [Cause No.76454] second-degree-felony conviction punishment

beyond the ordinary statutory maximum of 20-years.

[Arguments And Authority]

The three proponents of law argued in the lower courts asserted, that the 1984 jury's failure to deliver a [verdict] of either **true** or **not true** on the State's special pleas of a repeat offender alleged for enhancement purposes—thus:

- constituted [a mistrial] on the trial of punishment;
- barred jury from an imposition of punishment;
- unduly created an impossible circumstance for the appellate court to determine legally whether the 1984 remote-law sentence under Cause No.32729 is **valid** by remate-law [or] **invalid** by remote-law.

(a) Jury's Improper Verdict Constitute A Mistrial

On June 11th,1984, a jury convicted Petitioner of the offense burglary of a habitation by theft of property in Cause No.32729. The indictment in Cause No.32729 also alleged a **repeat-offender** paragraph for enhancement purposes. On June 12th,1984, the jury heard the State read off the allegations that Petitioner had been previously convicted of the felony offense burglary of a building in Cause No.28276 on December 5th,1979, in the 27th District Court of Bell County,Texas. The evidence of a repeat-offender pursuant to §12.42(c),Tex.Penal Code was proffered by the State, the arguments of both sides were offered, and the trial court judge delivered the charge on punishment.

The 1984 jury deliberated and offered the following verdict:

"We, the jury, having found the defendant guilty of

the offense of Burglary of a Habitation,assess his punishment at confinement in the Texas Department of Corrections for a term of seventy five (75)years. In addition we assess a fine of $10,000.00."

[See] (2019—Clerk's Record Vol.I,**State's Exhibt** #32/33).

Acknowledge that the 1984 jury did not deliver a verdict of either **true** or **not true** to State's special pleas of a **repeat-offender**[.]

Where the jury returns an informal verdict, the trial court shall call the jury's attention to the informal verdict, and with the jury's consent, reduce the verdict to the proper form. **Reese v. State**, 773 S.W. 2d 314,317 (Tex.Crim.App.1989); Art.37.10(a),Tex.Code Crim.Proc.Ann., (West Supp.1984).

The remote trial court record [03-84-215-CR] (COA)(Unpublished Op.) (1985) indicate that neither the trial judge, nor the prosecutor or defense counsel pointed out the jury's informal and incomplete verdict in failing to find whether the State's special pleas of a repeat offender was either **true** or **not true**. The trial judge executed the judgment of conviction in Cause No.32729 according to the informal verdict delivered by the jury. [See] (2019—Clerk's Record Vol.I,**State's Exhibit** #32).

The law in Texas, pursuant to Article 37.07,sec.1(a),Tex.Code Crim., Proc.Ann.(West Supp.1984), provides:

"The verdict in every criminal action must be general.

When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue."

[See] **Ex Parte Augusta**, 639 S.W.2d 481 (Tex.Crim.App.1982).

Thus, it was a provision of Texas law that placed its mandatory requirement on the duty of the jury to deliver a specific verdict of either **true** or **not true** on the State's special pleas of a repeat offender allegation relied on for enhancement purposes in Cause No.32729. And in light of such statutory requirement of Texas law,the jury's failure to deliver the verdict on the enhancement paragraph of State's indictment [Cause No.32729] thus constitute [a mistrial] on the trial of punishment, Petitioner respectfully argues.

The essential elements of an art.37.07,sec.1(a) statutory requirement of law were found in the 1984 trial on punishment:

- the 1984 State's special pleas alleged a repeat offender pursuant to Sec.12.42(c);
- the 1984 jury was seated on the trial of punishment;
- the State proffered its evidence on the allegations of a repeat-offender;
- the trial judge charged the jury on the law of a repeat offender, and jury's duty to find beyond a reasonable doubt whether the repeat-offender allegations were either true or not true;
- the jury deliberated and delivered the verdict,supra.

It is recognized under the laws of Texas that the punishment phase of criminal trials have all the [ear marks] of a trial on guilt or innocence. In the case of **Plessinger v. State**, 536 S.W.2d 380 (Tex.Crim. App.1976), the Texas Court of Criminal Appeals held that allegations of an [enhancement paragraph] are treated the same as allegations of the element of a substantive offense.

> "[T]he punishment hearing to decide the punishment of an alleged habitual offender not only resembles in all relevant respects a trial on the issue of guilt,it is itself a trial, with the trier of fact judging the issue by the standard of beyond a reasonable doubt. It therefore has all the [ear] marks of a trial on guilt or innocence."
>
> [See] **Plessinger v. State**,supra.

The case of **Essery v. State**, 163 S.W. 17,72 (Tex.Cr.App.1913),seems to have visited questions of Texas law, some one hundred years ago,in which the court held, inter alia: "The jury is not given the power to assess the punishment at its discretion, but only according to the predicate they lay for it by their finding of the issue." Essery at 19. The Essery court also echoed the mandatory requirement of art.37.07(1)(a): "When there are 'special pleas' on which a jury is to find they must say in their verdict that the allegation in such pleas are true or untrue."

The State of Texas overlooks the finding of fact and provisions of its statutory law legally supporting the conclusion that [a mistrial] occurred in 1984 on the trial of punishment in Cause No.32729[:]

- Art.37.07(1)(a) required by law a verdict delivered by the jury of either **true** or **not true** on the State's special pleas of a repeat offender—however the jury fail to deliver.
- Having fail to deliver the verdict required by law—the jury was not authorized by law to assess punishment [**Essery v. State**].
- Art.37.10(a) required by law the trial judge's duty to call to the jury's attention its informal verdict and, with the jury's con-

sent, reduce the verdict to the proper form—however the trial judge fail to follow an art.37.10(a) procedural rule.

