APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-70023

United States Court of Appeals
Fifth Circuit
FILED
March 16, 2023
Lyle W. Cayce Clerk

JOSEPH GAMBOA,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:15-CV-113

Before JONES, SMITH and DENNIS, *Circuit Judges*.

PER CURIAM:[*]

Petitioner Joseph Gamboa, a capital inmate in Texas, appeals the district court's denial of his "Motion to Dismiss Counsel" during his 28 U.S.C. § 2254 federal habeas corpus proceedings. Because we cannot grant any effectual relief, Gamboa's appeal is moot, and we must dismiss it for lack of jurisdiction.

[*] Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

I.

The background to this case has been amply discussed elsewhere. *See Gamboa v. Davis*, 782 F. App'x 297, 298–99 (5th Cir. 2019). We briefly recount the facts as relevant here. In 2007, a Texas jury convicted Joseph Gamboa of capital murder and sentenced him to death for killing Ramiro Ayala and Douglas Morgan during a 2005 robbery at a bar in San Antonio, Texas. *Id.* at 289. Gamboa's conviction and sentence were affirmed on direct appeal, *see Gamboa v. State*, 296 S.W.3d 574 (Tex. Crim. App. 2009), and his state habeas application was denied in February 2015, *see Gamboa*, 782 F. App'x at 298.

In 2015, following his unsuccessful state habeas proceedings, Gamboa moved in federal district court for appointment of counsel to assist with his 28 U.S.C. § 2254 federal habeas petition. The district court appointed attorney John Ritenour, Jr. to represent Gamboa. Ritenour filed Gamboa's § 2254 petition in February 2016, alleging various challenges to the constitutionality of Texas's death penalty scheme. Ritenour later met with Gamboa, who allegedly expressed his displeasure with what Gamboa perceived as Ritenour's failure to investigate other issues related to the guilt and penalty phases of his capital trial. In April 2016, the State filed an answer, contending that all of Gamboa's claims were foreclosed by settled precedent and that some were also procedurally defaulted. The next month, Ritenour filed an untimely two-paragraph reply brief, conceding that each claim in Gamboa's federal habeas petition was foreclosed. *Id.* at 298–299. On June 8, 2016, Ritenour wrote to Gamboa, enclosing the reply brief and explaining his rationale for conceding that all claims were foreclosed.

Three weeks later, on June 29, 2016, Gamboa filed a *pro se* "Motion to Dismiss Counsel" wherein he requested

that the district court remove Ritenour as his appointed counsel and appoint new counsel to represent him. The motion stated that "appointed counsel has failed to file the appropriate and REQUESTED ERRORS necessary to the adequate defense to the federal habeas writ pending against defendant herein." The *pro se* motion further stated that Gamboa had "lost faith in counsel and no longer trust [*sic*] counsel's advice" and that, "as a result of the attitude and performance of" appointed counsel, "there now exist [*sic*] an irreparable, antagonistic relationship between Defendant and appointed counsel." The motion, however, lacked a certificate of conference and, although it included a certificate of service, that certificate was incorrectly addressed.

On July 8, 2016, the district court struck Gamboa's motion for failing to comply with the Local Court Rules for the United States District Court for the Western District of Texas and, in the alternative, denied the motion on its merits. First, the court stated that the applicable standard for evaluating Gamboa's motion to substitute counsel was whether there was "good cause . . . for the withdrawal of counsel." The court then emphasized that the motion was filed four months after Ritenour filed the § 2254 petition, more than a month after Ritenour filed the "last operative pleading" in the case, and well after the Antiterrorism and Effective Death Penalty Act's statute of limitations had expired on Gamboa's petition. The court also observed that Gamboa had not alleged any specific facts demonstrating an actual or potential conflict of interest between himself and Ritenour nor had Gamboa identified with specificity any irreconcilable conflict between himself and Ritenour.

Responding to Gamboa's allegation that his counsel failed to assert claims that Gamboa wanted to include in his petition, the court noted that Gamboa had not

"identif[ied] any non-frivolous claims for relief" that he would have included in his § 2254 petition but that Ritenour failed to incorporate, and, moreover, counsel is under no duty to raise every non-frivolous claim that could be pressed. Last, the district court stated that the motion was deficient under the Local Rules because it lacked both a certificate of service and a certificate of conference.

On August 4, 2016, the district court denied Gamboa's § 2254 motion and denied a Certificate of Appealability ("COA"), determining that all of his claims were procedurally defaulted and/or foreclosed by precedent. Ritenour then moved to withdraw as counsel. The district court denied his motion without prejudice. Subsequently, Gamboa filed a *pro se* notice of appeal. The notice identified two orders that Gamboa sought to appeal—the district court's order denying his motion to dismiss counsel and the order denying his § 2254 petition.

In proceedings before this court, Ritenour again moved to withdraw, and we granted his motion. Gamboa obtained new counsel and successfully obtained a stay of proceedings in this court so that he could file a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) in the district court. He argued that Ritenour abandoned him, "depriving him of the quality legal representation guaranteed in his federal habeas proceedings under [18 U.S.C.] § 3599, and that the proceedings should therefore be reopened to cure that defect." *Id.* The district court denied Gamboa's Rule 60(b) motion as an unauthorized successive petition and, alternatively, denied the motion on the merits for failure to show extraordinary circumstances justifying Rule 60(b) relief. The district court also denied Gamboa a COA. Gamboa then sought a COA from this court to challenge the district court's ruling on his Rule 60(b) motion. Acknowledging that Gamboa's claims of attorney

abandonment were "troubling," we denied a COA in light of binding circuit precedent. *Id.* at 301 (citing *In re Edwards*, 865 F.3d 197, 204–05 (5th Cir. 2017)).

Following our denial of a COA, the parties briefed the issue of whether the district court committed reversible error in denying Gamboa's motion to dismiss counsel and appoint substitute counsel.

II.

On appeal, Gamboa argues that the district court applied the incorrect standard in considering his motion to appoint substitute counsel. He points out that the Supreme Court had mandated that district courts assess "the interests of justice" in considering indigent capital defendants' requests to replace appointed counsel under 18 U.S.C. § 3599(e), *see Martel v. Clair*, 565 U.S. 648, 652 (2012), but that the district court instead stated that the applicable standard was whether there was "good cause . . . for the withdrawal of counsel." Gamboa asks us to reverse the district court's denial of his motion and to remand this matter to the district court with instructions "that the case proceed with substitute counsel, as of the date of the filing" of his motion.

Before we may entertain the merits of Gamboa's appellate arguments, we must first consider our jurisdiction. Although Gamboa has not sought nor received a COA to appeal the denial of his motion to substitute counsel under 18 U.S.C. § 3599(e), a COA is not required to appeal this issue. Title 28 U.S.C. § 2253(c)(1)(A), the provision governing the issuance of a COA for state prisoners, provides that, unless a COA issues, "an appeal may not be taken" from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." The Supreme Court has observed that this

provision specifically "governs final orders that dispose of the merits of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner's detention." *Harbison v. Bell*, 556 U.S. 180, 183 (2009). By contrast, "[a]n order that merely denies a motion to enlarge the authority of appointed counsel (or that *denies a motion for appointment of counsel*) is not such an order and is therefore not subject to the COA requirement." *Id.* (emphasis added). This includes motions to substitute appointed counsel filed under 18 U.S.C. § 3599(e). *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1258 (11th Cir. 2014) (explaining that "petitioner d[id] not need a COA to appeal a district court's denial of" of his "Motion for Appointment of Substitute Collateral Counsel" under 18 U.S.C. § 3599(e) because "[a]n order denying a motion for court-appointed, federal habeas counsel under [that provision] is 'clearly an appealable order under 28 U.S.C. § 1291'" (cleaned up) (quoting *Harbison*, 556 U.S. at 183)).

Though appeals from the denial of appointment of counsel do not require a COA, we must address the additional jurisdictional issue of whether the present appeal is moot.[1] "A case becomes moot . . . 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quoting *Knox v. Serv. Emps. Intern. Union Local 1000*, 567 U.S. 298, 307 (2012)). Gamboa seeks to have the district court's order denying his motion for appointment of substitute counsel reversed. But Gamboa has not been represented by Ritenour—the attorney Gamboa sought to replace—since

[1] "None of the parties raised" any "jurisdictional issue[s] on appeal. Of course, we 'must examine the basis of [our] jurisdiction, on [our] own motion, if necessary.'" *Hill v. City of Seven Points,* 230 F.3d 167, 169 (5th Cir. 2000) (quoting *Mosley v. Cozby,* 813 F.2d 659, 660 (5th Cir. 1987)).

we granted Ritenour's motion to withdraw early in the proceedings in this court. Moreover, Gamboa has had the services of substitute counsel for almost the entirety of his proceedings in this court. So, any request to merely substitute counsel at this juncture in the habeas litigation would be moot.

What Gamboa actually seeks is not simply to change counsel now; instead, he asks us to rule that the district court should have granted his motion to appoint substitute counsel during his § 2254 proceedings before that court, which would allow him to rewind his federal habeas proceedings to the time he filed that motion. Implicit in this request is that we vacate or otherwise effectively invalidate orders that were entered after Gamboa filed his motion to substitute counsel, including, most importantly, the district court's denial of his § 2254 petition. Granting the relief he requests would, at a minimum, imply the invalidity of the order denying his petition, as it was issued following the denial of the motion to substitute counsel. But, as explained below, we are powerless to vacate or invalidate the district court's judgment denying Gamboa's federal habeas petition without first issuing a COA.

In order for us to overturn the district court's order "dispos[ing] of the merits of [his] habeas proceeding," *Harbison*, 556 U.S. at 183, Gamboa would need to appeal that order. But before he could prosecute such an appeal, he would first need to receive a COA from this court, which would then authorize his appeal. *See* 28 U.S.C. § 2253(c); *see also United States v. Davis*, 971 F.3d 524, 535 (5th Cir. 2020) (explaining that, in the context of a § 2255 motion, "a COA is a jurisdictional prerequisite to any appeal" and that this court therefore has "no judicial power to do anything without it"). And "[a] COA may issue 'only if the applicant has made a substantial showing

of the denial of a constitutional right.' Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal citation omitted) (quoting 28 U.S.C. § 2253(c)(2)).

The district court denied Gamboa a COA on the denial of his § 2254 petition. Foreseeing that a COA would be required to grant his request that we vacate this denial in order to deliver relief on his motion to substitute counsel, Gamboa asks in the alternative that we construe his September 12, 2016 Notice of Appeal as a request for a COA. Federal Rule of Appellate Procedure 22(b)(2) permits this. However, we decline to grant a COA because no reasonable jurist would find the district court's decision here debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). As Gamboa concedes, the claims that attorney Ritenour raised in Gamboa's petition were generic, broadside constitutional challenges entirely foreclosed by precedent. He is correct that "none of the claims contained in appointed counsel's petition would qualify for a COA."

Instead, Gamboa argues that the district court's erroneous denial of his motion to substitute counsel had the consequence of depriving Gamboa of a meaningful opportunity to be heard on his petition in violation of due process. While it is true that there is a due process right to counsel of one's choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006), and this is at least partly rooted in the fundamental right to be heard, *Gandy v. Alabama*, 569 F.2d 1318, 1320 (5th Cir. 1978) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)), this constitutional right typically does not extend to situations in which counsel is court-appointed, *Gonzalez-Lopez*, 548 U.S. at 151; *cf. Carlson v. Jess*, 526 F.3d 1018, 1025 (7th Cir. 2008) ("[M]otions for substitution of *retained* counsel

and for a continuance can implicate both the Sixth Amendment right to counsel of choice and the Fourteenth Amendment right to due process of law.") (emphasis added); *see also Christeson v. Roper*, 574 U.S. 373, 377 (2015) ("Congress has not, however, conferred capital habeas petitioners with the right to counsel of their choice."). Here, Gamboa's motion requested that the district court appoint new counsel, putting the motion beyond the apparent bounds of this particular aspect of due process as recognized thus far in caselaw. Section 2253(c) requires a "substantial showing of the denial of a constitutional right." When there is doubt as to the existence of the constitutional right asserted, we cannot say a substantial showing of its denial has been made. *Thacker v. Dretke*, 396 F.3d 607, 617–18 (5th Cir. 2005). Accordingly, we find Gamboa has not carried his burden to warrant issuing a COA for his appeal of the denial of his motion to substitute counsel.

III.

For these reasons, Gamboa's appeal of the denial of his motion to substitute counsel is DISMISSED as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-70023

United States Court of Appeals
Fifth Circuit
FILED
August 1, 2019

Lyle W. Cayce Clerk

JOSEPH GAMBOA,

Petitioner—Appellant,

versus

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 5:15-CV-113

Before JONES, SMITH and DENNIS, *Circuit Judges*.

PER CURIAM:[*]

Petitioner Joseph Gamboa moves for a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(2), seeking review of the district court's denial of his Rule 60(b) motion for relief from judgment in his 28 U.S.C. § 2254 action. The district court ruled that the motion was an impermissible successive habeas petition and, alternatively, that Gamboa failed to demonstrate extraordinary circumstances warranting relief under

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Rule 60(b)(6).[1] We conclude that reasonable jurists would not debate that Gamboa's Rule 60(b) motion was an unauthorized successive habeas petition and DENY a COA.[2]

I

Joseph Gamboa was convicted by a Texas jury of capital murder and sentenced to death in March 2007 for the killing of Ramiro Ayala and Douglas Morgan during a robbery at Taco Land, a bar in San Antonio, Texas, in 2005. Gamboa's conviction and sentence were affirmed on direct appeal. *See Gamboa v. State*, 296 S.W.3d 574 (Tex. Crim. App. 2009). Gamboa then filed a state habeas application, which was denied on February 4, 2015.

In 2015, Gamboa filed a motion seeking appointment of counsel under 18 U.S.C. § 3599 to prepare a federal habeas petition. The district court appointed John Ritenour, Jr. to represent Gamboa on March 19, 2015, and set a deadline of July 1, 2015 to file a habeas petition. Over the next several months, Ritenour moved three times for an extension of time to file Gamboa's habeas petition, seeking the full one-year limitations period under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1). The district court granted these motions.

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[1] The district court's consideration of this alternative matter was error. The Antiterrorism and Effective Death Penalty Act divests the district court of jurisdiction to consider unauthorized successive habeas petitions; thus, once the district court concluded Gamboa's motion was a successive § 2254 petition, it should have dismissed the motion or transferred it to this court for authorization. *See* 28 U.S.C. § 2244(b)(4); *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007).

[2] Consequently, we do not reach the district court's alternative holding that Gamboa was not entitled to relief under Rule 60(b)(6).

On February 3, 2016, Ritenour filed a fifty-five-page habeas petition alleging seven claims for relief that attacked the constitutionality of the Texas capital sentencing scheme. Respondent filed an answer in April 2016, arguing that all the claims were foreclosed by well-settled precedent and some claims were also procedurally defaulted. Ritenour then filed an untimely two- paragraph reply,[3] admitting that, "[a]fter considerable review and reflection," each claim in Gamboa's habeas petition was foreclosed by precedent.[4] The district court denied Gamboa's habeas petition on the grounds that five out of the seven claims were procedurally defaulted, one claim was partially procedurally defaulted, and all claims lacked merit. The court denied a COA. Ritenour then moved to withdraw, but the district court denied the motion without prejudice. Gamboa filed a pro se declaration indicating his intent to appeal, which the district court construed as a timely notice of appeal.

On appeal, Ritenour again moved to withdraw, and this court granted the motion. After obtaining new, pro bono counsel, Gamboa successfully obtained a stay of proceedings in this court so that he could file a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) in the district court. In his Rule 60(b) motion, Gamboa argued that Ritenour abandoned him, depriving him of the quality legal representation

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[3] Ritenour filed the reply twenty-four days late. On May 12, 2016, ten days after a reply was due, Ritenour filed a motion for an extension of time to file a reply, admitting that he missed both the deadline to file a reply and the deadline to request an extension of time, and stating that the delay was caused by his work on other legal matters. The court did not rule on the motion.

[4] Neither the habeas petition nor the reply acknowledged the issue of procedural default or argued that an exception applied to overcome procedural default.

guaranteed in his federal habeas proceedings under § 3599, and that the proceedings should therefore be reopened to cure that defect. The district court denied the Rule 60(b) motion as an unauthorized successive petition and, alternatively, denied the motion on the merits for failure to show extraordinary circumstances justifying Rule 60(b) relief. The district court also denied Gamboa a COA. Gamboa now seeks a COA in this court to challenge the district court's ruling on his Rule 60(b) motion.

II

A COA is required to appeal a district court's denial of a Rule 60(b) motion for relief from a federal habeas judgment. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). In determining whether to grant a COA, we do not give full consideration to "the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, we ask only "whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

III

We first consider whether Gamboa's Rule 60(b) motion was, as the district court determined, an unauthorized successive habeas petition. Rule 60(b) allows a party to seek relief from a final judgment "under a limited set of circumstances including fraud, mistake, and newly discovered evidence," *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005), or "any other reason that justifies

relief," FED. R. CIV. P. 60(b)(6). When presented with a Rule 60(b) motion in a habeas proceeding, the district court must first determine whether the motion is, in reality, a second or successive habeas petition, which can only be brought if a court of appeals first certifies that it meets the requirements of § 2244(b)(2).[5] A Rule 60(b) motion is a successive petition if it "advances one or more claims" by "seek[ing] to add a new ground for relief" or "attack[ing] the previous resolution of a claim on the merits." *Gonzalez*, 545 U.S. at 532. However, "there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination." *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez*, 545 U.S. at 532). This court construes these exceptions narrowly to include "[f]raud on the habeas court" or "erroneous previous ruling[s] which precluded a merits determination," such as the denial of a petition for

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[5] A second or successive habeas petition must be dismissed unless a court of appeals certifies that:

> (A) the applicant [has shown] that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2); *see also Gonzalez*, 545 U.S. at 530.

"failure to exhaust, procedural default, or statute-of-limitations bar." *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (internal quotation marks omitted). *But see Crutsinger v. Davis*, No. 18-70027, 2019 WL 2864445, at *4 (5th Cir. July 3, 2019) (a Rule 60(b) motion attacking the district court's denial of funding under 18 U.S.C. § 3599(f) in the first federal habeas proceeding was not a successive habeas petition); *Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017) (an allegation of federal habeas counsel's conflict of interest attacked a defect in the integrity of habeas proceedings).

The district court construed Gamboa's Rule 60(b) motion as a successive habeas petition. The court reasoned that, if Gamboa succeeded on his Rule 60(b) motion, the only result would be to give him an opportunity to present new claims through new counsel. The court also reasoned that the Rule 60(b) motion, by alleging counsel's failure to investigate various potential claims, evidenced an intent to eventually raise new claims. Accordingly, the court concluded that Gamboa's motion was an impermissible attempt to "circumvent" § 2244 by "using his abandonment allegation as a means to re- open the proceedings for the ultimate purpose of eventually raising and litigating new claims" and that this was "the very definition of a successive petition." Gamboa argues that his Rule 60(b) motion was not a successive habeas petition because it did not contain substantive claims for relief or challenge the district court's resolution of his habeas claims on the merits. Instead, he emphasizes that his Rule 60(b) motion alleged abandonment by Ritenour during the habeas proceedings, culminating in Ritenour's filing of a petition with seven generic claims challenging the Texas capital sentencing scheme that were copied and pasted from another client's petition. He contends that his allegation of abandonment is an attack on the integrity of

the habeas proceedings and not on the district court's resolution of any claim on the merits.

Challenges based on the movant's own conduct, or omissions by habeas counsel, "ordinarily do[] not go to the integrity of the proceedings, but in effect ask[] for a second chance to have the merits determined favorably." *Coleman*, 768 F.3d at 371 (citing *Gonzalez,* 545 U.S. at 532 n. 5). Gamboa argues that Ritenour's actions exceeded ordinary attorney omissions and amounted to "wholesale abandonment," depriving him of his statutory right to counsel under § 3599.[6] However, in *In re Edwards*, this court held that:

> Turning to the issue of the alleged abandonment of his habeas counsel, the district court was correct that this claim is also a successive claim. The Rule 60(b) motion seeks to re-open the proceedings for the

[6] Gamboa claims that Ritenour's case load, ailing health, and other personal matters led Ritenour to abandon him. Specifically, he claims that Ritenour only met with him once prior to filing the habeas petition and "told [Gamboa] that he had read the state court record in [his] case and believed [Gamboa] was guilty"; that, despite the standards for federal habeas counsel in death penalty cases, Ritenour failed to form a representation team that included multiple attorneys, investigators, and experts; that Ritenour failed to speak to Gamboa's family members, or to investigate and prepare Gamboa's petition even after three filing extensions; that Ritenour failed to conduct legal research until the day before the filing deadline; that Ritenour ignored documents Gamboa gave him that Gamboa contends contained potential witnesses and leads; that Ritenour failed to communicate with him throughout the proceedings; that Ritenour filed a seven-claim petition that he copied and pasted from the habeas petition of another client, Obie Weathers, that contained generic, legally-foreclosed challenges to the Texas death penalty scheme; and that Ritenour filed an untimely, two-paragraph reply brief conceding the claims in the habeas petition were foreclosed.

> purpose of adding new claims. This is the definition of a successive claim.

See 865 F.3d 197, 204–05 (5th Cir. 2017). The court reasoned that "arguments about counsel's failure to discover and present particular arguments sound[] in substance, not in procedure." *Id.* at 205 (citing *Coleman*, 768 F.3d at 372).

Troubling though Gamboa's allegations of attorney abandonment may be, reasonable jurists would not debate the district court's holding that his Rule 60(b) motion was an unauthorized successive habeas petition in light of *Edwards*. *See Miller-El*, 537 U.S. at 336. Accordingly, a COA is DENIED.