- The trial judge dismissed the jury and executed the judgment and the sentence as delivered by the jury in Cause No.32729.
- By the operation of the law the trial on punishment in Cause No.32729 was rendered [a mistrial].

Petitioner respectfully argues that the State of Texas overlooks a **mistrial** in Cause No.32729. A mistrial does not authorize jury's assessment of punishment. A mistrial does not authorize the trial judge's execution of a judgment of conviction. And a mistrial does not authorize a defendant's imprisonment. The State of Texas overlooks its law establishing that a mistrial on the trial of punishment places defendant back in his original position of the trial on guilt or innocence. [See] **Huseman v. State**, 17 S.W.3d 704 (Tex.App.—Amarillo 1999).

Petitioner respectfully contends that the Austin intermediate court of appeals' opinion and judgment did not address this proponent of the **illegal/void sentence and judgment** assertions and thus has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of the Court's discretionary jurisdiction in the Court's oversight of constitutional questions the proscription of any deprivation of liberty without due process of law or which violate the equal protection of the law.

(b) Impossible To Determine Legally Whether 1984 Sentence Is Valid

The Austin intermediate court was legally and duly called upon to redress a constitutional defect voiding the judgment and sentence in

Cause No.32729. Petitioner asserted that it is impossible to determine legally whether the 1984 remote-law sentence of 75-years and a [Fine] is valid pursuant to remote-law [or] invalid pursuant to remote-law[.] And on the basis of the 1984 jury's verdict discussed previously,this constitutional question presents a deadlock on the decision to be determined by the court.

In Texas, the intermediate court of appeals must address every issue raised and necessary to final disposition of appeal. [See] Rule 47.1, Tex.R.App.Proc.. The Austin intermediate court did not address this particular question on appeal and determining whether the 1984 remote law sentence is valid or invalid on the basis of the 1984 jury's lack of a verdict determining the State's special pleas of a **repeat-offender** alleged by indictment in Cause No.32729. (Appendix A)(Mem.Op.at pg.3). The State of Texas relied on the judgment of conviction in Cause No.32729 to enhance Petitioner's second-degree-felony conviction in Cause No.76454—twice, [03-17-00271-CR] and [03-19-00775-CR]. Thus, the Cause No.32729 judgment of conviction contributed to the habitual offender range of punishment jury assessed in Petitioner's case,[i.e., the jury in Cause No.76454 relied on the judgment in Cause No.32729 to enhance Petitioner's second-degree-felony range of 2-years to 20 -years maximum, to an habitual offender range of 25-years to 99-years or Life].

As previously shown, a jury convicted Petitioner in 1984 of burglary of a habitation by theft of property in Cause No.32729. [Sec.30.02(a)(1),Tex.Penal Code Vernon's Ann.(West Supp.1984)]. In 1984, the offense of burglary of a habitation,[regardless of the crime intended],

was a "first-degree-felony" offense punishable by imprisonment in the Texas Department of Corrections for a term of years not less than five (5) years or no more than ninety-nine (99) years or Life. In addition, a [Fine] not to exceed $10,000.00 was authorized by law. [Sec.12.32, Tex.Penal Code Vernon's Ann.(West Supp.1984). [See] **Bogany v. State**, 661 S.W.2d 957 (Tex.Crim.App.1984)(on the subject of remote-laws referenced to under this discussion).

The offense for which Petitioner was convicted under Cause No.32729 authorized a remote-law sentence of 75-years and a $10,000.00 [Fine] in 1984. However, as previously discussed, the indictment filed under Cause No.32729 also alleged a **repeat-offender** paragraph for enhancement of punishment pursuant to Sec.12.42(c),Tex.Penal Code Vernon's Ann., (West Supp.1984). And in 1984 this statutory law in Texas provided:

> "If it be shown on the trial of a first degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished in the Texas Department of Corrections for any term of not less than 15-years, or not more than 99-years or Life."

Acknowledge that there was no [Fine] of any amount authorized by law pursuant to Sec.12.42(c),Supra,in 1984[.]

[Arguments And Authority]

The remote-case-law authority and legal opinion and judgment rendered in the case of **Bogany v. State**,supra; and in Ex Parte Johnson, 697 S.W.2d 605 (Tex.Crim.App.1985), supports Petitioner's arguments that an assessment of a [Fine] on a finding of a repeat-offender pursuant to Sec.12.42(c),supra, was unauthorized by law and constitute an ille-

gal sentence in 1984.

The judgment of conviction under Cause No.32729, however, shows the jury assessed a [Fine]:

> "We, the jury, having found the defendant guilty of the offense of Burglary of a Habitation,assess his punishment at confinement in the Texas Department of Corrections for a term of seventy-five(75)years. In addition we assess a fine of $10,000.00."
>
> [See] (2019—Clerk's Record Vol.I,State's Exhibit #32).

Thus being demonstrated on the basis of the remote trial court record [03-84-215-CR], the grave constitutional-law question settled on whether the remote-law sentence of 75-years and a [Fine] is a valid sentence under Cause No.32729 [or] an invalid sentence under Cause No.32729[?] If punishment is not authorized by law,sentence is void[918 S.W.2d 557]. However the case is that the State of Texas cannot guarantee its judgment executed in Cause No.32729 on the principle of due process—where it is impossible to determine legally and justly whether the remote-law sentence of 75-years and a [Fine] is a valid or invalid sentence under the verdict of the jury delivered in Cause No.32729.