JAMES L. DENNIS, Circuit Judge, specially concurring:

Gamboa argues that his Rule 60(b) motion alleged a defect in the integrity of his federal habeas proceedings by attacking the performance of his federal habeas counsel, John Ritenour, whose alleged "wholesale abandonment" of Gamboa exceeded ordinary attorney omissions and deprived him of his statutory right to counsel under 18 U.S.C. § 3599. I acknowledge that reasonable jurists would not debate the district court's ruling that Gamboa's Rule 60(b) motion was a successive habeas petition because we are bound by *In re Edwards*, 865 F.3d 197 (5th Cir. 2017). However, I write separately to express my view that *Edwards*'s holding should be reconsidered and overruled because a Rule 60(b) motion alleging abandonment by counsel can, at least in some instances, attack a defect in the integrity of the habeas proceedings.

Edwards held that a Rule 60(b) motion alleging abandonment by habeas counsel is "the definition of a successive" habeas claim because it "seeks to re- open the proceedings for the purpose of adding new claims." *See id.* If *Edwards* is interpreted to mean that a Rule 60(b) motion is always improper if granting it would ultimately permit a party to pursue claims for relief under 28 U.S.C. § 2254 or § 2255, this interpretation is obviously incorrect: A Rule 60(b) motion for relief from judgment in the habeas context is *designed to reopen the proceedings* to allow a petitioner to have claims heard on the merits.[1] *See*

[1] Here, Respondent argues that Gamboa's Rule 60(b) motion is a successive habeas petition because it sought to raise and advance substantive claims. Gamboa's Rule 60(b) motion mentioned several potentially meritorious, case-specific claims that Ritenour did not bring, including a potential *Brady* violation. However, he presented these claims in a few paragraphs detailing Ritenour's failure to

United States v. Vialva, 904 F.3d 356, 361 (5th Cir. 2018) ("[T]he question before us is not whether Rule 60(b) motions can reopen proceedings—they certainly can—but whether [petitioners] have actually alleged procedural defects cognizable under Rule 60(b)."). As the Tenth Circuit stated in *In re Pickard*:

> What else could be the purpose of a 60(b) motion? The movant is always seeking in the end to obtain [28 U.S.C.] § 2255 relief. The movant in a true Rule 60(b) motion is simply asserting that he did not get a fair shot in the original § 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings.

681 F.3d 1201, 1206 (10th Cir. 2012).

If *Edwards* is interpreted to hold that a Rule 60(b) motion alleging abandonment by counsel is always a successive habeas petition, this interpretation is also overly broad and misses the mark. First, the Supreme Court has implicitly noted that extraordinary omissions

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investigate or conduct discovery and as further evidence that he was allegedly deprived of the quality legal representation guaranteed by § 3599. Thus, in my view, it is debatable whether Gamboa's objective in discussing these potential claims was to challenge the district court's resolution of his habeas petition on the merits or to argue that counsel's abandonment was a defect in the integrity of the proceedings. *See In re Segundo*, 757 F. App'x 333, 336 (5th Cir. 2018) (a Rule 60(b) motion alleging a claim of ineffective assistance of counsel was a successive habeas petition where the "claim was the focus of the motion, and reopening the proceedings to relitigate it is the clear objective of the filing" (citing *Preyor*, 704 F. App'x at 340)); *Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) ("[W]hile the viability of a petitioner's underlying constitutional claim may be tangentially relevant to the Rule 60(b) analysis, the Rule may not be used to attack 'the substance of the federal court's resolution of a claim *on the merits*." (internal citations and quotation marks removed)).

by counsel may rise to the level of a defect in the integrity of habeas proceedings. *See Gonzalez*, 545 U.S. at 532 n.5 (noting that omissions by habeas counsel "ordinarily" do not go to the integrity of the habeas proceedings). Second, this court has already recognized that a conflict of interest by habeas counsel can constitute a defect in the integrity of the proceedings, *see Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017); *In re Paredes*, 587 F. App'x 805, 823 (5th Cir. 2014), and abandonment by habeas counsel is analogous.

In *Gonzalez*, the Supreme Court "note[d] that an attack based on . . . habeas counsel's omissions . . . *ordinarily* does not go to the integrity of the [habeas] proceedings," thereby implicitly suggesting that some omissions by counsel could rise to the level of impacting the integrity of the proceedings. *See* 545 U.S. at 532 n.5 (emphasis added); *see also In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (an attack based on habeas counsel's omissions "generally" "do[es] not go to the integrity of the proceedings"). The Court noted with approval the Second Circuit's holding in *Harris v. United States,* 367 F.3d 74, 80–81 (2nd Cir. 2004), that a Rule 60(b) motion asserting that counsel omitted a Sixth Amendment claim was a successive habeas petition. *See id.* at 530–31. Notably, however, *Harris*'s holding emphasizes a distinction between allegations of ordinary omissions by counsel and abandonment. *See Harris,* 367 F.3d at 80–81. According to the Second Circuit:

> It follows that the integrity of a habeas proceeding cannot be impugned under Rule 60(b)(6) using the standard established in [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)]. Instead, a Rule 60(b)(6) movant must show that his lawyer agreed to prosecute a habeas petitioner's case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all.

Id. at 81. This distinction exists because, unlike ordinary omissions by counsel, abandonment "sever[s] the principal-agent relationship" and "an attorney no longer acts, or fails to act, as the client's representative." *See Maples v. Thomas*, 565 U.S. 266, 281 (2012); *see also In re Jasper*, 559 F. App'x 366, 371 (5th Cir. 2014). "[A] client [cannot] be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *See Maples*, 565 U.S. at 283.

Second, *Edwards*'s holding is also called into question by this court's recognition in *Clark*, 850 F.3d at 780, that an allegation that an attorney has a conflict of interest attacks the integrity of the habeas proceedings, and not the substance of the district court's resolution of the claim on the merits. As *Clark* discussed, a conflict of interest arises when a petitioner has meritorious but procedurally defaulted claim that his trial counsel was ineffective, but is represented by federal habeas counsel who also served as the petitioner's state habeas counsel. *See* 850 F.3d at 779 (discussing *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013)). This is because that habeas attorney "could not be expected to argue his own ineffectiveness to overcome" the procedural default of that ineffective-assistance-of counsel claim. *See id.* This court has held that, in such situations, because counsel "prevent[ed] [the petitioner] from having his ineffective-assistance-of-counsel claim reviewed on the merits," a Rule 60(b) motion asserting a conflict of interest attacks a defect in the integrity of the habeas proceedings and is not an impermissible successive petition.[2] *See id.* at 779–80.

[2] The *Edwards* court acknowledged the conflict-of-interest exception recognized in *Clark* but concluded that Edwards did not assert the

This court's reasoning that an allegation of a conflict of interest can warrant reopening of habeas proceedings without running afoul of 28 U.S.C. § 2244's bar on unauthorized successive petitions should apply with equal force when a petitioner alleges actual or constructive abandonment by counsel. In every action in which a criminal defendant is charged with a crime punishable by death and cannot afford adequate representation, the defendant is guaranteed a right to counsel. *See* 18 U.S.C. § 3599(a). "[T]he right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is not afforded, approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper." *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (discussing 21 U.S.C. § 848(q), which in 2006 was repealed and substantially reenacted as 18 U.S.C. § 3599 (internal citations and quotation marks omitted)). Section 3599(a) creates a statutory right to conflict-free- counsel, *see Mendoza v. Stephens*, 783 F.3d 203, 210 (5th Cir. 2015), and to "proper representation," *see* 18 U.S.C. § 3599(a), (c)–(d); *see also McFarland*, 512 U.S. at 858. Like conflicted counsel, who cannot "be

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same type of conflict of interest and found it inapposite. *See Edwards*, 865 F.3d at 206–07 ("Edwards asks us to extend the reasoning of *Clark* to his case. The district court found that a reasonable jurist could differ as to whether Edwards's alleged abandonment by counsel 'could be the sort of defect in the integrity of the federal habeas proceedings that could warrant Rule 60(b) relief' and granted a COA on it. The district court correctly observed, however, that Edwards . . . 'has not shown the type of conflict of interest presented in *Clark*.'" (internal citations omitted)). Here, however, Gamboa's Rule 60(b) motion did not assert that Ritenour had the same type of conflict of interest at issue in *Clark*; rather, Gamboa argued that *Clark* established a defect in the integrity of the proceedings that is analogous to the defect resulting from attorney abandonment.

expected to argue his own ineffectiveness," *see Clark*, 850 F.3d at 779, an attorney who has actually or constructively abandoned his client cannot be expected to raise meaningful claims on his client's behalf, if he raises any claims at all.

A similar deprivation thus results from counsel's abandonment and conflict of interest, as each prevents the district court from ever considering the petitioner's claims on the merits. *See id.*; *see also McFarland*, 512 U.S. at 859 ("By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty."). For example, where, as here, a petitioner alleges that counsel abandoned him prior to filing a habeas petition and ultimately filed a petition containing only pro forma claims, allowing the petitioner to proceed with new and adequate representation would cure the defect in the habeas proceedings resulting from counsel's abandonment. *See Clark*, 850 F.3d at 779–80.

Edwards's broad holding that a Rule 60(b) motion alleging abandonment is a successive habeas petition forecloses allegations of abandonment that I believe legitimately attack a defect in the integrity of the habeas proceedings without impermissibly attempting to "circumvent" the requirements of § 2244. *See Gonzalez*, 545 U.S. at 532. In my view, but for *Edwards*, Gamboa's Rule 60(b) motion would not be an unauthorized successive habeas petition.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
OCT 06, 2017

CLERK, U.S. DISTRICT COURT. WESTERN DISTRICT OF TEXAS
BY /s/
DEPUTY CLERK

JOSEPH GAMBOA, TDCJ # 999526, Petitioner,	§	
v.	§	CIVIL NO. SA-15-CA-113-OG
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent,	§	* DEATH PENALTY CASE *

ORDER ON MOTION FOR RELIEF FROM JUDGMENT

Pending before the Court are Petitioner Joseph Gamboa's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (Docket Entry "DE" 34), Respondent's opposition to the motion (DE 43), and Petitioner's reply (DE 48) thereto. Also before the Court are Petitioner's Supplement to his Rule 60(b) motion (DE 59), Respondent's opposition (DE 60), and Petitioner's reply (DE 61).

After carefully considering the pleadings and relief sought by Petitioner, the Court has concluded Petitioner's Rule 60 motion should be construed as a successive habeas petition over which this Court lacks jurisdiction. Alternatively, Petitioner has not demonstrated the

extraordinary circumstances necessary for relief under Rule 60(b)(6). Petitioner's motion will therefore be dismissed for lack of jurisdiction and denied in the alternative.

I. Background

In March 2007, Petitioner was convicted of capital murder and sentenced to death for murdering Ramiro Ayala and Douglas Morgan while in the course of robbing Ayala's San Antonio bar, Taco Land. On direct appeal, the Texas Court of Criminal Appeals rejected the eighteen points of error raised in Petitioner's brief and affirmed his conviction and sentence. *Gamboa v. State*, 296 S.W.3d 574 (Tex. Crim. App. Apr. 8, 2009). While his direct appeal was still pending, Petitioner also filed a state habeas application raising twenty-nine claims for relief. After conducting a lengthy evidentiary hearing, the state habeas trial court issued detailed findings of fact and conclusions of law recommending the denial of habeas relief. In February 2015, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and denied Petitioner's state habeas application. *Ex parte Gamboa*, No. 78,111-01, 2015 WL 514914 (Tex. Crim. App. Feb. 4, 2015).

Petitioner immediately filed a motion in this Court requesting the appointment of counsel under 18 U.S.C. § 3599 to prepare and file a federal habeas petition on his behalf. DE 1. On March 19, 2015, attorney John Ritenour, Jr. was appointed to represent Petitioner in his federal habeas proceedings. DE 2. On February 3, 2016, Petitioner filed a fifty-five page petition for federal habeas corpus relief alleging seven claims for relief, each of which attacked the constitutionality of the Texas capital sentencing scheme or the Texas capital sentencing special issues. DE 18. Respondent filed an answer arguing, in

part, that all of Petitioner's claims for relief were either procedurally defaulted or foreclosed by well-settled precedent from this Circuit. DE 22. In his reply, Petitioner candidly admitted that, indeed, all of his claims were foreclosed by well-settled Circuit authority. DE 24. On August 4, 2016, this Court issued a Memorandum Opinion and Order denying the relief requested in Petitioner's federal habeas petition, and further denying Petitioner a certificate of appealability. DE 27.

Shortly thereafter, Ritenour's motion to withdraw as Petitioner's attorney was denied by the Court without prejudice so that he could seek such permission with the Fifth Circuit, and the Court construed the motion as a Notice of Appeal to preserve Petitioner's right to appeal. DE 30. On appeal to the Fifth Circuit, Ritenour again filed a motion to withdraw as counsel, which the Fifth Circuit granted on November 2, 2016. *Gamboa v. Davis*, No. 16-70023 (5th Cir.). Represented by new counsel, Petitioner requested a stay of the Fifth Circuit's briefing schedule to allow him to return to this Court to litigate a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). On February 13, 2017, Petitioner's request was granted. Petitioner returned to this Court and filed his Rule 60(b) motion the same day. DE 34.

In his Rule 60(b) motion, Petitioner contends his federal habeas proceedings should be reopened to cure a "defect" that occurred in his prior proceedings namely, the denial of quality legal representation he is entitled to under 18 U.S.C. § 3599. According to Petitioner, he was deprived of this right by Ritenour's failure to: (1) conduct any investigation or research; (2) adequately communicate with his client during the proceedings; and (3) present anything other than seven generic challenges to the constitutionality of the Texas death penalty scheme despite the "many viable habeas claims" available to him.

Petitioner argues Ritnour's unilateral decision not to investigate and present these other claims "effected an abandonment of his obligations to his client" which constitutes an extraordinary circumstance sufficient to justify reopening the judgment. DE 34 at 40. As a result, Petitioner asks to be restored to the position he was in just prior to the issuance of this Court's Memorandum Opinion and Order, when he moved to have Ritenour replaced as counsel. *Id.* at 45.

II. Successive Petition

A district court has jurisdiction to consider a Rule 60 motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A motion that seeks to add a new ground for relief or attack the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Id.* at 531-32; *In re Sepulvado*, 707 F.3d 550, 552 (5th Cir. 2013). By contrast, a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition" falls within the jurisdiction of the district court to consider. *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). Thus, if the Rule 60 motion only attacks a "defect in the integrity" of the petitioner's federal habeas proceedings and does not seek to advance any new substantive claims, the motion shall not be treated as a second-or-successive petition. *Gonzalez*, 545 U.S. at 532. However, it is extraordinarily difficult to establish a claim of procedural defect:

> Procedural defects are narrowly construed. They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits

> determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar. They generally do not include an attack based on the movant's own conduct, or his habeas counsel's omissions, which do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably.

In re Coleman, 768 F.3d 367, 371-72 (5th Cir. 2014) (alterations omitted).

Petitioner argues his request for Rule 60 relief is not a successive habeas petition because it is solely an attack on a defect in his prior habeas proceedings—counsel's alleged abandonment. Petitioner purportedly does not seek to advance new claims, but rather only wishes to litigate his entitlement to adequate representation under § 3599. Such a statement is, at best, misleading. By filing the instant motion, Petitioner is currently litigating the alleged denial of his right to adequate representation under § 3599. Should Petitioner succeed on the current motion for relief from judgment, the only result would be that Petitioner, at some point in the future, would be given the opportunity to present claims (through new counsel) that were not presented in his original federal habeas proceedings because of Ritenour's alleged abandonment.

Further, Petitioner's motion itself indicates an intent to eventually raise new claims. On several occasions, Petitioner chastises Ritenour for not investigating potential claims that could have been raised in his federal petition. See DE 34 at 6 (failing to investigate claims Petitioner alleges to have asked counsel to investigate); 28 (failing to investigate potential claim under *Brady v.*

Maryland[1] or *Napue v. Illinois*[2]); 30 (failing to present any of the twenty-nine claims raised during the state habeas proceeding); and 37 (alleging there were "many viable claims" Ritenour elected not to investigate and present). Although Petitioner does not specifically announce his intention to raise these claims once he is "restored" to the position he was in before federal relief was denied, it is clear he is using his abandonment allegation as a means to re-open the proceedings for the ultimate purpose of eventually raising and litigating new claims. That is the very definition of a successive petition. *See In re Edwards*, 865 F.3d 197, 204-05 (5th Cir. 2017) (finding attempt to bring new claims under the guise of "defects in the integrity of the original habeas proceedings" to be successive).

Because the abandonment allegations concerning his original habeas counsel are simply an attempt to circumvent § 2244, Petitioner's motion must be dismissed as successive under § 2244. *In re Coleman*, 768 F.3d at 371 (holding that arguments about habeas counsel's failure to discover and present particular arguments sounded in substance and were not procedural defects bearing on the integrity of the proceedings); *Clark v. Stephens*, 627 Fed. App'x 305, 308 (5th Cir. 2015) (same). Petitioner has not obtained leave from the Fifth Circuit Court of Appeals to file a successive habeas petition as dictated by § 2244(b)(3)(A). Therefore, this Court lacks jurisdiction to consider the motion. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (§ 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one).

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[1] 373 U.S. 83 (1963).

[2] 360 U.S. 264 (1959).

III. Alternative Analysis

Even if Petitioner were able to show that his motion is not a successive petition, he has not shown extraordinary circumstances that would justify Rule 60(b) relief. Pursuant to Rule 60(b)(6), a court may reopen a final judgment when a party shows "any other reason that justifies relief." But while considered a "grand reservoir of equitable power to do justice," Rule 60(b)(6) relief is available only if "extraordinary circumstances" are present. *Gonzales*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)); *Rocha v. Thaler*, 619 F.3d. 387, 400 (5th Cir. 2010). In determining whether extraordinary circumstances are present, a court may consider a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988)). However, the Supreme Court has stated that "[s]uch circumstances will rarely occur in the habeas context." *Gonzales*, 545 U.S. at 535. And indeed, such circumstances do not exist in this case.

Petitioner contends Ritenour's effective abandonment of him during the federal habeas proceeding constitutes an extraordinary circumstance sufficient to warrant re-opening the judgment. To support his claim of abandonment, Petitioner alleges Ritenour failed to conduct any research or investigation, did not communicate with his client, and refused to present any other claims other than the seven boilerplate challenges to the death penalty that were cut and pasted from a previous client's petition. This last assertion that Ritenour ultimately did not raise certain "viable" claims is the heart Petitioner's complaint. But the Fifth Circuit has already determined that "counsel's failure to raise all issues a

petitioner would like to argue does not amount to abandonment." *Wilkins v. Stephens*, 560 Fed. App'x 299, 304 (5th Cir. 2014) (citing *Ibarra v. Thaler*, 691 F.3d 677, 685 n.l (5th Cir. 2012)). Thus, Petitioner's contention that extraordinary circumstances exist to warrant Rule 60(b) relief is incorrect.

Furthermore, the record reflects that, far from abandoning his client, Ritenour actively represented Petitioner throughout his federal habeas proceedings. Ritenour consulted with Petitioner and Petitioner's prior counsel, reviewed the entirety of the state court records and prior counsel's files, and conducted research into possible issues that could be raised in a federal petition. DE 35-1, Exhibits C, E and G; DE 37-1, Exhibit J. After doing so, Ritenour exercised his professional judgment and chose not to raise the allegations Petitioner now indicates were available to him. Although Petitioner appears to assert otherwise, counsel cannot be found ineffective for failing to raise every non-frivolous ground that might be pressed on appeal. *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009) (citations omitted). Indeed, Petitioner has presented this Court with no valid authority for the proposition that a petitioner has a constitutional right to compel appointed counsel to press a certain claim. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (finding no decision of the Court suggests an indigent defendant "has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.").

Petitioner cites to the Supreme Court's opinions in *Maples v. Thomas*[3] and *Holland v. Florida*[4] to support his

[3] 565 U.S. 266 (2012).

[4] 560 U.S. 631 (2010).

argument that Ritenour's alleged abandonment constitutes an extraordinary circumstance. As both of these cases pertain to equitable tolling of AEDPA limitations period, Petitioner is essentially asking the Court to equate the standards for equitable tolling with the "extraordinary circumstances" standard for Rule 60(b) relief without providing any authority to do so. But the Fifth Circuit has already rejected this argument, finding that *Maples* did not establish that abandonment constitutes a defect in the integrity of the proceedings for Rule 60(b) purpose. *In re Edwards*, 865 F.3d at 206. Moreover, unlike *Holland*, this is not a case where counsel who was specifically retained to pursue federal habeas relief completely abandoned his client in that pursuit. To the contrary, Ritenour missed no deadlines and filed a lengthy petition on Petitioner's behalf that raised substantive, albeit ultimately meritless, claims. Consequently, it is difficult to see any abandonment on the part of Ritenour. *Id.* (finding no abandonment when counsel "missed no deadlines and filed substantive arguments.") (citation omitted).

In sum, Petitioner fails to establish any risk of "injustice to the parties" or of "undermining the public's confidence in the judicial process," much less that "extraordinary circumstances" exist to grant Rule 60(b) relief. *Buck*, 137 S. Ct. at 777-78. Although Petitioner may, in hindsight, take issue with Ritenour's representation, it does not mean counsel abandoned his client or that a defect occurred in Petitioner's federal habeas proceedings. To the contrary, such attacks on counsel's omissions "do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably." *In re Coleman*, 768 F.3d at 371. Because Petitioner is not entitled to this "second chance" absent a showing of extraordinary

circumstances which he failed to demonstrate, Petitioner's motion under Rule 60(b) is denied in the alternative.

IV. Conclusion

The Court concludes that Petitioner's Rule 60 motion should be construed as a successive petition, and is alternatively without merit because Petitioner has not established an extraordinary circumstances that would justify relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

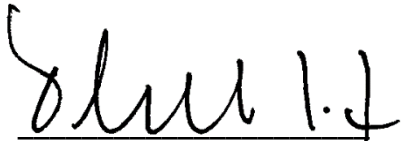
1. Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b), filed February 13, 2017, (DE 34), is **DISMISSED** for want of jurisdiction. Alternatively, the Motion for Relief from Judgment is **DENIED**;

2. No certificate of appealability shall issue in this case, as reasonable jurists could not debate the denial or dismissal of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 6 day of October, 2017.