The essential link required to determine the validity or invalidity of the 1984 sentence is missing from the verdict of the jury. The laws applicable in 1984 involved Sec.12.32 and Sec.12.42(c) of the Texas Penal Code Vernon's Ann.(West Supp.1984). Thus, there were two separate punishments authorized on the basis of the jury's verdict of either a finding of true or not true to the State's repeat-offender allegation. Therefore, to authorize the jury's punishment pursuant to Sec.12.32, a

specific verdict and finding by the jury of [not true] to the State's repeat-offender allegations was mandatory law in 1984. [Or], on the other hand, a specific verdict and finding by the jury of [true] to the State's repeat-offender allegations—thus the jury's sentence of 75-years and a $10,000.00 [Fine] constitute an **illegal sentence** assessed by jury pursuant to Sec.12.42(c) in 1984. And however so, because the 1984 jury fail to deliver either of the two separate verdicts [i.e., **true or not true**] on the trial of punishment, it is impossible to determine legally and justly whether the sentence of 75-years and a [Fine] is **valid** or **invalid** as executed upon the judgment of conviction in Cause No.32729. Thus, the judgment is void for want of the due process of law.

Here, the Austin intermediate court overlooks the conclusion demonstrating that because the 1984 jury did not deliver the proper verdict — it is impossible to legally determine whether the remote-law sentence is **valid** or **invalid** — the 1984 jury was not then authorized by law on the basis of its informal verdict to assess punishment [Essery] — the remote-law sentence was void upon its inception in 1984 — the execution of the remote-law sentence was not authorized by the informal verdict delivered by the 1984 jury — and thus the remote judgment of conviction was executed upon a void sentence in 1984.

It also questions whether the trial court, respectfully, may have deliberately avoided an art.37.10(a) procedural duty—taken in light of the evidence [03-84-215-CR] proffered by the State of a repeat offender and jury's sentence including a [Fine]—to overlook a possible disclosure of a jury's verdict of true to State's repeat-offender and thus jury's assessment of an **illegal sentence**. Bogany v. State, 661

S.W.2d 957 (Tex.Crim.App.1984).

The compiled procedural errors boil down to the settlement of a trial on punishment lacking fundamental rudiments of due process of law, a fair trial verdict delivered by the jury, and the entitlement to the equal protection of the law, Petitioner respectfully contends.

Respectfully, the Court must be deaf to all suggestions that a valid appeal to the Constitution comes too late, because courts were not earlier able to enforce what the Constitution demands. "The proponent before the Court is not the petitioner but the Constitution of the United States." **Chessman v. Teets**, 354 U.S. 156,165 (1957).

The State of Texas overlooks its stare decisis judicial duty confronted by the Austin intermediate court in this case on appeal. A Texas intermediate court of appeals must reverse a conviction unless it concludes beyond a reasonable doubt that the error did not contribute to the conviction or the punishment. Tex.R.App.Proc.,Rule 44.2(a); [See] **Williams v. State**, 988 S.W.2d 185,194 n.9 (Tex.Crim.App.1997) (citing **Chapman v. California**, 386 U.S. 18,24 (1967)). Here, it was made apparent that the State's use of the constitutionally void judgment of conviction in Cause No.32729, relied on to enhance Petitioner's second degree felony conviction in Cause No.76454 to an habitual offender 25 to 99 or Life range of punishment, constitute the error which contributed to the punishment.

"A void judgment is a nullity from the beginning, and is attended by none of the consequences of a valid judgment. It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights." Ex **Parte Spaulding**, 687 S.W.2d at 745 (Teague J.,concurring)

(Tex.Crim.App.1985). The State of Texas may not rely on a constitutionally void sentence to extract its judgment of conviction for enhancement purposes. The State of Texas may not renege on its constitutional guarantee, that it shall not deprive defendant of liberty without due process, by overlooking multiple procedural rule violations, the impairment of a fair and impartial trial on punishment,and the lack of a jury verdict determining the State's special pleas.

The Austin intermediate court did not fulfill the requirement of a Rule 47.1,Tex.R.App.Proc.,in considering Petitioner's assertions of an [illegal/void sentence and judgment]—where the court held:

> "We conclude that McBride's 1984 judgment of conviction is not void for lack of recitation about the enhancement allegation findings." (Citing—"Cf.Tex.Code Crim. Proc.art.42.01 §1"). (Appendix A)(Mem.Op.at pg.4).

[Was there anything else legally of constitutional question the Austin intermediate court could have considered to resolve this issue asserting a void judgment[?]].

A state court decision is an unreasonable application of clearly established precedent if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. **Carey v. Musladin**, ___U.S.___, 127 S.Ct. 649,653 (2000),(quoting **Williams v. Taylor**, 529 U.S. 362,412 (2000)).

Petitioner respectfully contends that the Austin intermediate court of appeals opinion and judgment has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of the Court's discretionary jurisdiction in the Court's oversight of a

state deprivation of Petitioner's constitutional rights.

The Austin intermediate court overlooks the essential constitutional question of law—whether the 1984 judgment in Cause No.32729 is void because it is impossible, on the basis of the verdict of the jury, to determine legally and justly if the sentence is valid or invalid[.]