ORLANDO L. GARCIA
Chief United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSEPH GAMBOA, TDCJ # 999526, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent,	§ § § § § § § § § § § § §	CIVIL NO. SA-15-CA-113-OG

ORDER DENYING MOTION TO WITHDRAW

The matters before this Court are (1) petitioner's counsel's motion to withdraw, filed September 6, 2016 (ECF no. 29), and (2) petitioner's pro se declaration dated September 2, 2016 evidencing an intent to appeal from this Court's denial of federal habeas corpus relief and denial of Certificate of Appealability (ECF nos. 29-1 & 29-2). In a comprehensive Memorandum Opinion and Order issued August 4, 2016 (ECF no. 27), this Court denied petitioner federal habeas corpus relief and denied a Certificate of Appealability ("CoA").

Motion to Withdraw

For the reasons discussed at length in this Court's Order issued July 8, 2016 (ECF no. 26), which is expressly

incorporated by reference herein, petitioner and his court-appointed counsel have failed to present this Court with a rational justification for permitting petitioner's counsel to withdraw from representation at this juncture in this proceeding. Instead, petitioner's current counsel presents a sworn declaration executed September 2, 2016 by petitioner in which petitioner asserts a desire to be represented on appeal by an unidentified "pro bono counsel." As this Court has previously explained to petitioner, he does not possess an unqualified right to the counsel of his choice in this federal habeas corpus proceeding; nor does petitioner possess the unilateral right to dismiss his current counsel absent a showing of good cause – a showing which petitioner has thus far failed to make.

In reviewing motions for substitution of counsel, the Supreme Court and Fifth Circuit have both directed District Courts to examine a variety of factors, including "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." *Martel v. Clair*, 132 S. Ct. 1276, 1287 (2012); *Battaglia v. Stephens*, 824 F.3d 470, 472 (5th Cir. 2016); *Mendoza v. Stephens*, 783 F.3d 203, 208 (5th Cir. 2015). Petitioner and his current counsel do not furnish any specific facts showing petitioner has any rational complaint about the performance of his current federal habeas counsel. Nor does petitioner or his current federal habeas counsel allege any specific facts showing either (1) an irreconcilable conflict exists between them or (2) a breakdown in communications has occurred between them of sufficient magnitude to warrant substitution of counsel at this juncture.

Furthermore, petitioner possesses a qualified statutory right to the assistance of court-appointed counsel during federal habeas corpus proceedings in this Court and throughout any ensuing appeals. 18 U.S.C. §§ 3599(a)(2) & 3599(e). Petitioner's assertions that he wishes to be represented by an unidentified "pro bono counsel on appeal" does not, standing alone, establish petitioner has made a voluntary, intelligent, and knowing of his statutory right to the assistance of court-appointed federal habeas counsel. This Court has a duty to ensure petitioner's statutory right to representation by qualified counsel is satisfied throughout the entirety of this federal habeas corpus litigation. *See Mendoza v. Stephens*, 783 F.3d at 207 ("Importantly, the Supreme Court observed that '[e]ven in the absence of that provision [§ 3599], a court would have to ensure that the defendant's statutory right to counsel was satisfied throughout the litigation; for example, *the court would have to appoint new counsel if the first lawyer developed a conflict with.., the client.*'" (quoting *Martel v. Clair*, 132 S. Ct. at 1286)). Both petitioner and his current counsel have failed to allege any specific facts showing such a conflict exists between them.

Under such circumstances, petitioner is not entitled to have this Court allow the withdrawal of his current federal habeas counsel in anticipation of the appearance at some unspecified date of an as-yet-unidentified "pro bono counsel." *See United States v. Romans*, 823 F.3d 299, 312 (5th Cir. 2016) ("In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." (quoting *United States v. Young*, 482 F.2d 993, 995 (5th Cir.1973) (in turn quoting *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972)), *cert. filed July 12, 2016, no. 16-5184*).

Petitioner and his current federal habeas counsel have not alleged any specific facts showing an actual or potential conflict of interest exists between petitioner and his current federal habeas counsel. Nor does petitioner or his current federal habeas counsel identify with specificity any irreconcilable conflict between petitioner and his current federal habeas counsel.

Petitioner's Pro Se Declaration

In a declaration executed September 2, 2016 (prior to the expiration of the deadline for filing a Notice of Appeal in this cause) petitioner unequivocally indicates that he wishes to pursue an appeal from this Court's Judgment denying him both federal habeas corpus relief and a CoA. In an effort to avoid the unintentional forfeiture of petitioner's right to appeal, the Court will liberally construe petitioner's sworn pro se declaration as a Notice of Appeal. Consistent with the policy underlying the prisoner mailbox rule, the Court will instruct the Clerk to file petitioner's pro se Notice of Appeal as timely filed on September 2, 2016. *See Brown v. Taylor*, F.3d _, __, 2016 WL 3743037, *2 (5th Cir. July 12, 2016) ("The prisoner mailbox rule announced in Houston provides that a pro se inmate's notice of appeal is deemed filed on the date that the inmate gives the notice to prison authorities to be sent to the relevant court."); *Richards v. Thaler*, 710 F.3d 573, 576 (5th Cir. 2013) ("In *Houston v. Lack*, the Supreme Court held that a pro se prisoner's notice of appeal under Federal Rule of Appellate Procedure 4(a)(1) is deemed filed as of the date it is delivered to prison officials for mailing."). Petitioner's declaration evidences a desire on petitioner's part to file a timely Notice of Appeal. No harm or prejudice to any party will come from construing petitioner's sworn pro se declaration as just such a Notice of Appeal. Petitioner's sworn declaration was filed as an attachment to the motion to withdraw filed September 6,

2016 by petitioner's current federal habeas counsel, i.e., in a timely manner.

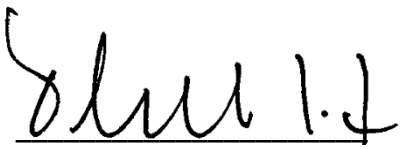
Accordingly, it is **ORDERED** that:

1. Petitioner's counsel's motion to withdraw, filed September 6, 2016 (ECF no. 29), is **DENIED WITHOUT PREJUDICE** to petitioner's current federal habeas counsel's right to seek permission to withdraw from the Fifth Circuit.

2. The Clerk shall construe petitioner's pro se declaration executed September 2, 2016 (ECF nos. 29-1 & 29-2) as a timely filed Notice of Appeal and file same among the pleadings and other documents filed in this cause effective September 2, 2016, consistent with the policy underlying the prisoner mailbox rule.

It is so ORDERED.

SIGNED this _8_ day of September, 2016.



ORLANDO L. GARCIA
CHIEF UNITED STATES
DISTRICT COURT

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSEPH GAMBOA, TDCJ No. 999526, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent,	§ § § § § § § § § § § § §	CIVIL NO. SA-15-CA-113-OG

MEMORANDUM OPINION AND ORDER

Petitioner Joseph Gamboa filed this action pursuant to 28 U.S.C. § 2254 challenging his March, 2007 conviction for capital murder and sentence of death in Bexar county cause no. 2005-CR-7168A. For the reasons discussed below, petitioner is entitled to neither federal habeas corpus relief nor a Certificate of Appealability from this Court.

I. Background and Procedural History

A. Indictment

On September 20, 2005, a Bexar County grand jury indicted petitioner in cause no. 2005-CR-7168A in a two-paragraph indictment charging petitioner with, on or about June 24, 2005, having (1) intentionally caused the

death of Ramiro Ayala by shooting Ayala with a deadly weapon, namely a firearm, in the course of committing and attempting to commit the robbery of Ayala, Douglas Morgan, and Denise Koger and (2) intentionally and knowingly caused the death of Ramiro Ayala by shooting Ayala with a deadly weapon, namely a firearm, and intentionally and knowingly causing the death of another individual, namely Douglas Morgan, by shooting Morgan with a deadly weapon, namely a firearm, with both murders committed during the same criminal transaction.[1]

B. Guilt-Innocence Phase of Trial

The guilt-innocence phase of petitioner's capital murder trial commenced on February 23, 2007.[2] The Texas Court of Criminal Appeals' opinion affirming petitioner's conviction and sentence on direct appeal accurately summarized the testimony and other evidence presented during the guilt-innocence phase of petitioner's trial as follows:

> On the night of June 23, 2005, Ramiro "Ram" Ayala, the owner of a San Antonio bar named Taco Land, was working alongside employees Denise Koger and Douglas Morgan. Shortly after the bar opened, between 10:00 and 11:00 in the evening, appellant and Jose Najera entered the bar. Neither man was known to the employer or his staff. Patrons Paul Mata and Ashley Casas arrived at around 11:30 p.m. They purchased a couple of beers and began a

[1] Transcript of pleadings, motions, and other documents filed in petitioner's state trial court proceeding, i.e. cause no. 2005-CR-7168A (henceforth "Trial Transcript"), at p. 6.

[2] The verbatim transcription from the guilt-innocence phase of petitioner's trial is contained in Volumes 29-33, Statement of Facts from petitioner's trial (henceforth "S.F. Trial").

game of pool. Shortly afterwards, appellant approached Paul, introduced himself as "Rick," and asked to play pool. After Paul and Ashley finished their game, appellant and Paul began to play. Another patron, Anita Exon, left around midnight and remembered seeing two Hispanic males who remained at the bar.

At some point during the pool game, appellant approached Ram and began to argue. Appellant then put a gun to Ram's stomach and shot him. Paul and Ashley hid in a nearby closet. Douglas and Denise hid behind the bar, only to be confronted later by appellant. Appellant told Douglas to open the cash register, but he was unable to do so. Appellant then shot him and had Denise open the cash register. After she retrieved the money, appellant demanded any money that was not kept in the register. While Denise was complying, appellant shot her in the back and commenced kicking her in the head. He then picked up Douglas and shot him again.

Shortly afterwards, appellant and Najera left the bar. Denise was able to telephone 911 for help while Paul attempted to render aid to Ram and assist Denise with the phone call. Ram died that same night; Douglas lived for three more weeks before succumbing to his injuries.

Officer Michael Wesner arrived first on the scene at approximately 1:15 a.m. Investigators took statements from the three witnesses and collected various items such as pool cues and a beer can thought to have been handled by appellant, as well as spent bullets and samples of blood. Later, he attended a memorial service for Ram where he interviewed several people. The *578 leads he

received at the service did not pan out under further investigation.

At some point, Anita Exon told Detective John Slaughter that, based on her belief that Denise had owed a person called "Tiny" money for drugs, "Tiny" might have been involved in this offense. Other leads included a June 25th Crime Stoppers tip regarding a person named Sean Waggoner.

Detective Slaughter testified that he had no reason to think of or discount "Tiny" as a suspect. The only reason he was considered by Detective Slaughter was that Anita mentioned him. Nothing in Denise's account of what happened referred to "Tiny," nor did anything else that came up in the investigation. Sean Waggoner matched the description of one of the assailants, and once he heard that the police where looking for him, he contacted Detective Slaughter. Detective Slaughter then met with Sean, who was cooperative. Sean gave a DNA sample and an alibi for his whereabouts on the night in question. His DNA did not match the DNA taken from the beer can believed to have been used by appellant and his accomplice, and further investigation substantiated his alibi.

On July 2, 2005, Detective Slaughter received a tip from Crime Stoppers regarding the identities of the two assailants, Najera and appellant. Detective Slaughter returned to the hospital that day to show Denise a photo line-up with a picture of appellant. She was not able to identify him as her assailant, but she did point to his picture and that of another person and said that they looked familiar to her. Detective Slaughter showed her another photo array that included Najera, and she was able to identify him as one of the assailants. Detective Slaughter was never

> able to communicate in any significant way with the other victim, Douglas, before his death.
>
> On the same day, Detective Roy Rodriguez showed Paul a black and white photo array consisting of pictures of appellant and five other men. Paul was able to identify appellant as one of the two men involved in the crime. Three days later, due to a miscommunication between Detectives Slaughter and Rodriguez, the same photo array, but this time in color, was shown to Paul. Once again he identified appellant. Paul was also shown another array, which included Najera's photo, but he was unable to identify him as one of the two offenders.
>
> On July 6, 2005, Detective Slaughter received fingerprint results from the pool cues and beer cans. A fingerprint examiner for the San Antonio Police Department found that the prints from one of the pool cues matched those of appellant.
>
> On June 7, 2006, Detective Slaughter executed a search warrant to obtain a DNA sample from appellant. The next day, appellant's and Najera's DNA were compared to samples from the beer can found at the Taco Land Bar. The results excluded Najera, but did not exclude appellant.

Gamboa v. State, 296 S.W.3d 574, 577-78 (Tex. Crim. App. 2009).

On March 1, 2007, the jury returned its verdict at the guilt-innocence phase of trial, finding petitioner guilty beyond a reasonable doubt of capital murder as charged in the indictment.[3]

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[3] Trial Transcript, at p. 283; S.F. Trial, Volume 33, at pp. 85-87.

C. Punishment Phase of Trial

The punishment phase of petitioner's capital murder trial commenced on March 2, 2007.[4]

The prosecution presented evidence showing (1) petitioner was placed on juvenile probation for possession of marijuana in 1998 and was noncompliant for the most part, failing to attend meetings and court appearances, failures his juvenile probation officer attributed in part to the great frequency with which petitioner's family moved during that period,[5] (2) petitioner was arrested on November 2, 1990 while driving a stolen vehicle and led police on a foot race in an unsuccessful attempt to avoid apprehension,[6] (3) petitioner was arrested on April 25, 2000 for burglary of a building after officers observed petitioner and another person shatter and then kick in the glass window of a convenience store and remove cases of beer and soft drinks and bags of chips,[7] (4) on September 7, 2003, petitioner physically assaulted his sister Victoria and her boyfriend,[8] (5) on December 18, 2004, petitioner

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[4] The verbatim transcription from the guilt-innocence phase of petitioner's trial is contained in Volumes 29-33, Statement of Facts from petitioner's trial (henceforth "S.F. Trial").

[5] S.F. Trial, Volume 34, testimony of Brent Houdman, at pp. 30-77. On cross-examination, petitioner's trial counsel elicited testimony establishing that petitioner's family moved with great frequency during petitioner's childhood, petitioner attended more than sixteen different schools, and that parental guidance necessary to succeed on juvenile probation was absent from petitioner's life. *Id.*, at pp. 52-68.

[6] S.F. Trial, Volume 34, testimony of Bruce St. Amoure, at pp. 78-93; testimony of Arnulfo Serna, at pp. 84-89.

[7] S.F. Trial, Volume 34, testimony of Robert Breen, at pp. 89-114.

[8] S.F. Trial, Volume 34, testimony of Victoria Gamboa, at pp. 115-19; Volume 35, testimony of Fernando Aguilar Barajas, at pp. 15-33. The arresting officer also testified petitioner gave an erroneous date of birth and attempted to flee after the officer had placed petitioner

drove a vehicle involved in the drive-by shooting of a residence containing several small children,[9] (6) between September, 1999 and the end of 2003, petitioner was convicted of burglary of a building, failure to identify, escape, and possession of a prohibited knife,[10] (7) in late-April, 2005, petitioner robbed a woman of her purse in the parking lot of a night club after firing at her and several others present,[11] (8) later the same evening, petitioner twice shot a man who was picking up trash in a gasoline station parking lot after the man refused petitioner's demand to give petitioner money,[12] (9) on April 26, 2005,

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inside a patrol car. S.F. Trial, Volume 35, testimony of Fernando Aguilar Barajas, at pp. 29-31.

[9] S.F. Trial, Volume 35, testimony of Cynthia Casey, at pp. 34-46; testimony of Pete Gamboa, at pp. 47-56; testimony of Charles Campbell, at pp. 56-65; testimony of Janice Henry, at pp. 67-76. In addition, a baggie found inside the vehicle contained marijuana. S.F. Trial, Volume 35, testimony of Pete Gamboa, at p. 53; testimony of Brian Cho, at pp. 77-80. In addition to a fully loaded .25 caliber semiautomatic handgun, officers also found a bag containing more .25 caliber ammunition. S.;F. Trial, Volume 35, testimony of Charles Campbell, at pp. 59-64.

[10] S.F. Trial, Volume 35, testimony of Rebecca Campos, at pp. 85-87. Copies of the petitioner's criminal court Judgments were admitted into evidence as State Exhibit nos. 96-99 and appear in S.F. Trial, Volume 40.

[11] S.F. Trial, Volume 35, testimony of Deshawn Phelps, at pp. 113-28; testimony of Eric Moreno, at pp. 129-33; testimony of Detective Freeman, at pp. 133-40. The person who drove petitioner and from the bar parking lot where petitioner robbed his victim at gun point testified about the events of that evening including the petitioner pointing a gun at him and forcing him to drive petitioner to various locations where petitioner fired his weapon and robbed or attempted to rob several different people. S.F. Trial, Volume 36, testimony of Julio Cuevas, at pp. 54-79.

[12] S.F. Trial, Volume 35, testimony of Bruce Robinson, at pp. 141-57; testimony of Enedina Martinez, at pp. 158-69; Volume 36, testimony of Julio Cuevas, at pp. 63-69.

petitioner unsuccessfully attempted to carjack the driver of a Corvette, fired several shots at the fleeing vehicle, striking the driver at least once, and then fired multiple shots at a young woman and her mother as he attempted to kidnap the young woman and drag her into a vehicle against her will,[13] and (10) during his pretrial detention at

[13] More specifically, Cynthia Adame testified without contradiction that (1) she observed a Corvette drive past her residence as she attempted to wake her mother to let her into their home, (2) she then saw and heard petitioner attempt to force the driver out of the Corvette, (3) petitioner fired several shots as the driver of the Corvette drove away, (4) petitioner then chased her to a nearby tire store and fired multiple shots at her and her mother in an attempt to force her to get into a small vehicle, and (5) while she managed to avoid being kidnaped by petitioner, she did suffer a miscarriage as a result of the stress she endured that night. S.F. Volume 36, testimony of Cynthia Adame. The police officer who responded to the reports of shots fired at Adame's residence found her hysterical but did obtain information from Adame and her mother concerning a suspect. Id., testimony of Dan Higginbotham, at pp. 24-30. Another officer who examined the Corvette at Brooks Air Force Base found two bullets inside the bullet-riddled vehicle but no spent shell casings at the location where petitioner fired at the Corvette. Id, testimony of Robert Ross, at pp. 30-40. Another officer testified that the driver of the Corvette was taken to the hospital suffering from a bullet wound to the left rear and a cut on the left ear. id., testimony of Justin Stepanik, at pp. 105-07. Photographs of the bullet-riddled Corvette were admitted into evidence as State Exhibit nos. 110-21 and appear in S.F. Trial, Volume 40. Julio Cuevas corroborated the account of Adame's attempted kidnaping by petitioner as well as petitioner's attempted carjacking of the Corvette and petitioner's firing of multiple shots at the fleeing Corvette. *Id.*, testimony of Julio Cuevas, at pp. 72-79. Throughout his testimony, Cuevas repeatedly asserted he had only driven petitioner around on the night in question because he believed petitioner might shoot him. *Id.*, at pp. 57, 62, 90. Cuevas also testified that when he asked petitioner why he had shot the man sweeping up trash at the Shell station, petitioner said he did not know and laughed. *Id.*, at p. 69. Within days of the incident drescribed above, both Cynthia Adame and her mother independently picked

the Bexar County Adult Detention Center ("BCADC"), petitioner was involved in no less than four fights with other inmates at the BCADC as well as a fight with another inmate in a holding cell at the courthouse.[14] The prosecution also presented victim impact testimony from

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petitioner's photograph from a photo array as the person they had seen attempting to kidnap Adama and attempting to carjack the Corvette. S.F. Trial, Volume 36, testimony of Jimmy Willingham, at pp. 114-17. A different witness also identified petitioner from a photo array as the shooter at the gas station the same evening. *Id*., at p. 113.

[14] A BCADC detention officer testified he witnessed petitioner fighting with another inmate named Tovar on October 30, 2005. S.F. Trial, Volume 36, testimony of Juan Vertiz, at pp. 118-29. A different member of the BCADC's Special Emergency Response Team "SERT" who responded to the fight on October 30, 2005 testified he observed a "shank" made from the metal lid of an AJAX canister and other materials at the scene of petitioner's fight with inmate Tovar and that inmate Tovar had to be taken to the hospital for treatment of a large gash in the top of his head while was taken to an administrative segregation unit within the BCADC. S.F. Trial, Volume 36, testimony of Jose Guerra, at pp. 130-37. Another BCADC detention officer testified he witnessed petitioner exit his cell and strike another inmate several times in the torso with his fists on December 4, 2005. *Id.*, testimony of Steven Morris, at pp. 137-44. A third BCADC detention officer testified he observed petitioner fighting with another inmate named Simpson on February 20, 2006, during which fight petitioner managed to put Simpson in a chokehold. *Id.*, testimony of William Carmen, at pp. 158-67. Yet another BCADC detention officer testified he observed petitioner fighting with two other inmates on June n9, 2006. *Id.*, testimony of Jacob Fuentes, at pp. 168-74. A Bexar County Courthouse security officer testified he and another guard intervened to stop a fight on February 9, 2007 between petitioner and another inmate in a holding cell at the Courthouse just prior to a docket call. S.F. Trial,, Volume 36, testimony of Timothy Brandon, at pp. 203-08; Volume 37, testimony of Timonty Brandon, ay pp. 18-20. A BCADC Classification officer testified petitioner requested to be housed with members of the Mexican Mafia. S.F. Trial, Volume 36, testimony of Mark Thomas Gibson, at p. 182.