[2]. [Sequential Finality Charge-Error]

In Texas, an intermediate court of appeals must reverse a conviction unless it concludes beyond a reasonable doubt that the error did not contribute to the conviction or the punishment. [See] Tex.R.App. Proc.,Rule 44.2(a); **Williams v. State**, 988 S.W.2d 185,194 n.9 (Tex. Crim.App.1997)(Citing **Chapman v. California**, 386 U.S. 18,24 (1967).

Appeals provided by state, while not themselves constitutionally required, must be provided to all in accordance with the equal protection clause. **Cf. Griffin v. Illinois**, 351 U.S. 12 (1956).

It was legally binding upon the Austin intermediate court to reverse and remand the trial court judgment in Cause No.76454 on the trial of punishment—thus in light of the opinion and judgment of the Amarillo intermediate court of appeals delivered in the case of **Vidales v. State**, 474 S.W.3d 274,283 (Tex.App.—Amarillo 2015)(pet. denied [PDR] 471 S.W.3d 457 (Tex.Crim.App.2015)); and the decision in the case of **Jordan v. State**, 256 S.W.3d 286,290-91 (Tex.Crim.App.2008).

Petitioner asserted, rigorously argued on appeal in this case,that the trial court-charge on punishment fail to require/authorize jury to find State's special pleas of an habitual offender pursuant to Sec.12.42(d) of the Texas Penal Code, and that Petitioner suffered egregious harm due to the court charge-error. Petitioner thus cited

the case of **Vidales v. State** as the controling case-law-authority entitling him to a judgment of the Austin intermediate court reversing and remanding Cause No.76454 on the trial of punishment.

By the "application paragraph",the trial court erroneously authorized jury to find an habitual-offender true pursuant to §12.42(d),[i]f to-wit:

> "You are instructed that if you find beyond a reasonable doubt that this defendant is the same person who was convicted of the felony alleged in Paragraph Two (2) of this indictment and the same person who was convicted of the felony offense alleged in Paragraph Three (3) of this indictment, you will assess the defendant's punishment at confinement in the Texas Department of Criminal Justice - Institutional Division for a term of not more than ninety-nine (99) years or less than twenty-five (25)years or life."
> [See] (2019)—Clerk's Record Vol.I,**Court Charge On Punishment**,at pg.208).
>
> [It is axiomatic that jurors are presumed to follow the court's instructions. **Bollenback v. United States**, 326 U.S. 614,626 (1894); Thriff v. State, 176 S.W.3d 221,224 (Tex.Crim.App.2005)].

In following this particular instruction of the trial court, however, the Austin intermediate court overlooks the fact that,the jury thus relied on the [indictment] which does not alleged that the 1984 or 1979 prior convictions were final/became final. [See] (2019—Clerk's Record Vol I, pg.6). In Texas, the Penal Code authorizes the State's enhancement of defendant's punishment pursuant to §12.42(d),upon a finding to-wit:

> "If it is shown on the trial of a felony offense...that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the Institutional Division of the Texas Department of

> Criminal Justice for life, or for any term of not more than 99 years or less than 25 years."

The Austin intermediate court concedes that **sequential finality** error exist on the basis of the trial court instruction given to jury: "Here, the charge on punishment addressed the sequential requirement in the instructions on the enhancement paragraphs of the indictment, but the charge did not require a specific finding about the proper sequencing of the prior convictions in the 'charging paragraph' of the instruction." (Appendix A)(Mem.Op.at pg.6).

However, having conceded to the trial court sequential finality charge error on the trial of punishment in Petitioner's case, the Austin intermediate court closed the law book citing the case of **Vidales v. State** (Tex.App.—Amarillo 2015),(Tex.Crim.App.2015)—thus overlooking an **illegal sentence** assessed by the jury in Petitioner's case. The Texas intermediate court of appeals in the case of Vidales reversed and remanded the trial court judgment on the grounds of sequential finality charge error. And in delivering the court's opinion and judgment, held:

> ["Vidales' sentence of 62 years confinement was illegal because it exceeded the maximum sentence for a second-degree felony... as jury never made an essential fact finding necessary to elevate the range of punishment for a minimum term of 25 years under §12.42(d) and therefore the maximum sentence was 20 years."]

The Vidales court held that the charge-error contributed to jury's assessment of an illegal sentence and thus Vidales suffered egregious harm. [See] **Vidales v. State.** And in explaining the parties' contentions on appeal which provided the grounds for the Amarillo intermedi-

ate court's judgment in Vidales, the court wrote:

"With admirable candor, the State concedes (1) the trial court's punishment charge erroneously fails to require the jury to find sequential finality of the prior felony conviction as required by section 12.42(d) of the Texas Penal Code and Jordan v. State, 256 S.W.3d 286,290-91 (Tex.Crim. App.2008), (2) Appellant suffered egregious harm from a lack of a jury instruction requiring the jury to find the second previous felony conviction was for an offense that occurred subsequent to the first previous felony conviction having become final.

As to this error, the State admits we should reverse the sentence and remand the case for a new trial on punishment." Vidales v. State, 474 S.W.3d 274,283 (Tex.App.— Amarillo 2015)(pet.denied [PDR] 471 S.W.3d 457 (Tex.Crim.App.2015)).

Thus, the egregious harm analysis was resolved by the Amarillo intermediate court in the case of Vidales v. State—where per se the judgment of conviction appealed, on the grounds of sequential finality charge-error, involve either a third-degree or second-degree felony enhanced to an habitual-offender range of punishment [i.e.,"Vidales' sentence of 62 years confinement was illegal because it exceeded the maximum sentence for a second-degree felony"]. (Id.)

Because the Austin intermediate court conceded to sequential finality charge-error exist on the trial of punishment in Petitioner's case, the egregious harm was then also determined by the Amarillo intermediate court of appeals and thus binding upon the Austin intermediate court to concede the opinion and judgment rendered in Vidales.

However, the Austin intermediate court took an unusual and unaccept-

able course of judicial proceedings to arrive at the court's decision overruling Petitioner's sequential finality charge-error ground. Here, the Austin intermediate court overlooks a jury's assessment of an **illegal sentence**, to eye instead a sufficiency of evidence topic rendered irrelevant on the basis of the error's effect—of an assessment of an illegal sentence. And in doing so, the Austin intermediate court also overlooks the indistinguishable similarities of Vidales' and McBride's cases; to-wit:

Vidales v. State	McBride v. State
(a **Vidales** was convicted by jury for a second-degree felony.	(a **McBride** was convicted by jury for a second-degree felony.
(b The State alleged an habitual offender paragraph for enhancement.	(b The State alleged an habitual offender paragraph for enhancement.
(c The jury delivered a verdict of true on the habitual offender allegation.	(c The jury delivered a verdict of true on the habitual offender allegation.
(d The court found the evidence sufficient to prove proper sequencing of prior convictions.	(d The court found the evidence sufficient to prove proper sequencing of prior convictions.
(e The court conceded to charge-error in failing to require jury to find sequential finality.	(e The court conceded to charge-error in failing to require jury to find sequential finality.
(f The jury essessed Vidales' sentence at 62 years confinement (TDCJ).	(f The jury assessed McBride's sentence at 99 years confinement (TDCJ).
(g Vidales contended that he suffered egregious harm.	(g McBride contended that he suffered egregious harm.
(h The court agreed[.]	(h The court disagreed[.]

In reviewing the criminal-case-similarity supra, indistinguishable in the analysis provided, it thus becomes apparent that the only matter the Austin intermediate court was unable to agree on involved the egregious harm determined by the Amarillo intermediate court in delivering the court's opinion and judgment in the case of Vidales. And in so disagreeing, the Austin intermediate court also overlooks the decision of the Texas Court of Criminal Appeals denying the [PDR] petitions of the State and appellate counsel, and ordering the Amarillo intermediate court to reinstate its May 15th,2015 opinion and judgment delivered by the court in **Vidales v. State.** [See] Vidales v. State, 471 S.W.3d 457 (Tex.Crim.App.2015).

The opinion and judgment in the case of Vidales v. State stands and presents controling and valid case-law-authority on the subject-matter determining sequential finality charge-error and egregious harm[.]

The Austin intermediate court, however, delivered a judgment which, in effect, authorized the execution of an **illegal sentence** under the judgment of conviction in Cause No.76454; overlooks a legally binding judgment and opinion of its sister intermediate court of appeals; and denies Petitioner the equal protection of the law afforded Sammy Vidales on the basis of the same trial court error Petitioner asserted, respectfully, on appeal in this case.

> "A sentence that is outside the maximum or minimum authorized by law is an illegal sentence." State v. Marroguin, 253 S.W.3d 783 (Tex. App.—Amarillo 2008); Ex Parte Seidel, 39 S.W.3d 221,225 (Tex.Crim. App.2000); Bogany v. State, 661 S.W.2d 957 (Tex.Crim.App.1984).

Respectfully, the equal protection of the law afforded Vidales must also be afforded to Petitioner guaranteed under the Fourteenth Amend-

ment to the United States Constitution.

The Austin intermediate court [overlooking sequential finality error contributed to an illegal sentence] has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of the discretionary jurisdiction of the Court.

[3]. [Sua Sponte Sec.3(a) Instruction]

> The Sixth Amendment oversight extends also to criminal defendants' right to a fair and impartial trial on punishment; an oversight of the State's guarantee under Article I, Section 10 of the Texas Constitution; Article I, Section 19 of the Texas Constitution.

The logic to same-transaction-contextual evidence of an extraneous offense or bad act is defendant's culpability for the criminal conduct described. [I]f the defendant is not identified as the person attribuable to same-transaction-contextual criminal conduct,then what legal/material purpose does same-transaction-contextual evidence serve on the trial of punishment[?]

The Austin intermediate court references to the case of Lopez v. State (Appendix A)(Mem.Op.at pg.13-14) to offer its case-law-authority subject of it not being required that the trial court sua sponte give jury a Sec.3(a) instruction for same-transaction-contextual evidence admitted on the trial of punishment. Here,however,the court overlooks the case that Lopez's identity was not an issue raised by the evidence. Lopez was identified by the complainant as her mother's boyfriend; he was identified by the complainant's mother as her boyfriend; and he was identified as a member of their household. And in the case of Camacho v. State (cited also (Appendix A)(Mem.Op.at pg.13-14)), Camacho was identified by the homeowner who was acquainted with Camacho; Camacho was also identified by an accomplice eyewitness.

To therefore distinguish the essential differences found in Petitioner's case, reviewed by the Austin intermediate court, a short account of the facts of the case is necessary.