(1) the man petitioner shot in a gas station parking lot,[15] (2) the widow of Ramiro Ayala about the loss of her husband of nearly 49 years,[16] and (3) a San Antonio music promoter who discussed the loss the San Antonio music community had suffered from the deaths of Ayala and Douglas Morgan, whom he identified as long-time supporters of local musicians.[17]

Petitioner's trial counsel presented testimony from (1) records custodians at the San Antonio ISD, South San ISD, and Texas Department of Family & Protective Services,[18] (2) petitioner's second grade teacher who testified petitioner was unable to read or comprehend what was read to him, often came to school with dirty hands, would flinch whenever she touched him, but was a very quiet, reserved, student who exhibited no behavioral problems,[19] (3) petitioner's oldest sister Cynthia who testified (a) their family moved often because their parents neglected the children's needs and did not pay their rent, (b) their parents gave the children no parental supervision or support, (c) the children often went days without food while their parents spent every night in bars,

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[15] Bruce Robinson testified that he was forced to undergo surgery after petitioner shot him in the stomach and continued to suffer post-operative digestive problems. S.F. trial, Volume 35, testimony of Bruce Robinson, at pp. 148-56.

[16] S.F. Trial, Volume 37, testimony of Agnes Ayala, at pp. 50-51.

[17] S.F. Trial, Volume 37, testimony of Roland Fuentes, at pp. 43-49.

[18] S.F. Trial, Volume 37, testimony of Rita Gomez, at pp. 91-97; testimony of Linda Zeigler, at pp. 97-106; testimony of Stephanie Ramos, at pp. 107-13. The Court admitted voluminous records from Texas Department of Family & Protective Services file on the Gamboa family, as well as petitioner's school records, which were admitted into evidence as Defense Exhibit nos. 4 through 10, and appear in S.F. Trial, Volumes 4 1-43.

[19] S.F. Trial, Volume 37, testimony of Karen Paris, at pp. 113-24.

(d) her younger sister Felicia died at age 11 months when she fell off a bed into a plastic bag containing clothing, (e) their parents regularly engaged in domestic violence in front of the children, (f) she and her older brother Daniel became the family's de facto parents, attempting to find food for the family while their parents drank to excess, and (g) their brother Alex died in 1999,[20] (4) a neuropsychologist who testified (a) she reviewed what she called the largest CPS case file she had ever seen addressing the myriad complaints about the Gamboa family, (b) she reviewed petitioner's school records, (c) she interviewed most of petitioner's living family members, (d) she administered a battery of tests to petitioner over a two-day period, (e) she reviewed additional information on petitioner's background produced by the defense team's mitigation specialist, (f) petitioner suffers from brain impairment, most likely of a genetic origin, (g) petitioner is not mentally retarded but is "just not doing well" in terms of his intellectual functioning, and (h) petitioner does not have the tools necessary to get on in life,[21] and (5) petitioner's oldest brother Daniel who testified (a) petitioner experienced a very difficult childhood, characterized by a complete lack of parental supervision and support, a lack of food on a regular basis, and regular movement of the family resulting from their parents' refusal to pay rent, (b) petitioner was never given a chance as a child to flourish, (c) their parents utterly neglected them, (d) he and his sister Cindy became the de facto parents in the family, seeking food for themselves and their siblings, (e) the

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[20] S.F. Trial, Volume 37, testimony of Cynthia Soto, at pp. 124-51. Ms. Soto also testified she left the family home when she was fourteen and Daniel left when he reached age seventeen. *Id.*

[21] S.F. Trial, Volume 37, testimony of Dr. Daneen A. Milam, at pp. 153-224.

family barely survived with the help of neighbors who furnished food and electrical power at times, and (f) most of the places the family stayed when he was still living at home lacked running water and electricity.[22]

On March 8, 2007, the jury returned its verdict at the punishment phase of petitioner's capital murder trial, finding (1) unanimously beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society, (2) unanimously and beyond a reasonable doubt that petitioner actually caused the death ort Ramiro Ayala and/or Douglas Morgan or did not actually cause the death or Raniro Ayala and/or Douglas Morgan but intended to kill Ramiro Ayala and/or Douglas Morgan or anticipated that a human life would be taken, and (3) taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the defendant's personal moral culpability, there are insufficient mitigating circumstances or mitigating circumstance to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[23]

D. Direct Appeal

Petitioner appealed.[24] The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence,

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[22] S.F. Trial, Volume 37, testimony of Daniel Joseph Gamboa, Jr., at pp. 226-53.

[23] Trial Transcript, at pp. 308-11; S.F. Trial, Volume 38, at pp. 65-66. Put more simply, the petitioner's jury answered the three Texas capital sentencing special issues "yes," "yes," and "no."

[24] Petitioner's appellate counsel filed petitioner's appellant's brief on March 12, 2008 and asserted eighteen points of error. Those points of error consisted of arguments that (1) the trial court erred in sua

denying relief on the merits on all of petitioner's challenges to the constitutionality of the Texas capital sentencing scheme. *Gamboa v. State*, 296 S.W.3d 574, 585-

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sponte dismissing venire member Aulds after he was arrested for DWI prior to trial, (2) the verdict at the guilt-innocence phase of trial was not unanimous because the jury had been permitted to convict based upon multiple theories of capital murder, (3) the trial court erred in denying the defense's motion for mistrial after prosecution witness Detective Rodriguez testified about an extraneous offense during the guilt-innocence phase of trial, (4) the trial court erred in denying the defense's motion for mistrial after a family member of a victim made an outburst during trial, (5) the trial court erred in denying the defense's motion for mistrial after a juror overheard a prosecution witness discussing the case with a prosecutor on the elevator, (6) the trial court erred in denying the defense's motion for mistrial after a juror's son was arrested during the punishment phase of trial and placed on personal recognizance, (7) the trial court erred in failing to suppress an in-court identification following a highly suggestive photo array, (8) the cumulative effect of the foregoing errors warrants a new trial, (9) there was factually insufficient evidence to support the jury's guilty verdict, (10) the trial court erred in failing to instruct the jury that a single "no" vote would result in a life sentence despite Texas 12/10 rule, (11) the trial court violated the Eighth Amendment by failing to instruct the jury there is no presumption in favor of a death sentence once the jury answers the future dangerousness special issue affirmatively and that the mitigation special issue is an independent issue, (12) the trial court erred in failing to define the term "militate" so as to preclude consideration of the defendant's age, race, sex, national origin, religion, political views, and sexual orientation, (13) the trial court violated the Eighth Amendment in failing to define the terms "probability," "criminal acts of violence," "continuing threat to society," during the punishment phase of trial, (14) the trial court erred in denying the defense's motion to preclude the death penalty as a sentencing option, (15) the trial court erred in denying the defense's motion to hold Article 37.07 1 unconstitutional because the grand jury did not consider and allege facts in the indictment rendering the defendant eligible for the death penalty, and (16) the manner of lethal injection employed by the State of Texas violates the Eighth Amendment.

86 (Tex. Crim. App. 2009). Petitioner did not thereafter seek review from the United States Supreme court via a petition for writ of certiorari.

E. State Habeas Corpus Proceeding

On November 28, 2008, while his direct appeal was still pending before the Texas Court of Criminal Appeals, petitioner filed an application for state habeas corpus relief in which he reiterated many of the claims he raised in his brief on direct appeal, as well as urged several new claims of ineffective assistance by his trial and appellate counsel.[25]

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[25] Petitioner's state habeas corpus application appears among the pleadings, motions, and other documents filed in petitioner's state habeas corpus proceeding (henceforth "State Habeas Transcript"), at pp. 1-155. For purposes of clarity, this Court will refer to the page numbers which appear in the lower left corner of the pages of the State Habeas Transcript. Petitioner's state habeas corpus application included almost thirty claims for relief, consisting of arguments that (1) petitioner's trial counsel rendered ineffective assistance by (a) failing to adequately investigate available evidence and present evidence of petitioner's innocence, (b) failing to properly preserve error after the trial court sua spone struck venire member Aulds following his arrest for DWI, (c) failing to raise an equal protection challenge to the striking of venire member Aulds, (d) failing to request a continuance to obtain an expert on eyewitness identification after a surprise identification by a prosecution witness early at trial, (e) failing to have petitioner's mental condition tested more thoroughly, (f) failing to adequately investigate petitioner's background for mitigating evidence, (g) failing to object to the guilt-innocence phase jury charge on the ground it did not require unanimity regarding the method of capital murder, (h) failing to object to or challenge the indictment on the ground the grand jury presented two different theories of capital murder, and (i) failing to move for a mistrial based upon the prosecution's eliciting of extraneous offense evidence during the guilt-innocence phase of trial, (2) petitioner's appellate counsel rendered ineffective assistance by failing to present points of error on direct appeal complaining about

The state trial court held evidentiary hearings on petitioner's state habeas claims on March 18-19, 26, and

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(a) the trial court's divergent rulings regarding the exclusion of venire members for bias, (b) the lack of jury unanimity regarding the method of capital murder permitted in the guilt-innocence phase jury charge, (c) the absence of harmless error relating to the multiple theories of capital murder in the guilt-innocence phase jury charge, (d) the grand jury's inclusion of multiple theories of capital murder in the indictment, and (e) the prosecution's eliciting of extraneous offense evidence during the guilt-innocence phase of trial, (3) the trial court erred in sua sponte striking venire member Aulds following his pretrial arrest, (4) the trial court erred in refusing to dismiss a juror during the punishment phase of trial when that juror's son was arrested and placed on personal recognizance, (5) the trial court erred in applying different standard to the two jurors involved in arrests, (6) the trial court erred in refusing to exclude an in-court identification based upon an improperly suggestive pretrial photo array procedure, (6) the trial court erred in permitting the jury to convict petitioner based upon multiple theories of capital murder, (7) the grand jury erroneously included multiple theories of capital murder in the indictment, (8) the trial court erred in failing to grant a mistrial after the prosecution elicited evidence of an extraneous offense during the guilt-innocence phase of trial, (9) the trial court erred in failing to instruct the jury on the effect of a single "no" vote during the punishment phase of trial, (10) the trial court violated the Eighth Amendment in failing to instruct the jury that no presumption in favor of the death penalty exists if the jury answer the future dangerousness special issue affirmatively, (11) the trial court violated the First and Eighth Amendments in failing to define the term "militates" so as to preclude consideration of the petitioner's age, race, sex, national origin, religion, political views, and sexual orientation, (12) the trial court violated the Eighth Amendment by failing to define the terms "probability," "criminal acts of violence, and "continuing threat to society," in the punishment phase jury charge, (13) the trial court erred in failing to preclude the death penalty as a sentencing option, and (14) the trial court erred in failing to hold Article 37.071 unconstitutional on the ground the Supreme Court's opinions in *Apprendi v. New Jersey* and its progeny require grand jury consideration of all facts rending a defendant eligible for the death penalty.

April 24, 2013.[26] In an Order issued October 24, 2014, the state habeas trial court concluded in pertinent part that (1) most of petitioner's claims for relief, including petitioner's constitutional challenges to the Texas capital sentencing special issues, were precluded by virtue of the Texas Court of Criminal Appeals' rejection on the merits of those same claims during petitioner's direct appeal, (2) petitioner's trial counsel reasonably concluded it was better to attack the in-court identifications as tainted by suggestive procedures rather than to employ an expert to challenge the prosecution's witnesses who identified petitioner, (3) petitioner's trial counsel reasonably relied upon the findings and conclusions of Dr. Milam in not seeking additional mental health evaluation of petitioner, (4) petitioner's trial counsel reasonably concluded petitioner's brother, sister, and Dr. Milam could effectively present the mitigating aspects of petitioner's

[26] The verbatim transcription of the testimony and other evidence presented during petitioner's state habeas corpus proceeding appears in the transcript of petitioner's State Habeas Corpus Hearing, found in Volume 2 through 5 of the petitioner's State Habeas Hearing Transcript, as well as in the Supplemental State Habeas Hearing Transcript, all of which are included among the state court records relating to petitioner's state habeas corpus proceeding furnished by respondent. The state habeas trial court heard testimony from(l) both of petitioner's trial counsel (attorneys Michael Ugarte and Patrick Hancock regarding their strategic decision-making before and during petitioner's trial), (2) a number of prosecution trial witnesses (Denise Koger, Sergeant John Slaughter, Roy Rodriguez, and Sergeant Jimmy Willingham regarding identification procedures employed prior to trial), (3) a Bexar County Sheriff's Department records custodian regarding a photograph of the brother of petitioner's accomplice Jose Najera, (4) and a pair of mental health professionals (master's level neuropsychologist Pam Leitzell, who conducted additional testing on petitioner, and Dr. Jon DeFrance, who evaluated the result of those tests and opined about petitioner's mental health in a manner similar to that of Dr, Milam at trial).

background to the jury, (5) Dr. DeFrance testified his testing was complimentary to that of Dr. Milam, Dr. Milam's testing was not in any respect wrong, and he reached similar conclusions regarding petitioner's mental health, (6) none of petitioner's complaints of ineffective assistance by his trial counsel satisfied both prongs of *Strickland* analysis, and (7) none of petitioner's complaints of ineffective assistance by his state appellate counsel satisfied both prongs of *Strickland* analysis.[27] In an unpublished Order issued February 4, 2015, the Texas Court of Criminal Appeals adopted the state trial court's factual findings and conclusions of law and denied petitioner's state habeas corpus application. *Ex parte Joseph Gamboa*, WR-78,1 11-01, 2015 WL 514914 (Tex. Crim. App. Feb. 4, 2015).

F. Proceedings in this Court

On February 3, 2016 petitioner filed his petition for federal habeas corpus relief in this Court, asserting therein seven claims for relief, all of which attack the constitutionality of the Texas capital sentencing scheme or the Texas capital sentencing special issues (ECF no. 18). On April 12, 2016 respondent filed an answer, arguing all of petitioner's claims for relief were either procedurally defaulted, barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), or foreclosed by well-settled precedent in this Circuit (ECF no. 22). On May 26, 2016 petitioner filed his reply to respondent's answer in which he candidly admitted that all of his claims were foreclosed by well-settled legal authority in this Circuit (ECF no. 24).

[27] State Habeas Transcript, at pp. 435-544.

II. The AEDPA Standard of Review

Because petitioner filed his federal habeas corpus action after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court's review of petitioner's claims for federal habeas corpus relief is governed by the AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the "contrary to" and "unreasonable application" clauses of Title 28 U.S.C. Section 2254(d) (1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) ("A state court's decision is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result

different from our precedent."). A state court's failure to cite governing Supreme Court authority does not, *per se*, establish the state court's decision is "contrary to" clearly established federal law: "the state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court decisions contradicts them." *Mitchell v. Esparza*, 540 U.S. at 16.

Under the "unreasonable application" clause, a federal habeas court may grant relief 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. *Brown v. Payton*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) ("A federal habeas court can only set aside a state-court decision as 'an unreasonable application of...clearly established Federal law,' § 2254(d)(1), if the state court's application of that law is 'objectively unreasonable."); *Wiggins v. Smith*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court's application of clearly established federal law was objectively unreasonable; an "unreasonable" application is different from a merely "incorrect" one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold."); *Wiggins v. Smith*, 539 U.S. at 520; *Price v. Vincent*, 538 U.S. 634, 641 (2003) ("it is the habeas applicant's burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner").

As the Supreme Court has explained:

> Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

Bobby v. Dixon, 132 S. Ct. 26, 27, 181 L. Ed. 2d 328 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Legal principles are "clearly established" for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state court decision establish those principles. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) ("We look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Under the AEDPA, what constitutes "clearly established federal law" is determined through review of the decisions of the United States Supreme Court, not the precedent of the federal Circuit Courts. *See Lopez v. Smith*, 135 S. Ct. 1, 2, 190 L. Ed. 2d 1 (2014) (holding the AEDPA prohibits the federal courts of appeals from relying on their own precedent to conclude a particular constitutional principle is "clearly established").

The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. Section 2254(d)(2) of Title 28, United States Code, provides federal habeas relief may not be granted on any claim that was adjudicated on the merits in the state courts unless the state court's adjudication of the claim resulted in a

decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301(2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."); *Williams v. Taylor*, 529 U.S. at 410 ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood v. Allen*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 34 1-42 (2006).

In addition, Section 2254(e)(1) provides a petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro v. Landrigan*, 550 U.S. at 473-74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'"); *Rice v. Collins*, 546 U.S. at 338-39 ("State court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'"); 28 U.S.C. §2254(e) (1). It remains unclear at this juncture whether Section 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under Section 2254(d)(2). *See Wood v. Allen*, 558 U.S. at 300 (choosing not to resolve the issue of Section 2254(e)(1)'s possible application to all

challenges to a state court's factual findings); *Rice v. Collins*, 546 U.S. at 339 (likewise refusing to resolve the Circuit split regarding the application of Section 2254(e)(1)).

However, the deference to which state-court factual findings are entitled under the AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El v. Dretke*, 545 U.S. at 240 (the standard is "demanding but not insatiable"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

Finally, in this Circuit, a federal habeas court reviewing a state court's rejection on the merits of a claim for relief pursuant to the AEDPA must focus exclusively on the propriety of the ultimate decision reached by the state court and not evaluate the quality, or lack thereof, of the state court's written opinion supporting its decision. *See Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010) (federal habeas review of a state court's adjudication involves review only of a state court's decision, not the written opinion explaining the decision), *cert. denied*, 132 S. Ct. 124 (2011); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) (holding the precise question before a federal habeas court in reviewing a state court's rejection on the merits of an ineffective assistance claim is whether the state court's ultimate conclusion was objectively reasonable), *cert. denied*, 541 U.S. 1045 (2004); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (holding a federal court is authorized by §2254(d) to review only a state court's decision and not the written opinion explaining that decision), *cert. denied*, 537 U.S. 1104 (2003).

III. Absence of a Burden of Proof in the Texas Capital Sentencing Mitigation Special Issue

A. The Claim

In his first claims for relief in his federal habeas corpus petition, petitioner argues the Supreme Court's opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151(2013), mandate that a burden of persuasion beyond a reasonable doubt be imposed on the prosecution with regard to the Texas capital sentencing scheme's mitigation special issue.[28]

B. State Court Disposition – Lack of Exhaustion & Procedural Default

At the punishment phase of petitioner's capital murder trial, the state trial court instructed the jury, in conformity with Article 37.071 of the Texas Code of Criminal Procedure, to answer three special issues, to wit (1) whether beyond a reasonable doubt there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society (known colloquially as the "future dangerousness" special issue), (2) whether beyond a reasonable doubt the defendant actually caused the death of Ramiro Ayala and/or Douglas Morgan or did not actually cause the death of Ramiro Ayala and/or Douglas Morgan but intended to kill Ramiro Ayala and/or Douglas Morgan or anticipated that a human life would be taken, and (3) whether, taking into consideration all of the evidence, including the circumstances of the offense and the defendant's character, background, and personal moral culpability, there is a sufficient mitigating circumstance

[28] Petitioner's Federal Habeas Corpus Petition, filed February 3, 2016 (ECF no. 18) (henceforth "Petition"), at pp. 33-36.

or there are sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed (known colloquially as the "mitigation" special issue).[29] The jury answered the first two special issues affirmatively and the final special issue negatively.[30]

Respondent correctly points out that petitioner never presented the same argument included in his first claim for federal habeas corpus relief to the Texas Court of Criminal Appeals either in his direct appeal or state habeas corpus proceeding. In both his eleventh point of error on direct appeal[31] and his twenty-second claim for relief in his state habeas corpus application,[32] petitioner argued the state trial court erred in failing to instruct the jury that no presumption in favor of a death sentence arose from an affirmative answer to the Texas capital sentencing scheme's future dangerousness special issue. At no point in either his direct appeal brief or state habeas corpus application, however, did petitioner present the same legal arguments he presents to this Court in his first claim for relief in his federal habeas corpus petition.

Before seeking federal habeas corpus relief, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971); 28 U.S.C. §2254(b) (1). To provide the State with this

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[29] Trial Transcript, at pp. 299-307.

[30] Trial Transcript, at pp. 308-10.

[31] Brief of Appellant, at pp. 75-76.

[32] State Habeas Transcript, at pp. 124-26.

necessary "opportunity," the prisoner must "fairly present" his claim to the appropriate state court in a manner that alerts that court to the federal nature of the claim. *See Baldwin v. Reese*, 541 U.S. at 29-32 (rejecting the argument that a petitioner "fairly presents" a federal claim, despite failing to give any indication in his appellate brief of the federal nature of the claim through reference to any federal source of law, when the state appellate court could have discerned the federal nature of the claim through review of the lower state court opinion); *O'Sullivan v. Boerckel*, 526 U.S. at 844-45 (holding comity requires that a state prisoner present the state courts with the first opportunity to review a federal claim by invoking one complete round of that State's established appellate review process); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (holding that, for purposes of exhausting state remedies, a claim for federal relief must include reference to a specific constitutional guarantee, as well as a statement of facts that entitle the petitioner to relief and rejecting the contention that the exhaustion requirement is satisfied by presenting the state courts only with the facts necessary to state a claim for relief).

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts and, thereby, to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Carey v. Saffold*, 536 U.S. 214, 220 (2002); *Duncan v. Walker*, 533 U.S. 167, 179 (2001); *O'Sullivan v. Boerckel*, 526 U.S. at 845; *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

Under the AEDPA, federal courts lack the power to grant habeas corpus relief on unexhausted claims. *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) ("28 U.S.C. § 2254(b)(1) requires that federal habeas petitioners fully

exhaust remedies available in state court before proceeding in federal court."), *cert. denied*, 543 U.S. 835 (2004),; *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003); *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003); *Henry v. Cockrell*, 327 F.3d 429, 432 (5th Cir. 2003) ("Absent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief."), *cert. denied*, 540 U.S. 956 (2003); *Mercadel v. Johnson*, 179 F.3d 271, 276-77 (5th Cir. 1999); *Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998); *Jones v. Jones*, 163 F.3d 285, 299 (5th Cir. 1998), *cert. denied*, 528 U.S. 895 (1999). However, Title 28 U.S.C. §2254(b)(2) empowers a federal habeas court to deny an unexhausted claim on the merits. *Pondexter v. Quarterman*, 537 F.3d 511, 527 (5th Cir. 2008), *cert, denied*, 555 U.S. 1219, 129 S. Ct. 544, 173 L. Ed. 2d 671 (2009)); *Moreno v. Dretke*, 450 F.3d 158, 166 (5th Cir. 2006), *cert. denied*, 549 U.S. 1120, 127 S. Ct. 935, 166 L. Ed. 2d 717 (2007); *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002), *cert. dism'd*, 541 U.S. 913 (2004); *Daniel v. Cockrell*, 283 F.3d 697, 701-02 (5th Cir. 2002), *cert. denied*, 537 U.S. 874 (2002). The exhaustion of all federal claims in state court is a fundamental prerequisite to requesting federal collateral relief under Title 28 U.S.C. Section 2254. *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001); *Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996); 28 U.S.C. §2254(b)(1)(A).

In order to "exhaust" available state remedies, a petitioner must "fairly present" all of his claims to the state courts. *Duncan v. Henry*, 513 U.S. at 365; *Picard v. Connor*, 404 U.S. at 270; *Kunkle v. Dretke*, 352 F.3d at 988; *Riley v. Cockrell*, 339 F.3d at 318; *Anderson v. Johnson*, 338 F.3d at 386; *Jones v. Jones*, 163 F.3d at 296; *Shute v. State of Texas*, 117 F.3d at 237 ("a habeas

petitioner 'must fairly apprize [sic] the highest court of his state of the federal rights which were allegedly violated."). In Texas, the highest state court with jurisdiction to review the validity of a state criminal conviction is the Texas Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985).

More simply, the exhaustion doctrine requires that the petitioner present his federal claim in a manner reasonably designed to afford the State courts a meaningful opportunity to address same. The exhaustion requirement is satisfied when the substance of the federal habeas claim has been "fairly presented" to the highest state court, i.e., the petitioner presents his claims before the state courts in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, 541 U.S. at 29-32 (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to federal law or a citation to an opinion applying *federal* law to such a claim); *Moore v. Cain*, 298 F.3d 361, 364 (5th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003); *Mercadel v. Johnson*, 179 F.3d at 275. However, the petitioner need not spell out each syllable of the claim before the state court for the claim to have been "fairly presented" and thereby fulfill the exhaustion requirement. *Riley v. Cockrell*, 339 F.3d at 318; *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999).

The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal habeas petition. *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Scott v. Hubert*, 635 F.3d 659, 667 (5th Cir.), *cert, denied*, 132 S. Ct. 763 (2011); *Riley v. Cockrell*, 339 F.3d at 318 ("It is not enough that the facts applicable to the federal claims were all before the State court, or that

the petitioner made a similar state-law based claim. The federal claim must be the 'substantial equivalent' of the claim brought before the State court."); *Wilder v. Cockrell*, 274 F.3d at 259 ("where petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement"); *Finley v. Johnson*, 243 F.3d 215, 219 (5th Cir. 2001). Likewise, to have "fairly presented" his federal claim, the petitioner must have reasonably alerted the state courts to the federal nature of his claim. *Baldwin v. Reese*, 541 U.S. at 29-32 (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to federal law or a citation to an opinion applying federal law to such a claim); *Wilder v. Cockrell*, 274 F.3d at 260 ("A fleeting reference to the federal constitution, tacked onto the end of a lengthy, purely state-law evidentiary argument, does not sufficiently alert and afford a state court the opportunity to address an alleged violation of federal rights.").

The Fifth Circuit has consistently held that federal habeas review on unexhausted claims presented by a convicted Texas criminal defendant is barred under the procedural default doctrine. *See, e.g.*, *Beatty v. Stephens*, 759 F.3d 455, 465 (5th Cir. 2014) (Texas petitioner who failed to raise complaint of ineffective assistance by his trial counsel during his first state habeas corpus proceeding would be precluded under Article 11.071, §5 from returning to state court to litigate same claim and procedurally defaulted on claim in federal habeas corpus proceeding), *cert. denied*, 135 S. Ct. 2312 (2015); *Trottie v. Stephens*, 720 F.3d 231, 248 (5th Cir. 2013) (holding petitioner's failure to fairly present factual basis

underlying an ineffective assistance complaint in his state habeas corpus action rendered same ineffective assistance complaint unexhausted and procedurally defaulted), *cert. denied*, 134 S. Ct. 1540 (2014); *Bagwell v. Dretke*, 372 F.3d 748, 755-56 (5th Cir. 2004) (holding a petitioner procedurally defaulted by failing to "fairly present" a claim to the state courts in his state habeas corpus application), *cert. denied*, 543 U.S. 989 (2004); *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002) (holding unexhausted claims were procedurally barred), *cert. dism'd*, 541 U.S. 913 (2004); *Jones v. Johnson*, 171 F.3d 270, 276-77 (5th Cir. 1999) (holding unexhausted ineffective assistance claim procedurally barred from federal habeas review), *cert. denied*, 527 U.S. 1059 (1999); *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998) (holding unexhausted claims procedurally barred), *cert. denied*, 523 U.S. 1113 (1998).

Section 5 of Article 11.071 of the Texas Code of Criminal Procedure prohibits a successive state habeas corpus application except in limited circumstances which do not apply to petitioner's complaint about the violation of the presumption of innocence arising from the alleged vagueness of the first Texas capital sentencing special issue. See Art. 11.071, §5(a), Tex. Code Crim. Proc. Ann. (Vernon Supp. 2016) (barring consideration on the merits of new claims contained in a subsequent state habeas corpus application unless either (1) the new claims could not have been presented in a previous application because the legal or factual basis for the new claims were unavailable at the time the previous application was filed, (2) by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt, or (3) by clear and convincing evidence, but for a violation of the United States Constitution, no rational

juror would have answered in the state's favor one or more of the capital sentencing special issues). Absolutely nothing prevented petitioner from fairly presenting the same Eighth Amendment arguments contained in his first claim for federal habeas corpus relief herein to the state courts, either on direct appeal or in his state habeas corpus application. Texas law precludes petitioner from returning to state court at this juncture and exhausting state habeas remedies on his currently unexhausted first claim for federal habeas corpus relief. Therefore, petitioner has procedurally defaulted on his first, unexhausted, claim for federal habeas corpus relief herein.

The Supreme Court has recognized exceptions to the doctrine of procedural default where a federal habeas corpus petitioner can show either (1) "cause and actual prejudice" for his default or (2) that failure to address the merits of his procedurally defaulted claim will work a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Harris v. Reed*, 489 U.S. 255, 262 (1989). To establish "cause," a petitioner must show either that some objective external factor impeded the defense counsel's ability to comply with the state's procedural rules or that petitioner's trial or appellate counsel rendered ineffective assistance. *Coleman v. Thompson*, 501 U.S. at 753; *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that proof of ineffective assistance by counsel satisfies the "cause" prong of the exception to the procedural default doctrine). In order to satisfy the "miscarriage of justice" test, the petitioner must supplement his constitutional claim with a colorable showing of factual innocence. *Sawyer v. Whitley*, 505 U.S. 333, 335-36 (1992). In the context of the punishment phase of a capital trial, the Supreme Court has held that a showing of "actual innocence" is made

when a petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable state law. *Sawyer v. Whitley*, 505 U.S. at 346-48. The Supreme Court explained in *Sawyer v. Whitley* this "actual innocence" requirement focuses on those elements which render a defendant eligible for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error. *Sawyer v. Whitley*, 505 U.S. at 347.

Petitioner's first claim herein currently remains unexhausted and is therefore procedurally defaulted. Petitioner has alleged no facts showing that either of the longstanding exceptions to the procedural default doctrine discussed above excuse petitioner's failure to exhaust state habeas remedies on his first claim herein..

C. Alternatively. No Merit on *De Novo* Review

Nonetheless, Title 28 U.S.C. §2254(b)(2) empowers a federal habeas court to deny an unexhausted claim on the merits. *Pondexter v. Quarterman*, 537 F.3d at 527; *Moreno v. Dretke*, 450 F.3d at 166. Because no state court has ever addressed the merits of the petitioner's twenty-fifth claim herein, this Court's review of that federal constitutional claim is necessarily *de novo*. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (holding de novo review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (holding *de novo* review of the prejudice prong of Strickland was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

Petitioner's initial claim for federal habeas corpus relief misconstrues the nature of the Texas capital sentencing special issues. In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court expressly recognized the Eighth Amendment addresses two different but related aspects of capital sentencing: the eligibility decision and the selection decision. *Tuilaepa*, 512 U.S. at 971. The Supreme Court's analysis of those two aspects of capital sentencing provided the first comprehensive system for analyzing Eighth Amendment claims a clear majority of the Supreme Court had ever offered:

> To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravated circumstance may be contained in the definition of the crime or in a separate sentencing factor (or both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague. * * *
>
> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." That

> requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

Tuilaepa, 512 U.S. at 971-73, 114 S.Ct. at 2634-35 (citations omitted).

In *Tuilaepa*, the Supreme Court also clearly declared its view that States may adopt capital sentencing procedures which rely upon the jury, in its sound judgment, to exercise wide discretion. *Tuilaepa*, 512 U.S. at 974. The Supreme Court concluded, at the selection stage, States are not confined to submitting to the jury specific propositional questions but, rather, may direct the jury to consider a wide range of broadly-defined factors, such as "the circumstances of the crime," "the defendant's prior criminal record" and "all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment." *Tuilaepa*, 512 U.S. at 978.

In *Loving v. United States*, 517 U.S. 748 (1996), the Supreme Court described the first part of the *Tuilaepa* analysis, i.e., the eligibility decision, as follows:

> The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of the aggravating

> circumstance in addition is no part of the constitutionally required narrowing process."

Loving, 517 U.S. at 755 (citations omitted).

The Supreme Court subsequently elaborated on the distinction between the narrowing function or "eligibility decision" and the "selection phase" of a capital sentencing proceeding in *Buchanan v. Angelone*, 522 U.S. 269 (1998):

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Ibid.* In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.*, at 972, 114 S.Ct., at 2634-2635. Petitioner concedes that it is only the selection phase that is at stake in his case. He argues, however, that our decisions indicate that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled. *See, e.g*, *Gregg v. Georgia*, 428 U.S. 153, 206-207, 96 S.Ct. 2909, 2940-2941, 49 L.Ed.2d 859 (1976). He further argues that the Eighth Amendment therefore requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.
>
> No such rule has ever been adopted by this Court. While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those two

aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. *Tuilaepa*, *supra*, at 971-973, 114 S.Ct., at 2634-2636; *Romano v. Oklahoma*, 512 U.S. 1, 6-7, 114 S.Ct. 2004, 2008-2009, 129 L.Ed.2d 1 (1994); *McCleskey v. Kemp*, 481 U.S. 279, 304-306, 107 S.Ct. 1756, 1773-1775, 95 L.Ed.2d 262 (1987); *Stephens*, *supra*, at 878-879, 103 S.Ct., at 2743-2744.

In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 317-318, 109 S.Ct. 2934, 2946-2947, 106 L.Ed.2d 256 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978). However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993); *Penry*, *supra*, at 326, 109 S.Ct., at 2951; *Franklin v. Lynaugh*, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190,

> 108 L.Ed.2d 316 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380, 110 S.Ct., at 1198; *see also Johnson*, *supra*, at 367-368, 113 S.Ct., at 2669.
>
> But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible. *See Tuilaepa*, *supra*, at 978-979, 114 S.Ct., at 2638-2639 (noting that at the selection phase, the state is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); *Stephens*, *supra*, at 875, 103 S.Ct., at 2741-2742 (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional, and noting that accepting that argument would require the Court to overrule *Gregg*, *supra*).

Buchanan v. Angelone, 522 U.S. at 275-277.

Because the Texas capital sentencing scheme's mitigation special issues addresses the constitutional concerns identified by the Supreme Court as the "selection phase" of the capital sentencing process, the mitigation special issue does not, strictly speaking, require that a Texas capital sentencing jury weigh aggravating versus mitigating factors. Instead, as this Court has previously explained, the Texas mitigation special issue authorizes the jury to reduce an otherwise

capital sentence to one of life imprisonment. "The Texas capital sentencing scheme's 'mitigation' Special Issue serves not to render the defendant eligible for the death penalty or to 'select' the defendant for execution; rather, it allows the capital sentencing jury unfettered discretion to dispense an act of grace to the otherwise condemned defendant." *Hernandez v. Thaler*, 2011 WL 4437091, *54 (W.D. Tex. Sept. 23, 2011), *modified on reh'g*, 2012 WL 394597 (W.D. Tex. Feb. g, 2012), *affirmed*, 537 F. App'x 531 (5th Cir. Aug. 2, 2013), *cert. denied*, 134 S. Ct. 1760 (2014).

Petitioner's reliance upon the Supreme Court's opinions in *Apprendi* and *Alleyene* is also misplaced. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court struck down on due process grounds a state scheme that permitted a trial judge to make a factual finding based on a preponderance of the evidence regarding the defendant's motive or intent underlying a criminal offense and, based on such a finding, increase the maximum end of the applicable sentencing range for the offense by a factor of one hundred percent. *Apprendi*, 530 U.S. at 497. The Supreme Court's opinion in *Apprendi* emphasized it was merely extending to the state courts the same principles discussed in Justice Stevens' and Justice Scalia's concurring opinions in *Jones v. United States*, 526 U.S. 227, 252-53 (1999): other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Put more simply, the Supreme Court held in *Apprendi* (1) it was unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal is exposed and (2) all such

findings must be established beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court applied the holding and its reasoning in *Apprendi* to strike down a death sentence in a case in which the jury had declined to find the defendant guilty of pre-meditated murder during the guilt-innocence phase of a capital trial (instead finding the defendant guilty only of felony murder) but a trial judge subsequently concluded the defendant should be sentenced to death based upon factual determinations that (1) the offense was committed in expectation of receiving something of pecuniary value (i.e., the fatal shooting of an armored van guard during a robbery) and (2) the foregoing aggravating factor out-weighed the lone mitigating factor favoring a life sentence (i.e., the defendant's minimal criminal record).[33] *Ring v. Arizona*, 536 U.S. at 609. The Supreme Court emphasized, as it had in *Apprendi*, the dispositive question "is not one of form, but of effect": [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. "A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury

[33] In point of fact, the Arizona trial judge found a second aggravating factor applied in Ring's case, i.e., Ring's comments after the fatal shooting in which he chastised his co-conspirators for their failure to praise Ring's marksmanship rendered his offense "especially heinous, cruel, or depraved." The Arizona Supreme Court later held there was insufficient evidence to support the trial judge's finding of depravity but nonetheless re-weighed the remaining aggravating factor against the lone mitigating factor and affirmed Ring's death sentence. *Ring v. Arizona*, 536 U.S. at 595-96.

verdict alone." *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 483). Because *Ring* would not have been subject to the death penalty but for the trial judge's factual determination as to the existence of an aggravating factor, the Supreme Court declared *Ring*'s death sentence violated the right to trial by jury protected by the Sixth Amendment. *Ring v. Arizona*, 536 U.S. at 609.

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Supreme Court applied the rule announced in *Apprendi* to strike down a federal prisoner's enhanced sentence premised upon a judicial finding the defendant had brandished a firearm during the commission of a bank robbery offense. The Supreme Court reasoned that the judicial finding the defendant had brandished a firearm was an element of the offense which must be submitted to the jury and found beyond a reasonable doubt because the finding increased the mandatory minimum sentence for the offense and, therefore, the finding was an "element" of the crime in question. *Alleyne*, 133 S. Ct. at 2155-58. The Supreme Court explained a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. *Alleyne*, 133 S. Ct. at 2158 (citing *Apprendi*, 530 U.S. at 483 n.10).

In contrast to the situations involved in *Apprendi*, *Ring*, and *Alleyne*, the essential elements of the offense of capital murder, as defined by Texas law, are set forth in Sections 19.02(b) and 19.03 of the Texas Penal Code.[34] Capital murder, as so defined by Texas law, is punishable

[34] Tex. Pen. Code Ann. §19.02(b) (Vernon 2011); Tex. Pen. Code Ann. §19.03 (Vernon Supp. 2015).

by a sentence of either life imprisonment or death.[35] Applicable Texas law does not include any of the sentencing factors included in the Texas capital sentencing special issues set forth in Article 37.071 of the Texas Code of Criminal Procedure as "essential elements" of the offense of capital murder: "In Texas, the statutory maximum for a capital offense is death. The mitigation issue does not increase the statutory minimum. To the contrary, the mitigation issue is designed to allow for the imposition of a life sentence, which is less than the statutory maximum." *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003), *cert. denied*, 543 U.S. 823 (2004). The nature of petitioner's capital sentencing proceeding was vastly different from the sentencing proceedings the Supreme Court addressed in *Apprendi*, *Ring*, and *Alleyne*. *See Allen v. Stephens*, 805 F.3d 617, 628 (5th Cir. 2015) ("in resolving the mitigation special issue, the jury did not find aggravating circumstances that exposed Allen to the death penalty. The jury reached the mitigation special issue only because it had already found the existence of such aggravating circumstances, and had already determined that Allen was eligible to receive a death sentence."), *cert. denied*, 136 S.Ct. 2382 (2016).

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court struck down as a violation of the Sixth Amendment's right to jury trial a judge-imposed sentence of imprisonment that exceeded by more than three years the state statutory maximum of 53 months. *Blakely v. Washington*, 542 U.S. at 303-04. In so ruling, the Supreme

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[35] Tex. Pen. Code Ann. §12.31(a) (Vernon Supp. 2015). Petitioner's capital offense took place on or about June 24, 2005, prior to the effective date of the September 1, 2005 amendment to Section 12.31 which provided for a punishment of life imprisonment "without parole."

Court relied upon its prior holding in *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). In *Blakely*, the Supreme Court also relied upon its prior opinion in *Ring v. Arizona*, *supra*, for the principle "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. at 303. None of the foregoing legal principles were violated when petitioner's *jury* rendered its verdict during the punishment phase of petitioner's capital murder trial.

Petitioner's capital sentencing *jury* made a key factual determination at the punishment phase of petitioner's trial *beyond a reasonable* doubt; more specifically, finding a probability petitioner would commit criminal acts of violence that would constitute a continuing threat to society.[36] Petitioner's *jury* also determined, after taking into consideration all the evidence, including the circumstances of the offense, petitioner's character and background, and petitioner's personal moral culpability, there was insufficient mitigating circumstance to warrant a life sentence.[37] Thus, the capital sentence imposed upon petitioner pursuant to Texas law was based on jury findings, unlike the judicially-imposed sentences struck down in *Apprendi*, *Ring*, *Jones*, and *Blakely*.

Moreover, the Arizona capital sentencing scheme the Supreme Court addressed in *Ring* relied upon a trial judge's factual findings of "aggravating" factors and

[36] Trial Transcript, at p. 308.

[37] Trial Transcript, at p. 226.

directed the trial judge to weigh those aggravating factors against any mitigating factors found to apply to the defendant. Thus the Arizona trial judge's factual findings in *Ring* were part of the constitutionally-mandated eligibility determination, i.e., the narrowing function. In contrast, the Texas capital sentencing scheme under which petitioner was tried, convicted, and sentenced performed the constitutionally-required narrowing function discussed in *Tuilaepa* and *Loving* at the guilt-innocence phase of petitioner's trial and further narrowed the category of those eligible for the death penalty by requiring a jury finding, beyond a reasonable doubt, of future dangerousness. *See Sonnier v. Quarterman*, 476 F.3d 349, 365-67 (5th Cir. 2007) (recognizing the Texas capital sentencing scheme, like the one upheld by the Supreme Court in *Kansas v. Marsh*, 548 U.S. 163 (2006), performs the constitutionally-required narrowing function through its statutory definition of capital murder and further narrows the category of those eligible for the death penalty by requiring an additional fact finding, beyond a reasonable doubt, that there is a probability the defendant will commit criminal acts of violence that would constitute a continuing threat to society), *cert. denied*, 552 U.S. 948 (2007).

The Supreme Court has expressly recognized the lack of efficacy in selection phase jury instructions addressing mitigating evidence:

> [W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not

> exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S. Ct. 633, 642 (2016).

Unlike Arizona's weighing scheme, the Texas capital sentencing scheme performs the constitutionally-mandated narrowing function, i.e., the process of making the "eligibility decision," at the guilt-innocence phase of a capital trial by virtue of the manner with which Texas defines the offense of capital murder in Section 19.03 of the Texas Penal Code. *See Johnson v. Texas*, 509 U.S. 350,

362 (1993) (holding its previous opinions upholding the Texas capital sentencing scheme found no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment because the statute itself adopted different classifications of murder for that purpose); *Lowenfield v. Phelps*, 484 U.S. 231, 243-47 (1988)(comparing the Louisiana and Texas capital murder schemes and noting they each narrow those eligible for the death penalty through narrow statutory definitions of capital murder); *Jurek v. Texas*, 428 U.S. 262, 268-75 (1976) (*plurality opinion* recognizing the Texas capital sentencing scheme narrows the category of murders for which a death sentence may be imposed and this serves the same purpose as the requirements of other statutory schemes which require proof of aggravating circumstances to justify the imposition of the death penalty); *Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir.) (recognizing the Texas capital sentencing special issues do not function as aggravating circumstances but rather adequately guide and focus the jury's objective consideration of particularized circumstances of the individual offense and the individual offender (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 274 (1988)), cert. denied, 519 U.S. 854 (1996).[38]

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[38] Contrary to the argument underlying petitioner's first claim for relief herein, Texas is not a "weighing jurisdiction" where capital sentencing jurors must balance "aggravating" versus "mitigating" factors before rendering a verdict at the punishment phase of a capital trial. *See Hughes v. Johnson*, 191 F.3d 607, 623 (5th Cir. 1999) (Texas is a 'non-weighing state' in that its capital-sentencing scheme does not direct the appellate court or even the jury to 'weigh' aggravating factors against mitigating ones."), *cert. denied*, 528 U.S. 1145 (2000); *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir.) ("Texas, unlike Mississippi's sentencing procedure analyzed in Stringer, is not a 'weighing' jurisdiction; *i.e.*, the sentencer is not called upon to weigh

The Texas capital sentencing scheme under which petitioner was convicted and sentenced involved a significantly different approach to capital sentencing than the Arizona scheme involved in *Ring*. By virtue of (1) its guilt-innocence phase determination *beyond a reasonable doubt* that the petitioner committed *capital* murder, as defined by applicable Texas law, and (2) its factual finding of future dangerousness, also made *beyond a reasonable doubt*, petitioner's jury found *beyond a reasonable doubt* the petitioner was *eligible* to receive the death penalty. *Sonnier v. Quarterman*, 476 F.3d at 365-67. In contrast, Ring's jury made no analogous factual findings. Instead, Ring's Arizona jury found beyond a reasonable doubt only that Ring was guilty of "felony murder," a wholly separate offense from the offense of capital murder as defined under Texas law.