On March 30th,2017, a jury convicted Petitioner of second-degree burglary of a habitation by theft of property in Cause No.76454. The indictment in this case charged Petitioner with second-degree felony Burglary of a Habitation by Theft of Jewelry, and alleged also that Petitioner had previously been convicted in 1979 and 1984, sought for an enhancement of Petitioner's punishment pursuant to §12.42(d). However there were no allegations or special pleas of the use or exhibit of a firearm/deadly weapon alleged by the State. And there were no **affirmative finding** on the use or exhibit of a firearm/deadly weapon executed upon the judgment of conviction in Cause No.76454. [See](2019—Clerk's Record Vol.I,pg.6); [03-17-00271-CR].

On March 27th-28th,2017, during the guilt or innocence phase of trial, the jury heard testimony elicited from State's eyewitnesses Jorge and Kristen Sanchez II describing an individual held up inside the 105 Wren Drive residence (habitation in question) firing a firearm multiple times at the persons of Jorge Sanchez II (neighbor) and Henry Phillip Jones (homeowner)—same-transaction-contextual evidence described by the witnesses. [See] (2019—RR.Vol.6,pg.34-41); (2019—RR.Vol.7,pg.6,pg.11; pg.12-22). Neither Jorge or Kristen identified anybody.

The March 2017 and October 2019 trials on punishment were conducted by the Honorable Judge Alan Mayfield (visiting judge) Presiding by an assignment in Cause No.76454. Petitioner represented himself during the course of both trials. On appeal of the trial court judgment in [03-17-00271-CR], Petitioner was represented by court-appointed appellate counsel Justin Bradford Smith.

The Third District Court of Appeals at Austin was presented a single error on appeal addressing the punishment phase [03-17-00271-CR] and the court reversed and remanded the case on the trial of punishment on February 13th,2019; affirming the trial court judgment of conviction. The court's Mandate issued on May 21st,2019, and the trial court conducted the new trial on punishment.

The jury selection was conducted on September 30th,2019, and the new trial on punishment commenced on October 1st,2019. Thus, throughout the trial, Petitioner's guilt lingered on the minds of the jurors seated on the jury. The State proffered the same extent of the evidence the previous jury heard during the March 2017 trial. And Jorge and Kristen Sanchez II testified describing an individual held up inside the 105 Wren Drive residence firing a firearm multiple times at the persons of Jorge Sanchez II and Henry Phillip Jones. [See] (2019—RR.Vol.6,pg.64 -73); (2019—RR.Vol.7,pg.32, pg.38 vs. 17; pg.39 vs. 5-24; pg.43 vs. 11-25; pg.44).

Acknowledge here that the prosecutors and trial judge were aware that Mr.Henry Phillip Jones suffered heart-failure and died on December 20th,2015—and thus Jorge and Kristen Sanchez II were only eyewitness to the actual events alleged at 105 Wren Drive prior to police's involvement on June 12th,2015. However, neither Jorge nor Kristen were able to identify anybody attributable to the aggravated assault with a firearm described by them.

Kristen Sanchez II confirmed her inability to identify anybody:

(By Prosecutor)

Q. "Okay. Did you ever see -- did you ever see the person that was in the house?"

A. "I never saw anybody."

Q. "Okay."

A. "Other than my husband and Mr.Jones." (2017—RR.Vol.6,pg.41 vs.7-11).

[Kristen Sanchez II, during the October 2019 trial on punishment,did not change her testimony that she never saw anybody. (2019—RR.Vol. 6,pg.73 vs.5-13)].

* * *

Jorge Sanchez II confirmed his inability to identify anybody:

(By Prosecutor)

Q. "Now, you never saw the person that was in Mr.Jones's House; is that right?"

A "No, I didn't." (2019—RR.Vol.7,pg.22 vs.21-23).

(By McBride pro se)

Q. "Okay. And you stated you didn't know what the intruder looked like?"

A. "No, sir, all I saw was a black silhouette of a person --"

Q. "Okay."

A. "-- standing in the dining room."

Q. "So what about when he -- you said you saw him flee from the house, right?"

A. "I only saw the backside, but I wasn't sure if that was the right person or not."

Q. "Okay. And so did you see what color clothing the person had on?"

A. "I don't recall at that time." (2019—RR.Vol.7,pg.44 vs.6-18).

[Jorge Sanchez II, during the October 2019 trial on punishment,did change his testimony from a black silhouette to a person wearing

a gray-shirt—thus implying a partial description of the clothing Petitioner was wearing (gray-T-shirt, black jeans, black ball cap and transitional-prescription-eyeglasses) on June 12th,2015. (2019—RR.Vol.7,pg.46 vs.1-13)].

[Arguments And Authority]

Petitioner argued on appeal that the testimony describing an aggravated assault with a firearm, inter alia, required the trial judge to give jury a sua sponte Sec.3(a) instruction on the trial of punishment pursuant to art.37.07 of the Texas Code Criminal Procedure, and that he suffered egregious harm due to a lack thereof.

The State argued, and the Austin intermediate court agreed, that the testimony complained of was same-transaction-contextual evidence and thus the trial judge was not required to give jury a sua sponte sec.3 (a) instruction; therefore, there was no error on the part of the trial court in failing to do so. [Citing the cases of Camacho v. State, 864 S.W.2d 524,532 (Tex.Crim.App.1993); Wesbrook v. State, 29 S.W.3d 103, 115 (Tex.Crim.App.2000); Castaldo v. State, 78 S.W.3d 345,352 (Tex. Crim.App.2002); Lopez v. State, 515 S.W.3d 547,552 (Tex.App.—Houston [14th Dist.] 2017,pet.ref'd).