The petitioner's first capital sentencing special issue, i.e., the future dangerousness issue, included a "beyond a reasonable doubt" burden of proof squarely placed on the prosecution. Petitioner's *jury* made that determination. Thus, no violation of the principles set forth in *Apprendi*, *Jones*, *Ring*, *Alleyne*, or *Blakely* occurred during petitioner's trial. Insofar as petitioner implicitly argues his jury's factual finding on the future dangerousness special issue was an essential part of the procedural process under Texas law for determining whether the petitioner was *eligible* to receive the death penalty, that argument is foreclosed by the Supreme Court's *express* recognition the Texas capital sentencing scheme accomplishes the eligibility determination, i.e. the

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mitigating evidence against a list of aggravating circumstances which the state must plead and prove."), *cert. denied*, 509 U.S. 947 (1993); *see also Williams v. Cain*, 125 F.3d 269, 281 (5th Cir. 1997) (discussing the differences between "weighing" and "nonweighing" capital sentencing schemes), *cert. denied*, 525 U.S. 979 (1998).

constitutionally mandated "narrowing function," at the guilt-innocence phase of trial. *Johnson v. Texas*, 509 U.S. at 362; *Jurek v. Texas*, 428 U.S. at 270-71.

In contrast, the *Penry* or "mitigation" special issue employed at the punishment phase of petitioner's capital trial was designed to address the second aspect of capital sentencing discussed in *Tuilaepa*, i.e., the constitutional requirement that the jury be given an opportunity "to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 549 U.S. at 174; *Sonnier v. Quarterman*, 476 F.3d at 365; *Garza v. Thaler*, 909 F.Supp.2d 578, 674-79 (W.D. Tex. 2012), *CoA denied*, 738 F.3d 669 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014). "The use of mitigation evidence is a product of the requirement of individualized sentencing." *Kansas v. Marsh*, 549 U.S. at 174.

The Supreme Court has distinguished the constitutional requirements of the *eligibility* decision, i.e., the narrowing function, and the *selection* decision, i.e., the individualized assessment of mitigating circumstances, holding the latter requires only that the sentencing jury be given broad range to consider all relevant mitigating evidence but leaving to the States wide discretion on how to channel the sentencing jury's balancing of mitigating and aggravating factors. *See Kansas v. Marsh*, 549 U.S. at 174-75 (holding, in connection with the *selection* phase of a capital sentencing proceeding, the Constitution mandates only that (1) the defendant has a right to present the sentencing authority with information relevant to the sentencing decision and (2) the sentencing authority is obligated to consider that information in determining the appropriate sentence); *Tuilaepa*, 512 U.S. at 978 (holding, at the *selection* stage, States are not

confined to submitting to the jury specific propositional questions but, rather, may direct the jury to consider a wide range of broadly-defined factors, such as "the circumstances of the crime," "the defendant's prior criminal record" and "all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment.")

At the *selection* phase of a capital trial, the Supreme Court has left to the States the decision whether to channel a sentencing jury's weighing of mitigating evidence or grant the jury unfettered discretion to consider all relevant mitigating evidence and weigh same in any manner the jury deems reasonable. *See Kansas v. Marsh*, 549 U.S. at 174 ("So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed."). Likewise, the Supreme Court has not yet imposed a particular burden of proof requirement with regard to a capital sentencing jury's consideration of mitigating evidence when such consideration occurs exclusively within the selection process.

> "[D]iscretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty,.. .the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has been

> found that the defendant is a member of the class made eligible for that penalty."

Tuilaepa, 512 U.S. at 979 (citations omitted).

"[T]here is no constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty." *Johnson v. Texas*, 509 U.S. at 362 (quoting *Boyde v. California*, 494 U.S. 370, 377 (1990)). "We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Kansas v. Marsh*, 549 U.S. at 175 (*quoting Franklin v. Lynaugh*,487U.S. 164, 179 (1988)).

As explained above, the "eligibility" decision required by the Eighth Amendment is satisfied under Texas law by the jury's findings "beyond a reasonable doubt" that (1) the defendant is guilty of capital murder as defined under Section 19.03 of the Texas Penal Code and (2) there is a probability the defendant will commit criminal acts of violence that would constitute a continuing threat to society. *Sonnier v. Quarterman*, 476 F.3d at 365-67. This is all the Constitution requires to satisfy the concerns discussed by the Supreme Court in *Apprendi*, *Ring*, and *Alleyne*.

Consistent with the Supreme Court's holdings in *Kansas v. Marsh*, *Tuilaepa v. California*, and *Johnson v. Texas*, a Texas capital sentencing jury may be granted "unfettered discretion" regarding how it should weigh the mitigating evidence, if any, relevant to a particular defendant's background and character against the aggravating circumstances of the defendant's offense and the defendant's demonstrated propensity for future

dangerousness. Thus, the Texas Legislature's decision *not* to assign a particular burden of proof on either party in connection with the Texas capital sentencing scheme's *Penry* or mitigation special issue falls well within the broad range of discretionary authority a State may exercise in connection with the *selection* phase of a capital trial.[39]

Neither the Supreme Court's opinion in *Apprendi* nor any of the Supreme Court's subsequent opinions construing its holding in *Apprendi*, including the holding in *Alleyne*, mandate imposition of a burden of proof on the prosecution with regard to the Texas capital sentencing scheme's mitigation special issue. *Kansas v. Carr*, 136 S. Ct. at 642; *Allen v. Stephens*, 805 F.3d at 626-28; *Garza v. Thaler*, 909 F.Supp.2d at 674-79. The Fifth Circuit has repeatedly rejected the arguments underlying petitioner's first claim herein. *See, e.g.*, *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) ("No Supreme Court or Circuit precedent constitutionally requires that Texas' mitigation special issue be assigned a burden of proof."), *cert. denied*, 133 S. Ct. 105 (2012); *Druery v. Thaler*, 647 F.3d 535, 546 (5th Cir. 2011) ("In *Avila v. Quarterman*, this court rejected a petitioner's argument 'that allowing a sentence of death without a jury finding beyond a reasonable doubt that there were no mitigating circumstances sufficient to warrant a sentence of life imprisonment violated his Sixth and Fourteenth Amendment right to due process and a fair trial.' 560 F.3d

[39] It can be argued the absence of a burden of proof standard in the *Penry* or mitigation special issue could be reasonably expected to benefit defendants because a shrewd defense counsel could argue the absence of an instruction mandating a particular burden of proof on the mitigation special issue permits the jury to answer the *Penry* special issue affirmatively if the jury concludes there is only a scintilla of evidence supporting an affirmative finding on that special issue.

299, 315 (5th Cir.2009). Other decisions have likewise rejected the argument that failure to instruct the jury that the State has the burden of proof beyond a reasonable doubt on the mitigation issue is unconstitutional."), *cert. denied*, 132 S. Ct. 1550 (2012); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006) ("[N]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof.' *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir.), *cert. denied*, 546 U.S. 848, 126 S. Ct. 103, 163 L. Ed. 2d 117 (2005)), *cert. denied*, 549 U.S. 1343 (2007).

D. Conclusions

Petitioner's first claim for relief is unexhausted and procedurally defaulted. In addition, petitioner's complaint about the absence of a beyond reasonable doubt burden of proof upon the prosecution in connection with the Texas mitigation special issues lacks any arguable merit. Petitioner's initial claim does not warrant federal habeas corpus relief.

IV. Lack of Definitions of Key Terms in Special Issues

A. The Claim

In his second claim for federal habeas relief, petitioner argues the trial court erred, and violated the Eighth Amendment, by failing to define the following terms as used in the Texas capital sentencing special issues and petitioner's punishment phase jury charge: "probability," "criminal acts of violence," "continuing threat to society," "personal moral culpability," "more blameworthiness," and "mitigating circumstances."[40]

[40] *Petition*, at pp. 36-40.

B. State Court Disposition Partial Procedural Default

Petitioner's thirteenth, fourteenth, and fifteenth points of error on direct appeal complained about the trial court's failure to define the first three of these six terms.[41] The Texas Court of Criminal Appeals denied these points of error on the merits. *Gamboa v. State*, 296 S.W.3d at 585-86. Likewise, petitioner's twenty-fourth, twenty-fifth, and twenty-sixth grounds for relief in his state habeas corpus application presented the same complaints.[42] The state habeas trial court concluded those claims were foreclosed by the Texas Court of Criminal Appeals' rejection of same on the merits during petitioner's direct appeal.[43] The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions when it denied petitioner state habeas corpus relief. *Ex parte Joseph Gamboa*, WR-78, 111-01, 2015 WL 514914, *1 (Tex. Crim. App. Feb. 4, 2015).

At no point in his appellant's brief or state habeas corpus application, however, did petitioner complain about the state trial court's failure to define the terms "personal moral culpability," "more blameworthiness," or "mitigating circumstances as used in petitioner's punishment phase jury charge. Thus, the last half of this claim is unexhausted and, for the same reasons discussed at length above in Section III.B., petitioner has procedurally defaulted on his complaints about the state

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[41] Brief of Appellant, at pp. 80-86.

[42] State Habeas Transcript, at pp. 130-35.

[43] State Habeas Transcript, at pp. 537-39. Please note the state trial court's order addressing petitioner's state habeas corpus application re-numbered these claims as petitioner's twenty-fifth, twenty-sixth, and twenty-seventh claims to correctly reflect the fact petitioner's state habeas corpus application erroneously included two claims designated as claim "eighteen."

trial court's failure to define the terms "personal moral culpability," "more blameworthiness," or "mitigating circumstances as used in petitioner's punishment phase jury charge.

C. No Merits – for Either Exhausted or Unexhausted Complaints

The Fifth Circuit has repeatedly rejected the exact same arguments raised by petitioner in the exhausted portion of his second claim herein. *See, e.g.*, *Sprouse v. Stephens*, 748 F.3d 609, 622-23 (5th Cir.) (denying CoA on complaints about the lack of definitions of "probability," "criminal acts of violence," and "continuing threat to society" in a Texas capital sentencing jury charge), *cert. denied*, 135 S. Ct. 477 (2014); *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009) (holding the terms "probability, "criminal acts of violence," and "continuing threat to society" "have a plain meaning of sufficient content that the discretion left to the jury is no more than that inherent in the jury system itself"), *cert. denied*, 562 U.S. 1203 (2011); *Turner v. Quarterman*, 481 F.3d 292, 299-300 (5th Cir.) (rejecting claims the terms "probability, "criminal acts of violence," and "continuing threat to society" were so vague as to preclude a capital sentencing jury's consideration of mitigating evidence), *cert. denied*, 551 U.S. 1193 (2007); *Leal v. Dretke*, 428 F.3d 543, 552-53 (5th Cir. 2005) (listing numerous Fifth Circuit opinions rejecting complaints about the failure of Texas courts to define the terms "probability, "criminal acts of violence," and "continuing threat to society"), *cert. denied*, 547 U.S. 1073 (2006). This Court has likewise rejected complaints that the key terms employed in the Texas capital sentencing scheme require definitions beyond those contained in the Texas capital sentencing statute itself. *See Garza v. Thaler*, 909 F.Supp.2d at 667-69 (rejecting

vagueness challenges to terms used in Texas capital sentencing special issues).

All of the key terms in his punishment phase jury charge about which petitioner complains in his second claim for federal habeas relief herein have a common understanding in the sense that ultimately mean what the jury says by their final verdict they mean and do not require further definition. *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir.), *cert. denied*, 509 U.S. 947 (1993); *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984), *cert. denied*, 471 U.S. 1030 (1988). Petitioner's constitutional complaints about the trial court's failure to define the terms "probability, "criminal acts of violence," and "continuing threat to society" have repeatedly been rejected by the Fifth Circuit and are frivolous.

The constitutional standard for evaluating the propriety of a capital sentencing jury charge is set forth in *Boyde v. California*, 494 U.S. 370, 380 (1990), wherein the Supreme Court held the test for determining whether jury instructions satisfy the Constitution is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Johnson v. Texas*, 509 U.S. 350, 367-368 (1993). Petitioner identifies no potentially mitigating evidence before the jury at the punishment phase of his trial which he contends the jury was unable to properly consider in answering one or more of the Texas capital sentencing special issues because of the lack of definitions of the terms "personal moral culpability," "moral blameworthiness," or "mitigating circumstances." *See Beazley v. Johnson*, 242 F.3d 248, 259-60 (5th Cir.) (holding the Texas capital sentencing scheme's statutory definition of "mitigating evidence" as that which renders the defendant less morally blameworthy did not preclude

consideration of any aspect of the defendant's character or record or any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death), *cert. denied*, 534 U.S. 945 (2001).

The Fifth Circuit has repeatedly rejected arguments that the Texas capital sentencing scheme's definition of "mitigation" is too narrow. *See, e.g.*, *Sprouse v. Stephens*, 748 F.3d at 622-23 (denying a CoA on this same issue); *Blue v. Thaler*, 665 F.3d 647, 665-66 (5th Cir. 2011) (Article 37.071 does not unconstitutionally preclude the jury from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a life sentence), *cert. denied*, 133 S. Ct. 105 (2012); *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir.) ("The definition of mitigating evidence does *not* limit the evidence considered under the third special issue (whether mitigating circumstances warrant a life, rather than a death, sentence). '[V]irtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues'."), *cert. denied*, 534 U.S. 945 (2001). Thus, the unexhausted and procedurally defaulted portion of petitioner's second claim herein is also without arguable merit.

D. Conclusions

The Texas Court of Criminal Appeals' rejections on the merits during the course of petitioner's direct appeal of petitioner's complaints about the absence of definitions of the terms "probability, "criminal acts of violence," and "continuing threat to society" from his punishment phase jury charge were neither contrary to, nor involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in petitioner's direct appeal. Petitioner's unexhausted, procedurally defaulted, complaints about the absence of definitions of the terms "personal moral culpability," "moral blameworthiness," and "mitigating circumstances" from petitioner's punishment phase jury charge do not furnish a basis for federal habeas corpus relief. There is no reasonable probability that, but for the absence of definitions of those terms, petitioner's jury was unable to give mitigating effect to any of the evidence before it when answering the Texas capital sentencing special issues.

V. Unfettered Discretion in Answering Open-Ended Mitigation Special issue

A. The Claim

In his third claim for federal habeas corpus relief, petitioner argues the Texas capital sentencing scheme's mitigation special issue is facially unconstitutional because it effectively grants unfettered discretion to the jury in an open-ended manner which does not compel the jury to weigh mitigating and aggravating factors or to make specific findings regarding both and makes meaningful appellate review of the jury's answer to the mitigation special issue problematic.[44]

B. State Court Disposition – Procedural Default on Unexhausted Claim

Petitioner did not fairly present this complaint to the Texas Court of Criminal Appeals in either his appellant's

[44] *Petition*, at pp. 40-43.

brief or his application for state habeas corpus relief.[45] For the reasons discussed at length above in Section III.B, petitioner has procedurally defaulted on this unexhausted set of complaints.

C. Alternatively, No Merit on *De Novo* Review

The short answer to petitioner's complaint that the Texas capital sentencing scheme's mitigation special issues does not require a capital sentencing jury to make specific factual findings and expressly weight aggravating versus mitigating factors is, as was explained at length above in Section III.C., the Texas capital sentencing scheme does not require a capital sentencing jury addressing the mitigation special issue to weigh aggravating versus mitigating factors because the Texas capital sentencing scheme accomplishes the narrowing function of Eighth Amendment analysis at the guilt-innocence phase of trial. Texas is not a weighing jurisdiction. *See Allen v. Stephens*, 805 F.3d at 628 ("in resolving the mitigation special issue, the jury did not find aggravating circumstances that exposed Allen to the death penalty. The jury reached the mitigation special issue only because it had already found the existence of such aggravating circumstances, and had already determined that Allen was eligible to receive a death sentence."); *Woods v. Johnson*, 75 F.3d at 1033-34

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[45] Likewise, while petitioner filed numerous pretrial motions asserting a wide variety of legal theories and seeking to declare portions of the Texas capital sentencing scheme unconstitutional (*See., e.g.*, *Trial Transcript*, at pp. 171-73, 179-82, 184-223), petitioner never specifically asserted either of the two complaints he urges in his third claim for federal habeas corpus relief herein, i.e., that the Texas capital sentencing scheme fails to either (1) properly focus the jury's attention on weighing aggravating verses mitigating factors or (2) permit meaningful state appellate review of the jury's answer to the mitigation special issue.

(recognizing the Texas capital sentencing special issues do not function as aggravating circumstances but rather adequately guide and focus the jury's objective consideration of particularized circumstances of the individual offense and the individual offender).

Insofar as petitioner complains the open-ended and unstructured nature of the Texas capital sentencing scheme's mitigation special issue affords the jury unfettered discretion to impose a death sentence, petitioner's complaint lacks arguable merit. The Fifth Circuit has repeatedly rejected this same argument. *See, e.g.*, *Turner v. Quarterman*, 481 F.3d 292, 299 (5th Cir.) ("at the selection step, the jury must be allowed to make 'an individualized determination' and to consider 'relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.' *Id.* In this second step, the jury may even be given 'unbridled discretion in determining whether the death penalty may be imposed." (quoting *Tuilaepa v. California*, 512 U.S. at 979-80)), *cert. denied*, 551 U.S. 1193 (2007); *Woods v. Cockrell*, 307 F.3d 353, 359-60 (5th Cir. 2002) ("It is the eligibility decision that must be made with maximum transparency to 'make rationally reviewable the process for imposing a sentence of death.' *Moore*, 225 F.3d at 506 (quoting *Tuilaepa*, 512 U.S. at 973). On the other hand, a jury is free to consider a 'myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' 225 F.3d at 506 (quoting 512 U.S. at 979-80, 114 S.Ct. 2630). It is the jury's subjective and 'narrowly cabined but unbridled discretion to consider any mitigating factors,' 225 F.3d at 507, that

Texas refrains from independently reviewing. We continue to hold that Texas may correctly do so.").

Insofar as petitioner complains the Texas capital sentencing scheme's mitigation special issue is not amenable to meaningful state appellate review that argument also fails to present a basis for federal habeas relief. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir.) ("Circuit precedent has specifically rejected the argument that there is a constitutional requirement that mitigation special issue evidence be subject to appellate review by the state."), *cert. denied*, 546 U.S. 848 (2005); *Woods v. Cockrell*, 307 F.3d at 359-60 (holding Texas Court of Criminal Appeals' refusal to review the sufficiency of the evidence supporting negative answers to the Texas capital sentencing scheme's "mitigation" special issue, i.e., the *Penry* issue, did not violate due process principles); *Johnson v. Cockrell*, 306 F.3d 249, 256 (5th Cir.2002) (denying CoA on claim that Texas Court of Criminal Appeals' refusal to review whether sufficient mitigating evidence existed to support a life sentence violated Eighth Amendment), *cert. denied*, 538 U.S. 926 (2003); *Beazley v. Johnson*, 242 F.3d 248, 261 (5th Cir.) (holding petitioner was afforded meaningful state appellate review of death sentence when state appellate court reviewed sufficiency of evidence supporting future dangerousness special issue), *cert. denied*, 534 U.S. 945 (2001); *Bartee v. Quarterman*, 574 F.Supp.2d at 696-97 (listing numerous Fifth Circuit opinions, opinions of this Court and district courts in the Western District of Texas rejecting the argument that "meaningful appellate review" of a jury's findings on the Texas capital sentencing special issues is constitutionally necessary above and beyond that permitted under the *Jackson v. Virginia* standard).

In addition, this Court has long held the Supreme Court's holding in *Teague v. Lane*, 489 U.S. 288, 310

(1989), forecloses any complaints about the "lack of meaningful appellate review" applicable to a Texas capital sentencing jury's answer to the "mitigation" special issue. *See, e.g.*, *Bartee v. Quarterman*, 574 F.Supp.2d 624, 696 (W.D. Tex. 2008) ("At the time petitioner's conviction and sentence became final for Teague purposes, no federal court had held the Texas capital sentencing scheme either deprived a capital defendant of meaningful appellate review of the jury's answers to the capital sentencing special issues or deprived a Texas capital murder defendant of a constitutional right to proportionality review of his capital sentence."), *CoA denied*, 339 F. App'x 429 (5th Cir. July 31, 2009), *cert. denied*, 559 U.S. 1009 (2010); *Martinez v. Dretke*, 426 F.Supp.2d 403, 530-32 (W.D. Tex. 2006) (identifying Fifth Circuit precedent repeatedly rejecting the argument the Constitution mandates state appellate review of the sufficiency of mitigating evidence), *CoA denied*, 270 F. App'x 277 (5th Cir. March 17, 2008).

Moreover, the Fifth Circuit has repeatedly rejected arguments that the Constitution mandates state appellate review of the sufficiency of "mitigating" evidence supporting or opposing a capital sentencing jury's answer to the Texas capital sentencing scheme's mitigation special issue. *See, e.g.*, *Woods v. Cockrell*, 307 F.3d at 359-60 (holding Texas Court of Criminal Appeals' refusal to review the sufficiency of the evidence supporting negative answers to the Texas capital sentencing scheme's "mitigation" special issue, i.e., the *Penry* issue, did not violate due process principles); *Johnson v. Cockrell*, 306 F.3d at 256 (denying CoA on claim that Texas Court of Criminal Appeals' refusal to review whether sufficient mitigating evidence existed to support a life sentence violated Eighth Amendment); *Beazley v. Johnson*, 242 F.3d at 261 (holding petitioner was afforded meaningful

state appellate review of death sentence when state appellate court reviewed sufficiency of evidence supporting future dangerousness special issue); *Moore v. Johnson*, 225 F.3d 495, 505-07 (5th Cir. 2000) (holding Texas Court of Criminal Appeals' refusal to review the sufficiency of the evidence supporting negative answers to the Texas capital sentencing scheme's "mitigation" special issue, i.e., the *Penry* issue, did not violate due process principles), *cert. denied*, 532 U.S. 949 (2001); *Hughes v. Johnson*, 191 F.3d 607, 621-23 (5th Cir. 1999) (holding no Eighth Amendment violation resulted from Texas Court of Criminal Appeals' refusal to engage in proportionality review of capital sentencing jury's answer to mitigation special issue because Texas is a non-weighing jurisdiction), *cert. denied*, 528 U.S. 1145 (2000).

This Court has repeatedly rejected the Eighth Amendment component of petitioner's third claim herein as foreclosed by the Supreme Court's holding in *Tuilaepa*. *See, e.g.*, *Jasper v. Thaler*, 765 F.Supp.2d 783, 836 (W.D. Tex. 2011) (because of the unique role the Texas capital sentencing scheme gives to Texas capital sentencing juries through the mitigation special issue, i.e., permitting a Texas capital sentencing jury to engage in an act of grace for an otherwise condemned capital murderer, there is no constitutional requirement that the evidence supporting or opposing a jury's answer to the Texas capital sentencing scheme's mitigation special issue be subjected to state appellate review for evidentiary sufficiency), *aff'd*, 466 F. App'x 429 (5th Cir. April 26, 2012), *cert. denied*, 133 S. Ct. 788 (2012); *Bartee v. Quarterman*, 574 F.Supp.2d at 696-97 (no clearly established Supreme Court authority mandates state appellate review of the evidentiary sufficiency underlying a Texas capital sentencing jury's answers to the Texas special issues beyond that afforded by *Jackson v.*

Virginia); *Martinez v. Dretke*, 426 F.Supp.2d at 530-32 (holding the Supreme Court's opinion in *Tuilaepa* permits states to adopt capital sentencing schemes which vest the sentencing jury with virtually unfettered discretion at the selection phase of a capital trial); *Cordova v. Johnson*, 993 F.Supp. 473, 509 (W.D. Tex. 1998) ("Insofar as proportionality analysis is constitutionally necessary with regard to the Texas capital sentencing scheme, that analysis is incorporated in the 'eligibility decision' described in *Tuilaepa* and *Buchanan* and is accomplished in the Texas capital sentencing scheme at the guilt-innocence phase of a trial because the Texas capital murder statute itself performs the constitutionally-mandated narrowing function."), *CoA denied*, 157 F.3d 380 (5th Cir. 1998), *cert. denied*, 525 U.S. 1131 (1999).

D. Conclusions

Following *de novo* review, petitioner's unexhausted, procedurally defaulted, third claim for federal habeas corpus relief lacks any arguable merit and does not warrant federal habeas corpus relief.

VI. Narrow Statutory Definition of Mitigating Evidence

A. The Claim

In his fourth claim for federal habeas corpus relief, petitioner argues the statutory definition of "mitigating evidence" contained in the Texas capital sentencing statute, i.e., which defines "mitigating evidence" as that which "a juror might regard as reducing the defendant's moral blameworthiness," is unconstitutionally narrow because it fails to encompass mitigating factors about a

defendant's background and character reflecting the diverse frailties of mankind.[46]

B. State Court Disposition - Procedural Default on Unexhausted Claim

Petitioner did not include this argument as part of his brief on direct appeal or in his state habeas corpus application. For the reasons discussed at length above in Section III.B., petitioner has procedurally defaulted on this unexhausted claim.

C. Alternatively. No Merit on De Novo Review

Petitioner argues the Texas statutory definition of "mitigation" is unconstitutionally narrow because it focuses the jury's attention on whether evidence reduces a defendant's moral blameworthiness. The Fifth Circuit has repeatedly rejected this same argument. *See, e.g.*, *Sprouse v. Stephens*, 748 F.3d at 622 (denying a CoA on this same issue); *Blue v. Thaler*, 665 F.3d at 665-66 (Article 37.071 does not unconstitutionally preclude the jury from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a life sentence); *Beazley v. Johnson*, 242 F.3d at 260 ("The definition of mitigating evidence does not limit the evidence considered under the third special issue (whether mitigating circumstances warrant a life, rather than a death, sentence). '[V]irtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues'."). This Court has also rejected this same argument on multiple occasions. *See, e.g.*, *Bartee v. Quarterman*, 574 F.Supp.2d at 707-11 (rejecting a

[46] *Petition*, at pp. 43-45.

virtually identical claim); *Martinez v. Dretke*, 426 F.Supp.2d at 538-41 (rejecting a virtually identical claim as lacking any arguable merit).

The Supreme Court has established the constitutional standard for evaluating the propriety of a jury instruction at the punishment phase of a capital murder trial as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The Supreme Court has consistently applied this standard to evaluate challenges to punishment-phase jury instructions. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 262-63 (2007) (holding proper test is whether there is a reasonable likelihood the jury applied the challenged instruction in a way that prevented its consideration of constitutionally relevant evidence); *Ayers v. Belmontes*, 549 U.S. 7, 13 (2006) (holding the same); *Weeks v. Angelone*, 528 U.S. 225, 226 (2000) (emphasizing the *Boyde* test requires a showing of a reasonable likelihood, as opposed to a mere possibility, the jury construed the jury instructions to preclude its consideration of relevant mitigating evidence); *Jones v. United States*, 527 U.S. 373, 390 & n.9 (1999) (holding the same); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (holding the same); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (holding the same); *Johnson v. Texas*, 509 U.S. at 367 (holding *Boyde* requires a showing of a reasonable likelihood the jury interpreted the jury instructions so as to preclude it from considering relevant mitigating evidence).

Thus, the Supreme Court has clearly established the principle that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual,

notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. at 246. This "reasonable likelihood" standard does not require the petitioner to prove the jury "more likely than not" interpreted the challenged instruction in an impermissible way; however, the petitioner must demonstrate more than "only a possibility" of an impermissible interpretation. *Johnson v. Texas*, 509 U.S. at 367; *Boyde v. California*, 494 U.S. at 380. This Court must analyze the challenged language included in the jury charge within the context of the overall jury charge. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial." *Johnson v. Texas*, 509 U.S. at 368; *Boyde v. California*, 494 U.S. at 381.

Petitioner's arguments in support of his fourth claim herein misconstrue the appropriate constitutional standard for evaluating the propriety of jury instructions at the punishment phase of a capital trial. As explained above, the Supreme Court identified the proper inquiry as whether there is a reasonable likelihood the jury applied the challenged instructions in a way that prevented the consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. at 380. Thus, the federal constitutional issue properly before this Court in connection with petitioner's challenge to the statutory definition of "mitigating evidence" contained in Texas Code of Criminal Procedure Article 37.071, §2(f)(4) is *not* whether the statutory language in question satisfies some abstract definition of the term "mitigating evidence" but, rather, whether the jury instructions actually given

during the punishment phase of petitioner's trial could reasonably be construed as precluding the jury from giving mitigating effect to any of the evidence properly before the jury at the punishment phase of petitioner's capital trial. *Id.* Petitioner does not identify any potentially mitigating evidence actually in the record at the conclusion of the punishment phase of his trial to which a rational juror would have reasonably considered himself or herself precluded from giving mitigating effect in answering the capital sentencing special issues.

Given the extremely broad nature of the future dangerousness special issue, as well as the very broad definition of mitigating evidence included in petitioner's punishment phase jury charge, it is difficult to imagine any rational juror construing the petitioner's punishment phase jury charge as precluding consideration of any of the evidence presented during either phase of petitioner's trial. On the contrary, the trial court instructed the jury to consider "all the evidence in this case...,"[47] The trial court also instructed the jury with regard to special issue number two to consider "all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."[48] The trial court also specifically instructed the jury to "consider mitigating evidence to be evidence that a juror might regard as reducing Joseph Gamboa's moral blameworthiness."[49] Fibnally, in the third special itself, the trial court instructed the jury to take into consideration "all the evidence, including the

[47] Trial Transcript, at p. 299.

[48] Trial Transcript, at p. 301.

[49] Trial Transcript, at p. 302.

circumstances of the offense, Joseph Gamboa's character and background, and the personal moral culpability of Joseph Gamboa...," in determining how to answer the mitigation special issue.[50] Nor does petitioner identify anything in the jury arguments of the prosecution which might reasonable be construed as limiting the jury's ability to consider mitigating evidence. There was no reasonable likelihood the petitioner's jury applied the petitioner's punishment phase jury instructions in a way that prevented the consideration of any constitutionally relevant evidence. Petitioner's fourth claim herein lacks any arguable merit.

D. Conclusions

Following *de novo* review petitioner's unexhausted, procedurally defaulted, fourth claim herein lacks any arguable merit and does not warrant federal habeas corpus relief.

VII. Open-Ended Discretion in Mitigation Special Issue

A. The Claim

In his fifth claim for federal habeas corpus relief herein, petitioner argues the open-ended discretion permitted Texas capital sentencing juries under the mitigation special issue permits the type of arbitrariness condemned by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972).[51]

B. State Court Disposition – Procedural Default on Unexhausted Claim

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[50] Trial Transcript, at p. 303.

[51] *Petition*, at pp. 45-47.

As explained above in connection with claim one, petitioner did not fairly present this complaint to the Texas Court of Criminal Appeals in either his appellant's brief or in his state habeas corpus application. Therefore, for the reasons discussed at length above in Section III.B, petitioner has procedurally defaulted on this unexhausted claim.

C. Alternatively, No Merit on De Novo Review

For reasons similar to those discussed at length above in Section III.C., this claim lacks any arguable merit. The Fifth Circuit has repeatedly rejected this same argument. *See, e.g.*, *Sprouse v. Stephens*, 748, F.3d at 621-22 ("It is just this narrowly cabined but unbridled discretion to consider any mitigating factors submitted by the defendants and weighed as the jury sees fit that Texas has bestowed upon the jury. In so doing, Texas followed Supreme Court instructions to the letter. No court could find that Texas had acted contrary to federal law as explained by the Supreme Court, and no benefit will arise from further consideration of the obvious." (quoting *Moore v. Johnson*, 225 F.3d 495, 506-07 (5th Cir. 2000)); *Turner v. Quarterman*, 481 F.3d at 299 ("at the selection step, the jury must be allowed to make 'an individualized determination' and to consider 'relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.' *Id.* In this second step, the jury may even be given 'unbridled discretion in determining whether the death penalty may be imposed.'" (quoting *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994)); *Woods v. Cockrell*, 307 F.3d at 359-60 ("It is the eligibility decision that must be made with maximum transparency to 'make rationally reviewable the process for imposing a sentence of death.' *Moore*, 225 F.3d at 506 (quoting *Tuilaepa*, 512 U.S. at 973). On the other hand, a jury is free to consider a 'myriad of factors to determine

whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' 225 F.3d at 506 (quoting 512 U.S. at 979-80). It is the jury's subjective and 'narrowly cabined but unbridled discretion to consider any mitigating factors,' 225 F.3d at 507, that Texas refrains from independently reviewing. We continue to hold that Texas may correctly do so."). Nothing in the constitution forbids Texas from affording a capital sentencing jury unbridled discretion at the punishment phase of trial to withhold a sentence of death.

D. Conclusions

Following *de novo* review petitioner's unexhausted, procedurally defaulted, fifth claim herein lacks any arguable merit and does not warrant federal habeas corpus relief.

VIII. Failure to Place Burden of Proof on Prosecution Regarding Aggravating Evidence

A. The Claim

In his sixth claim for federal habeas corpus relief, petitioner argues the Texas capital sentencing special issues unconstitutionally fail to impose a burden of proof on the prosecution to prove the existence of aggravating factors during the punishment phase of a capital murder trial.[52]

B. State Court Disposition – Procedural default on Unexhausted Claim

[52] *Petition*, at pp. 47-48.

Petitioner did not fairly present this argument to the Texas Court of Criminal Appeals in either his appellant's brief or his application for state habeas corpus relief. For the reasons discussed at length above in Section III.B, petitioner has procedurally defaulted on this unexhausted claim.

C. Alternatively, No Merit on *De Novo* Review

Petitioner's reliance upon the Supreme Court's opinion in *Walton v. Arizona*, 497 U.S. 639 (1990), is misplaced and his argument non sequitur. As explained above in Section III.C., unlike Arizona, Texas is not a weighing jurisdiction. *See James v. Collins*, 987 F.2d at 1120 (recognizing Texas is not a weighing jurisdiction in which the sentencing authority is called upon to weigh mitigating evidence against a list of aggravating factors or circumstances which the prosecution must plead and prove). Unlike the constitutional issues before the Arizona courts in *Ring* and *Walton*, the Texas capital sentencing scheme accomplishes the constitutionally required narrowing function at the guilt-innocence phase of trial through a narrow statutory definition of the offense of capital murder. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998) (where the constitutionally required narrowing function was accomplished at the guilt-innocence phase of a Texas capital murder trial, further narrowing at the sentencing stage was not required), *cert. denied*, 525 U.S. 1174 (1999). The Texas capital sentencing scheme's mitigation special issue is not constitutionally obligated to require the jury to make specific factual findings regarding aggravating and mitigating factors or to weigh those opposing factors against each other. *See Allen v. Stephens*, 805 F.3d at 628 ("in resolving the mitigation special issue, the jury did not find aggravating circumstances that exposed Allen to the death penalty. The jury reached the mitigation special issue only because

it had already found the existence of such aggravating circumstances, and had already determined that Allen was eligible to receive a death sentence."); *Woods v. Johnson*, 75 F.3d at 1033-34 (recognizing the Texas capital sentencing special issues do not function as aggravating circumstances but rather adequately guide and focus the jury's objective consideration of particularized circumstances of the individual offense and the individual offender).

D. Conclusions

Following *de novo* review petitioner's unexhausted, procedurally defaulted, sixth claim herein lacks any arguable merit and does not warrant federal habeas corpus relief.

IX. Failure to Instruct on the Effect of a Single Hold-Out Juror

A. The Claim

In his seventh and final claim for federal habeas corpus relief, petitioner argues the Texas 12/10 rule arbitrarily requires a capital sentencing jury to continue deliberating after one juror has decided to vote for a life sentence and fails to inform the jury of the effect of a single hold-out juror in violation of the Eighth Amendment and the Supreme Court's holdings in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Mills v. Maryland*, 486 U.S. 367 (1988).[53]

B. State Court Disposition

[53] *Petition*, at pp. 48-49.

Petitioner included a somewhat similar argument as his tenth point of error in his appellant's brief.[54] The Texas Court of Criminal Appeals rejected this complaint on the merits. *Gambos v. State*, 296 S.W.3d at 585-86.

C. AEDPA Analysis

This claim is without arguable merit. The United States Supreme Court rejected the Eighth Amendment argument underlying petitioner's final claim herein in *Jones v. United States*, 527 U.S. 373, 382 (1999) (the Eighth Amendment does *not* require a capital sentencing be instructed as the effect of a "breakdown in the deliberative process," because (1) the refusal to give such an instruction does not affirmatively mislead the jury regarding the effect of its verdict and (2) such an instruction might well undermine the strong governmental interest in having the jury express the conscience of the community on the ultimate question of life or death). The Supreme Court has never held the Constitution mandates a jury instruction of the type requested by petitioner in this claim. On numerous occasions, the Fifth Circuit has expressly rejected the Eighth Amendment argument underlying petitioner's final claim herein, i.e., the argument a Texas capital murder defendant is constitutionally entitled to have his punishment-phase jury instructed regarding the consequences of a hung jury or a single holdout juror. *See, e.g.*, *Hughes v. Dretke*, 412 F.3d 582, 593-94 (5th Cir. 2005) (holding the same arguments underlying petitioner's final claim herein were so legally insubstantial as to be unworthy of a certificate of appealability), *cert. denied*, 546 U.S. 1177 (2006); *Alexander v. Johnson*, 211 F.3d 895, 897-98 (5th Cir. 2000) (holding the *Teague v. Lane* non-retroactivity doctrine precluded applying such a rule in a

[54] Appellant's Brief, at pp. 67-75.

federal habeas context); *Davis v. Scott*, 51 F.3d 457, 466-67 (5th Cir. 1995) (holding the same), *cert. denied*, 516 U.S. 992 (1995); *Jacobs v. Scott*, 31 F.3d 1319, 1328-29 (5th Cir. 1994) (rejecting application of the Supreme Court's holding in *Mills v. Maryland* to a Texas capital sentencing proceeding), *cert. denied*, 513 U.S. 1067 (1995).

Petitioner's reliance upon the Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is misplaced. In *Caldwell*, the Supreme Court addressed an instance in which a capital murder prosecutor's jury argument suggested, in an erroneous and misleading manner, the jury was not the final arbiter of the defendant's fate.[55] To establish a *Caldwell* violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). Both the Fifth Circuit and this Court have repeatedly rejected efforts identical to petitioner's to shoe-horn the Supreme Court's holding in *Caldwell v. Mississippi* into the wholly dissimilar context of a Texas capital trial. *See, e.g.*, *Turner v. Quarterman*, 481 F.3d at 300 (recognizing Fifth Circuit precedent foreclosed arguments the Eighth Amendment and Due Process Clause of the Fourteenth Amendment mandated jury instructions regarding the effect of a capital sentencing jury's failure to reach a unanimous verdict); *Barrientes v. Johnson*, 221 F.3d 741,

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[55] In *Caldwell*, the Supreme Court held the following statement by the prosecution during its closing argument undermined reliable exercise of jury discretion:

> Now, [the defense] would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can they be? Your job is reviewable. They know it.

Caldwell v. Mississippi, 472 U.S. at 325 & 329.

776-78 (5th Cir. 2000) (holding trial court's voir dire instructions informing jury the court would impose sentence, not the jury, but specifically explaining how the jury's answers to the capital sentencing special issues would require the court to impose either a sentence of life or death did not result in a *Caldwell* violation), *cert. denied*, 531 U.S. 1134 (2001); *Hughes v. Johnson*, 191 F.3d at 618 (holding voir dire explanations to potential jurors of the impact of affirmative answers to the Texas capital sentencing special issues were sufficient to avoid any possibility the jurors misunderstood their role or the effect of their punishment-phase verdict); *Alexander v. Johnson*, 211 F.3d 895, 897 n.5 (5th Cir. 2000) (holding the same); *Bartee v. Quarterman*, 574 F.Supp.2d at 702-03 (holding there is no constitutional right to have a capital sentencing jury informed of the effect of a hung jury); *Moore v. Quarterman*, 526 F.Supp.2d 654, 729-30 (W.D. Tex. 2007 (holding there is no constitutional requirement that a capital sentencing jury be informed of the consequences of a hung jury or of a single holdout juror)), *CoA denied*, 534 F.3d 454 (5th Cir. 2008); *Blanton v. Quarterman*, 489 F.Supp.2d 621, 644-45 (W.D. Tex. 2007) (holding the same), aff'd, 543 F.3d 230 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009); *Martinez v. Dretke*, 426 F.Supp.2d at 534-36 (holding the same). No *Caldwell* error results because a Texas capital sentencing jury is not informed of the effect of a single holdout juror. *Jasper v. Thaler*, 765 F.Supp.2d at 838-39; *Bartee v. Quarterman*, 574 F.Supp.2d at 701-03.

Likewise, petitioner reliance upon the Supreme Court's holdings in *McKoy* and *Mills* is unpersuasive. Petitioner's argument that the Texas twelve-ten rule violates the due process principles set forth in these opinions has repeatedly been rejected by both the Fifth Circuit and this Court. See *Blue v. Thaler*, 665 F.3d at

669-70 (rejecting an Eight Amendment challenge to the Texas twelve-ten rule); *Alexander v. Johnson*, 211 F.3d at 897 (specifically rejecting both Fourteenth and Eighth Amendment challenges to the Texas twelve-ten rule in the course of affirming this Court's rejection of claims virtually identical to those raised by petitioner herein); *Miller v. Johnson*, 200 F.3d 274, 288-89 (5th Cir. 2000) (holding *Mills* inapplicable to a Texas capital sentencing proceeding), *cert. denied*, 531 U.S. 849 (2000); *Woods v. Johnson*, 75 F.3d at 1036 (holding the same); *Hughes v. Johnson*, 191 F.3d 607, 628-29 (5th Cir. 1999) (holding both *Mills* and *McKoy* inapplicable to the Texas capital sentencing scheme), *cert. denied*, 528 U.S. 1145 (2000); *Jacobs v. Scott*, 31 F.3d 1319, 1328-29 (5th Cir. 1994) ("Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, *Mills* is inapplicable."), *cert. denied*, 513 U.S. 1067 (1995); *Bartee v. Quarterman*, 574 F.Supp.2d at 700-01 (rejecting reliance upon *Mills* and *McKoy* as bases for challenging the very different Texas capital sentencing scheme). Because the Texas capital sentencing scheme is vastly different from those employed on Maryland and North Carolina, petitioner's reliance on the Supreme Court's opinions in *McKoy* and *Mills* is misplaced. *Alexander v. Johnson*, 211 F.3d at 897; *Miller v. Johnson*, 200 F.3d at 288-89; *Woods v. Johnson*, 75 F.3d at 1036; *Jacobs v. Scott*, 31 F.3d at 1328-29.

D. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits of petitioner's constitutional challenges to the Texas 12/10 Rule in the course of petitioner's direct appeal was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,

nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the petitioner's state trial court and direct appeal proceedings.