Interesting however though, none of these cases involve Petitioner's particular trial on punishment case circumstances, and the witnesses in those cases made positive identifications of defendant as attributable to the extraneous offenses and bad acts described. However,in Petitioner's case, this is simply not the case confronted by the Austin intermediate court in addressing the sua sponte Sec.3(a) ground asserted by Petitioner on appeal in this case. The Austin intermediate

court overlooks three essential elements of a sua sponte Sec.3(a) requirement[:] First,the proceedings must involve the trial on punishment; second,the defendant must be shown to be attributable to the bad act and extraneous offense described by the witness; and third, the jury may not consider the extraneous offense and bad act evidence in assessing defendant's punishment until the jury is satisfied beyond a reasonable doubt that the defendant attributed to the conduct. [See] Vernon's Ann.Tex.Code Crim.Proc.arts.36.14, 36.19, 37.07,Sec.3(a),and **Huizar v. State**, 12 S.W.3d 479 (Tex.Crim.App.2000).

The Texas Court of Criminal Appeals, in **Huizar v. State**,granted the State's [PDR] to decide whether a trial court should, under the Code of Criminal Procedure article 37.07,Sec.3(a), sua sponte give jury an instruction on the burden of proof for evidence of an extraneous offense or bad act admitted during the punishment phase. And after its review, the court held that a trial court must include the Sec.3(a) instruction during the punishment phase because it is logically required to enable the jury to properly consider such evidence under the prescribed reasonable doubt standard. "A trial court must include the reasonable doubt instruction even if the defendant does not request it. The failure to give such an instruction sua sponte can be reversible error when there is egregious harm." **Huizar v. State**, supra.

The Austin intermediate court agree with the State's analysis that the testimony Petitioner complains of was same-transaction-contextual and thus there was no sua sponte Sec.3(a) instruction required on the part of the trial court. The Austin intermediate court however overlooks:

(1) the witnesses, describing the same-transaction-contextual evidence

of an aggravated assault with a firearm, were unable to identify anybody attributable to the bad act; (2) the same-transaction-contextual evidence of an aggravated assault with a firearm described, during the punishment phase, an offense greater and more severe than the offense Petitioner was tried and convicted for; and (3) the trial judge gave the jury an instruction that it may consider all the facts in evidence in assessing the punishment (2019—Clerk's Record Vol.I,pg.209). ["It is axiomatic that jurors are presumed to follow the court's instructions." Bollenback v. United States, 326 U.S. 614,626 (1894)].

> "Conversely, an extraneous offense is any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." Zarco v. State, 210 S.W.3d at 821,822,(citing Rankin v. State, 953 S.W.2d 740,741 (Tex.Crim.App.1996).

Same-transaction-contextual evidence may play a significant role when relied on properly to impart to the trier of fact information essential to understanding the context and circumstances of the events; yet, the law in Texas is that the probative relevance of the evidence must outweigh its prejudicial and injurious impact on defendant's absolute right to a fair and impartial trial. Rule 404(b) of the Texas Rules of Criminal Evidence; Powell v. State, 189 S.W.3d 285 (Tex.Crim. App.2006); DeLeon v. State, 77 S.W.3d 300 (Tex.App.—Austin 2001).

> "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." King v. State, 953 S.W.2d 266,271 (Tex.Crim.App.1997),(citing the Supreme Court case **Kotteakos v. United States**, 328 U.S. 750,776(1946).
> "Statutory requirement that the jury be satisfied beyond a reasonable doubt of the defendant's culpability in the extraneous offense and

bad act is 'law applicable to the case' in non-capital punishment context, triggering another statutory requirement for the trial court to sua sponte submit instruction on that burden of proof." Vernon's Ann. Tex.Code Crim.Proc.arts.36.14, 36.19, 37.07,sec.3(a); Huizar v. State, 12 S.W.3d 479 (Tex.Crim.App.2000).

"Statutory requirement that jury must be satisfied beyond a reasonable doubt of defendant's culpability in extraneous offenses and bad acts is a legislatively prescribed burden of proof applicable to extraneous offense and bad act evidence admitted at punishment in all non-capital cases." Vernon's Ann.Tex.Code Crim.Proc.art.37.07,Sec.3(a). "The plain language of this provision 'requires that such evidence may not be considered in assessing punishment until the fact finder is satisfied beyond a reasonable doubt that [the extraneous bad acts and offenses] are attributable to the defendant'." Field v. State, 1 S.W. 3d 687 (at 688)(Tex.Crim.App.1999); Huizar v. State, at 482,483.

The Austin intermediate court overlooks the trial court's instruction inviting the jury to consider all the facts in evidence in assessing punishment thus triggered a Field v. State/Huizar v. State requirement of the trial judge to sua sponte give jury the Sec.3(a) instruction. The Austin intermediate court overlooks the failure of the trial court to give the Sec.3(a) instruction thus fail to require jury to determine whether State had met its burden to prove beyond a reasonable doubt that the bad acts were attributable to Petitioner.

Nevertheless, the State looking to establish such proof loads and fires its first salvo to imply upon the court that "the appellant concedes that the evidence that he fired shots at two individuals occurred during his act of committing the burglary of a habitation." [See]

(Appellee's Brief,at pg.26). For better wording, however, Petitioner asserted that: "The unadjudicated extraneous offense testimony alleged that Appellant, (1) fired a firearm multiple times at the [persons] of Henry Jones and Jorge Sanchez II on June 12th,2015 in the act of committing burglary of a habitation." (Appellant's Brief,at pg.34).

The Petitioner's guilt was established upon the basis of the judgment of conviction itself and, thus, may explain the State's and the Austin intermediate court's position to overlook evidence that State's only eyewitnesses, who allegedly beared-witness to the actual events of an aggravated assault with a firearm, were unable to identify anybody attributable to either of the offenses [burglary of a habitation, or aggravated assault with a firearm]. Nevertheless, the Austin intermediate court made references—unsubstantiated on the basis of the trial court record in this case—implying that Petitioner was actually the individual who fired the shots from inside the 105 Wren Drive residence. (Appendix A)(Mem.Op.at pg.13-14). In fact, the Austin intermediate court adds its opinion that: "McBride acknowledges that he fired the shots at the two people during his act of committing the burglary of a habitation,..." Thus the court attempts to account for the identification of Petitioner required by law. And the Austin intermediate court overlooked Petitioner's pro se motion for rehearing pointing out this inconsistency with the evidence, offering proof on the basis of the record that Petitioner did not acknowledge any involvement in a shooting incident[:]

(Q. prosecutor — A. McBride)

Q. "Well, about the man shooting at him?"

A. "I don't know if that's true, sir."

Q. "Okay. So you don't know whether Mr.Jones got shot at or not?"

A. "I don't know." (2019—RR.Vol.9,pg.47 vs.16-20).

* * *

A. "The evidence do not show that there was gunfire inside the house."

Q. "Okay."

A. "You have no bullets." (2019—RR.Vol.9,pg.48 vs.1-4).

[Also reference to: (2017—RR.Vol.8,pg.189 vs.15-19)].

It was also a departure from the usual and accepted course of judicial proceedings for the Austin intermediate court to reference to evidence [i.e.,"the evidence showed that police located McBride as he fled the scene shortly after he had fired shots at the neighbors. When police apprehended McBride, he had a loaded handgun in his right rear pocket."] (Appendix A)(Mem.Op.at pg.14) the court knew to be inadmissible had it been properly and timely objected to. In addition, eyeing the trial court record, the Austin intermediate court thus acknowledged that police linked Petitioner to the alleged 105 Wren Drive offense through blatant inadmissible hearsay repeating out-of-court statements allegedly made to police by Henry Phillip Jones—a deceased individual who was unavailable for verification of police's account(s). And in arriving at its opinion of the evidence, the Austin intermediate court overlooks a trial court record account rife with procedural rule violations and inconsistencies, prosecution's leading questions, bolstering the testimony of witnesses, questions of irrelevant and misleading impact, and blatant inconsistencies in the testimony offered by the parade of State's witnesses. Thus, a sheer show of a trial rendered

inherently unfair and unreliable, respectfully. Cf.Kyles v. Whitley, 514 U.S. 419,434 (1991).

However, here, the Austin intermediate court shifted from the analysis of the error asserted by Petitioner to an opinion of the evidence inferring Petitioner's guilt; thus, overlooking the "predominent concern is error and not whether there is overwhelming evidence to support defendant's guilt." Rules App.Proc.,Rule 81(b)(2); Miles v. State, 918 S.W.2d 511 (Tex.Crim.App.1996).

Respectfully, Petitioner asserted trial court error in failing to sua sponte give jury a Sec.3(a) instruction on the trial of punishment; that he suffered egregious harm due to a lack of the instruction. "Circumstances of the offense which tend to prove the allegations of the indictment are not extraneous offenses." Ramirez v. State, 815 S.W.2d 636,641 (Tex.Crim.App.1991).

The Austin intermediate court overlooks the State's apparent purpose for eliciting the testimony of an aggravated assault with a firearm on the trial of punishment was not to prove the allegations of the indictment, but was proffered to influence the jury's consideration of punishment. Thus, the sua sponte Sec.3(a) instruction was essential to require jury to determine beyond a reasonable doubt whether the State met its burden of proof that Petitioner attributed to the bad act—before jury could consider such evidence in assessing punishment.

And in light of the second-degree offense Petitioner was convicted of, and the inability of Jorge and Kristen Sanchez II to identify anybody linked to the 105 Wren Drive offenses, the lack of the instruction amounted to egregious harm suffered by Petitioner in this case.

A state court decision is an unreasonable application of clearly

established precedent if the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the petitioner's case. Carey v. Musladin, ___U.S.___, 127 S.Ct. 649,653 (2006),(quoting Williams v. Taylor, 529 U.S. 362,412 (2000).

"If the error was not objected to at the trial, the court shall grant relief only if the error is so egregious and create such harm that the appellant has not had a fair and impartial trial." Art.36.19,Tex.Code Crim.Proc.Vernon's Ann..

[Could fair minded jurist agree that Petitioner received a fair and impartial trial on punishment, inter alia, in light of the trial court sua sponte Sec.3(a) error complained of?]

Petitioner respectfully contends that the Austin intermediate court judgment and opinion, delivered under the [sua sponte Sec.3(a) instruction] ground, so far departed from the usual and accepted course of judicial proceedings, or has sanctioned such a departure by another court, as to call for an exercise of the Court's discretionary jurisdiction in oversight of defendants' right to a fair and impartial trial.

* * * * *

"Every person accused of a crime is entitled to a fair trial."
Henley v. State, 567 S.W.2d 66,69 (Tex.Crim.App.1978).

* * * * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas K. McBride

Date: May 23rd, 2022