X. ***Teague*** **Foreclosure**

For the reasons set forth above and in Respondent's Answer (ECF no. 22), all seven of petitioner's claims for relief herein are foreclosed by the non-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989). The non-retroactivity doctrine of *Teague v. Lane* forecloses adoption of the new principles advocated by petitioner in his seven claims herein. Under the holding in *Teague*, federal courts are generally barred from applying new constitutional rules of criminal procedure retroactively on collateral review. *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994). A "new rule" for *Teague* purposes is one which was not dictated by precedent existing at the time the defendant's conviction became final. *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (holding a "new rule" either "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final"). Under this doctrine, unless reasonable jurists hearing the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor, a federal habeas court is barred from doing so on collateral review. *Id.* A conviction becomes final for Teague purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires. *Caspari v. Bohlen*, 510 U.S. at 390. As explained at length above, all seven of petitioner's claims for relief herein argue in favor of the adoption of "new rules" of federal constitutional criminal procedure which

were not in existence on the date petitioner's conviction became final, i.e., on May 6, 2015 — the ninety-first day after the Texas Court of Criminal Appeals affirmed petitioner's conviction on direct appeal and the deadline for filing a certiorari petition expired (per Rule 13.1 of the Rules of the Supreme Court of the United States).

The only two exceptions to the *Teague* non-retroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, i.e., a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *O'Dell v. Netherland*, 521 U.S. at 157.

Teague remains applicable after the passage of the AEDPA. *See Horn v. Banks*, 536 U.S. 266, 268-72 (2002) (applying *Teague* in an AEDPA context); *Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003) (recognizing the continued vitality of the Teague non-retroactivity doctrine under the AEDPA), *cert. denied*, 539 U.S. 979 (2003). As of the date petitioner's conviction and sentence became final for *Teague* purposes no federal court had ever held a Texas criminal defendant was entitled to any of the new rules of federal constitutional criminal procedure urged by petitioner in his seven claims for relief herein. The Supreme Court has never mandated any of the new rules advocated by petitioner herein. Thus, all seven of petitioner's claims herein are foreclosed by the non-retroactivity doctrine of *Teague*. None of the new rules proposed by petitioner in his seven claims herein fall within either of the recognized exceptions to the *Teague* doctrine. Even assuming the Supreme Court might one

day adopt one or more of the new rules advocated by petitioner herein, that day has not yet arrived.

XI. Certificate of Appealability

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a CoA. *Miller-El v. Johnson*, 537 U.S. 322, 335-36 (2003); 28 U.S.C. §2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted. *Crutcher v. Cockrell*, 301 F.3d at 658 n.10; 28 U.S.C. §2253(c)(3).

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. at 282; *Miller-El v. Johnson*, 537 U.S. at 336. This Court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas

petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.*

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Johnson*, 537 U.S. at 338 (*quoting Slack v. McDaniel*, 529 U.S. at 484). In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether this Court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. at 484 (holding when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct).

In death penalty cases, any doubt as to whether a CoA should issue must be resolved in the petitioner's favor. *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir.), *cert. denied*, 558 U.S. 993 (2009); *Bridgers v. Dretke*, 431 F.3d 853, 861 (5th Cir. 2005), *cert. denied*, 548 U.S. 909 (2006). Nonetheless, a CoA is not automatically granted in every death penalty habeas case. *See Miller-El v. Cockrell*, 537 U.S. at 337 ("It follows that issuance of a COA must not be *pro forma* or a matter of course.").

Reasonable minds could not disagree with this Court's conclusions that (1) the state habeas court's denials on the merits of a portion of petitioner's seventh claim herein as well as a portion of petitioner's second claim herein were consistent with both clearly established Supreme Court precedent and objectively reasonable in light of the evidence before the state appellate court and state habeas court during petitioner's direct appeal and state habeas corpus proceeding, (2) petitioner's first, third, fourth, fifth, sixth, and a portion of his second claims herein are unexhausted and procedurally defaulted, (3) all of Petitioner's claims herein are foreclosed by the non-retroactivity doctrine announced in *Teague v. Lane*, and (4) all of petitioner's claims herein lack arguable merit. Petitioner is not entitled to a CoA on any of his claims herein. *See Allen v. Stephens*, 805 F.3d at 626-28 (denying CoA on challenges to Texas capital sentencing scheme based upon *Apprendi* and *Ring*); *Sprouse v. Stephens*, 748 F.3d at 621-24 (denying CoA on complaints about the failure of the Texas capital sentencing scheme to (1) provide meaningful appellate review of the jury's answer to the mitigation special issue, (2) more broadly define the term "mitigating evidence," (3) define the terms "probability," "criminal acts of violence," and "continuing threat to society," (4) inform the jury of the consequence of a hold-out juror, and (5) allocate to the state the burden of proving a lack of mitigating evidence warranting a life sentence); *Blue v. Thaler*, 665 F.3d at 664-70 (denying CoA on challenges to (1) the Texas capital sentencing scheme's statutory definition of "mitigating evidence," (2) the failure of the Texas capital sentencing scheme to place the burden on the prosecution in the mitigation special issue to disprove the existence of mitigating evidence, and (3) the failure of the Texas capital sentencing scheme's

ten-twelve rule to advise jurors of the consequences of a failure to agree on a sentencing special issue).

Accordingly, it is hereby **ORDERED** that:

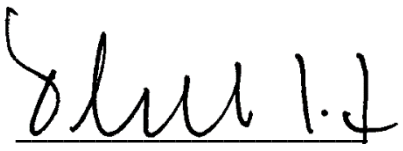
1. All relief requested in petitioner's federal habeas corpus petition, filed February 3, 2016 (ECF no. 18), is **DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability on all claims herein.

3. All other pending motions are **DISMISSED AS MOOT.**

It is so ORDERED.

SIGNED this 4 day of August, 2016.



ORLANDO L. GARCIA
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSEPH GAMBOA, TDCJ # 999526, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent,	§ § § § § § § § § § § § §	CIVIL NO. SA-15-CA-113-OG

ORDER STRIKING MOTION TO DISMISS COUNSEL

The matters before this Court are (1) petitioner's unopposed motion for an extension of time to respond to respondent's answer, filed May 12, 2016 (ECF no. 23), and (2) petitioner's pro se motion to dismiss counsel, filed July 5, 2016 (ECF no. 25).

Motion for Extension of Time

Petitioner's motion for extension of time is reasonable in duration and unopposed by respondent. Petitioner's request for additional time to file his response to respondent's answer will be granted.

Motion to Dismiss Counsel

This Court appointed qualified counsel to represent petition in this cause on March 19, 2015 (ECF no. 2). Petitioner's federal habeas counsel filed a petition on February 3, 2016 (ECF no. 18), asserting seven claims for relief. Respondent filed an answer on April 12, 2016 (ECF no. 22). On May 26, 2016 (ECF no. 24), petitioner's federal habeas counsel filed a response to the respondent's responsive pleading.

On July 5, 2016 (ECF no. 25), petitioner filed a pro se motion requesting this Court dismiss petitioner's court-appointed federal habeas counsel because petitioner "has lost faith in counsel and no longer trusts counsel's advice and strongly feels" said counsel has engaged in malpractice. Petitioner also alleges his court-appointed federal habeas counsel "has failed to file the appropriate and REQUESTED ERRORS necessary to the adequate defense to the federal habeas writ pending against defendant herein." Petitioner's pro se motion misconstrues the nature of this proceeding and the scope of petitioner's right to dictate the contents of his pleadings in this cause.

A defendant does not have an absolute right to the counsel of his choice; good cause must exist for the withdrawal of counsel. *United States v. Austin*, 812 F.3d 453, 456 (5th Cir. 2016). Likewise, petitioner does not possess an absolute right to have new counsel appointed in this capital habeas corpus proceeding cause more than four months after petitioner's federal habeas corpus counsel filed a federal habeas corpus petition, more than a month after petitioner's federal habeas counsel filed the last operative pleading in this cause, and long after the AEDPA's one-year statute of limitations on petitioner's federal habeas corpus petition expired. *See United States*

v. Romans, ___ F.3d ___, ___, 2016 WL 2957797, at *5 (5th Cir. 2016) ("In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973) (quoting *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972))). Petitioner has not alleged any specific facts showing an actual or potential conflict of interest exists between himself and his federal habeas counsel herein. Nor has petitioner identified with specificity any irreconcilable conflict between himself and his federal habeas counsel.

Petitioner does not identify any non-frivolous claims for relief which he claims should have been included in his federal habeas corpus petition but which were not included by his court-appointed federal habeas counsel. Petitioner does not offer any specific facts supporting petitioner's contention that his court-appointed counsel has been guilty of legal malpractice. Petitioner alleges only in conclusory fashion that "there now exists an irreparable, antagonistic relationship" between himself and his court-appointed federal habeas counsel resulting from "the lack of poor communication" but offers no specific facts to support these assertions. In short, petitioner does not offer any explanation as to why he believes there is an antagonistic relationship between himself and his court-appointed federal habeas counsel. Insofar as petitioner complains his federal habeas counsel failed to include an unidentified claim or unidentified claims in petitioner's federal habeas corpus petition, petitioner has made no effort to identify any such omitted claim or claims. Nor does petitioner allege any facts showing that such omitted claim or claims was ever properly exhausted through fair presentation to the

Texas Court of Criminal Appeals during petitioner's direct appeal or state habeas corpus proceedings.

Moreover, it is not the duty of federal habeas counsel to include each and every claim for relief a litigant may wish to see presented in a federal habeas corpus petition. The Constitution does not require appellate counsel to raise every non-frivolous ground that might be pressed on appeal. *United States v. Fields*. 565 F.3d 290, 294 (5th Cir.), *cert. denied*, 558 U.S. 914 (2009). Appellate counsel is not ineffective solely because of failure to present every ground urged by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."). To prevail on a claim of ineffective assistance by appellate counsel, a petitioner must identify with specificity grounds for relief that he claims should have been included in his appellate brief and demonstrate a reasonable probability that, but for appellate counsel's failure to include those points of error, the defendant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). The foregoing principles apply with equal force to assertions of ineffective assistance by a federal habeas counsel. Thus, petitioner's federal habeas counsel owed petitioner a duty not simply to include every claim petitioner wished to see asserted in this cause but, rather, to carefully winnow the wheat from the chaff and assert those claims which petitioner's federal habeas counsel believed in his professional judgment possessed a reasonable likelihood of success.

Petitioner argues in equally conclusory fashion that his rights under various state statutory and constitutional

provisions have been violated. Once again, petitioner misconstrues the scope and nature of this federal habeas corpus proceeding. Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding complaints regarding the admission of evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process); *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 3102 (1990) (recognizing that federal habeas relief will not issue for errors of state law); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding a federal court may not issue the writ on the basis of a perceived error of state law). In the course of reviewing state criminal convictions in federal habeas corpus proceedings, a federal court does *not* sit as a super-state appellate court. *Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. at 780; *Pulley v. Harris*, 465 U.S. at 41.

> When a federal district court reviews a state prisoner's habeas petition pursuant to 28 U.5.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter.

Coleman v. Thompson, 501 U.S. 722, 730 (1991).

Petitioner does not identify any new counsel whom petitioner wishes to have appointed to represent him in this federal habeas corpus proceeding. The AEDPA's one-year statute of limitations on petitioner's federal habeas corpus claims expired many months ago. Absent specific facts showing an actual or potential conflict of

interest exists between petitioner and his federal habeas counsel or specific facts showing that irreconcilable differences exists between petitioner and his federal habeas counsel, dismissal of petitioner's federal habeas counsel at this juncture would serve no legitimate purpose. It is now too late for petitioner to add new claims without running afoul of 28 U.S.C. § 2244(d).

Finally, petitioner's pro se motion to dismiss counsel does not include either (1) a certificate of conference indicating that petitioner conferred with respondent's counsel of record before filing this motion as required by Rule CV-7(i) of the Local Court Rules of the United States District Court for the Western District of Texas or (2) a certificate of service indicating petitioner sent a copy of this motion to respondent's counsel, as required by Rule CV-5(b)(2) of the Local Court Rules of the United States District Court for the Western District of Texas.

Accordingly, it is **ORDERED** that:

1. Petitioner's unopposed motion for an extension of time within which to file a response to respondent's answer, filed May 12, 2016 (ECF no. 23), is **GRANTED**.

2. Petitioner's pro se motion to dismiss counsel, filed July 5, 2016 (ECF no. 25), is **STRICKEN** for failure to include a certificate of conference and a certificate of service and, alternatively, in all respects **DENIED**.

It is so **ORDERED**.

SIGNED this 8th **day of July, 2016.**

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT COURT

APPENDIX G

FILED: April 25, 2023

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-70023

JOSEPH GAMBOA,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:15-CV-113

ON PETITION FOR REHEARING EN BANC

Before JONES, SMITH and DENNIS, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX H

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

APPENDIX I

18 U.S.C. § 3599

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

> (A) before judgment; or
>
> (B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

> (2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to

practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or

request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

APPENDIX J

Federal Rule of Civil Procedure 60

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

APPENDIX K

RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSEPH GAMBOA Petitioner, vs. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION Respondent,	§ § § § § § § § § § § § §	No: SA-15-CA-113-OG DEATH PENALTY CASE

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

Respondent has affirmatively alleged that all of petitioner's claims are without merit, foreclosed by existing precedent, procedurally defaulted, and all but claim two are unexhausted. Respondent asserts that claim two is partially exhausted and partially unexhausted, but nevertheless is without merit.

After considerable review and reflection, petitioner concedes that his argument regarding each of his claims has been foreclosed under currently existing, adversely decided, precedent. That said, petitioner neither waives nor abandons any issue, and continues to raise each to

preserve it for further review as changes to the legal landscape may develop.

Respectfully submitted,

/S/ JOHN J. RITENOUR, JR.
JOHN J. RITENOUR, JR.
Texas Bar Number 00794533

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of May , 2016 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Mr. Jay Clendenin, Esq.
Assistant Attorney General of Texas
PO Box 12548
Austin, TX 78711
Email: jay.clendenin@texasattorneygeneral.gov
Phone: 512-463-1416

/S/ JOHN J. RITENOUR, JR.
JOHN J. RITENOUR, JR.

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSEPH GAMBOA Petitioner-Appellant, Vs. WILLIAM STEPHENS, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION Respondent-Appellee,	§ § § § § § § § § § § § §	Cause No: SA-15-CA-113-OG DEATH PENALTY CASE

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE ORLANDO GARCIA, CHIEF UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

Joseph Gamboa, Petitioner in the above styled and numbered cause, through undersigned counsel and pursuant to the United States Constitution and 28 U.S.C. §2254, petitions this Honorable Court to issue a writ of habeas corpus ordering Petitioner's release from confinement on the ground that Petitioner is being denied his liberty as a result of an illegal and unconstitutional judgment of conviction for capital murder and sentence of death.

I.

CONFINEMENT AND RESTRAINT

Mr. Gamboa is currently confined on death row at the Polunsky Unit, Texas Department of Criminal Justice, Correctional Institutions Division in Livingston, Texas. William Stephens, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, is the state official responsible for the confinement of Mr. Gamboa. Petitioner is confined pursuant to a March 12,2007 judgment imposing the death penalty for the offense of capital murder in Cause No. 2005-CR-7178A. Petitioner is indigent and has been indigent throughout all current and prior proceedings in this cause.

II.

JURISDICTION

This Court has personal jurisdiction pursuant to 28 U.S.C. §2241(d) because Mr. Gamboa was convicted in the 379th Judicial District Court of Bexar County, Texas. Subject matter jurisdiction is conferred by 28 U.S.C. §2254. Mr. Gamboa's state habeas application was denied on February 4, 2015. On March 19, 2015, this Court appointed undersigned counsel to represent Petitioner in this matter. Pursuant to the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, this application is timely if filed on or before February 4, 2016. However, in its order of October 14, 2015, this Court ordered this application to be filed on or before February 1, 2016. On February 1, 2016, Petitioner filed a Motion to Extend that time by two days, to February 3,2016. That motion had not been ruled on at the time of the filing of this petition.

III.

STATEMENT REGARDING EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted the state remedies for the claims he is presenting in this federal habeas corpus action. Petitioner's claims were made in the state habeas action, proven at the hearing on the state writ in the trial court but denied in the state court. Petitioner has met the burden, pursuant to 28 U.S.C. § 2254(b)(1), that an application for writ of habeas corpus relief of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or as excused by the Federal court pursuant to 28 U.S.C. §2254(b)(1)(B).

IV.

PRIOR PROCEEDINGS

A. TRIAL PROCEEDINGS

Petitioner was charged by indictment with the offense of Capital Murder allegedly occurring on June 24, 2005. See Exhibit 1; CR 18.[1] Petitioner entered a plea of not guilty. See Exhibit 2. After jury selection was completed, his trial began on February 23, 2007, with the jury returning a verdict of guilty on July 1, 1997. See Exhibit 3; CR 283. The punishment proceedings were conducted from March 2, 2007 until March 8, 2007, when the jury returned an affirmative answer to special issues number one and two and a negative answer to special

[1] The clerk's record from the trial CR and page number. The court reporter's record from the trial is contained in 43 volumes, numbered 1 through 43 and will be referred to as volume-number RR and page number. Proceedings at the Writ Hearing will be cited as SHRR and page number.

issue number three. See Exhibit 4; CR 308-311. As required by the Texas State capital murder scheme, the trial court sentenced Petitioner to death on March 8, 2007. 38RR 68. The associated Judgement is dated March 12, 2007. See Exhibit 5; CR 131-314. A motion for new trial was filed on March 23, 2007, but was not ruled on by the trial court, and thus overruled as a matter of law. CR 317-321.

B. DIRECT APPEAL

Attorney Angela Moore, Bexar County Chief Appellate Public Defender, was appointed to represent Petitioner on direct appeal to the Texas Court of Criminal Appeals. CR 316. The brief for Petitioner was filed on September 4, 1998. The brief is 121 pages long, and has not been attached to this petition. The brief for Petitioner raised 18 points of error. Point of Error 1 alleged error in the trial court's sua sponte dismissal of a juror over the objection of the defense. Point of Error 2 alleged Petitioner was denied the right to a unanimous jury verdict because the charge allowed the jury to convict him of capital murder on two separate theories. Points of error 3-6 alleged the trial court erred in denying four motions for mistrial, following the state eliciting evidence of an extraneous offence from it's witness; following an outburst by the victim's family member; following the discovery that a juror overheard a state witness discussing the case with an uninvolved prosecutor in the public elevator; and following the revelation that a juror's son had been arrested and granted a PR bond, after the guilt-innocence phase, but before the sentencing phase, over the objection of the defense. Point of error 7 alleged the trial court erred in denying a motion to suppress eyewitness identification of the Petitioner, based on a suggestive out-of-court identification process. Point of error 8 alleged the cumulative effect of the multiple trial

errors required reversal. Point of error 9 alleged factual insufficiency of the evidence. Point of error 10 alleged the unconstitutionally of failing to instruct the jurors regarding the jurors' voting effect concerning the mitigation special issue - known as the Texas capital sentencing statute's "10-12 rule." Point of error 11 alleged error in failure to instruct the jury that there is no presumption in favor of death, and the the mitigation special issue is to be considered independently without regard to the "future dangerous" special issue. Points of error 12-15 alleged error in the failure to define various terms used in the sentencing special issue statements. Point of error 16 alleged a violation of equal protection in the trial court's denial of a defense motion to preclude the death penalty as a sentencing option. Point of error 17 alleged the trial court erred in failing to find Article 37.071 unconstitutional in this case, since the grand jury had not considered and alleged in an indictment the facts legally essential to Petitioner's conviction and death sentence. Finally, point of error 18 alleged the trial court erred in denying the defense motion to preclude the use of current protocol for carrying out a sentence of death using pancuronium bromide.

The Texas Court of Criminal Appeals affirmed the conviction and sentence in a published opinion dated April 8, 2009. *Gamboa v. State*, 296 S.W.3d 574 (Tex. Crim. App. 2009). See Exhibit B. The mandate for that decision issued on May 4, 2009. A petition for writ of certiorari with the Supreme Court of the United States was not filed.

C. STATE HABEAS CORPUS PROCEEDINGS

On June 4, 2007, during the pendency of his direct appeal, Mr. Jay Brandon was appointed to represent Mr. Gamboa on a State Writ of Habeas Corpus. *See* Exhibit 6. (Obtained by counsel from the state district clerk's office.

Is not in the electronic clerk's record provided counsel by that office.) Pursuant to the Texas Code of Criminal Procedure, Mr. Gamboa's writ of habeas corpus was due to be filed ". . . not later than 45 days after the date the state's original brief is filed on direct appeal with the court of criminal appeals . . .." *Tex. Code Crim. Proc. art 11.07 §4(a)*. As the State's original brief on direct appeal was filed on July 14, 2008, the writ of habeas corpus was due on August 28, 2008. However, pursuant to the provision of Texas Code of Criminal Procedure art 11.07 §4(b), Mr. Gamboa was granted a 90-day extension in the due date for his writ, to November 26, 2008. *See* Exhibit 7. (Obtained by counsel from the state district clerk's office. Is not in the electronic clerk's record provided counsel by that office.). Mr. Gamboa's State writ of habeas corpus was subsequently timely filed on November 24, 2008. *See* Exhibit 8 (Obtained by counsel from the state district clerk's office. Is not in the electronic clerk's record provided counsel by that office.). The body of the state writ is 189 pages, including exhibits. It is not attached to this petition. It is found in electronic file provided to counsel and identified as 2005CR7158A-W1, pages 145-333.

The state writ raised 29 grounds for relief. Ground 1 addresses Ineffective Assistance of Counsel for failure to sufficiently investigate to uncover evidence of Petitioner's innocence. Grounds 2-7 addressed errors related to the trial courts erroneous recusal of one juror, and failure to excuse a second juror, both over objections of defense counsel, and Ineffective Assistance of Trial Counsel (IATC) for failing to preserve the associated errors. Ground 8 addressed Ineffective Assistance of Counsel in failing to request a continuance and obtain the assistance of an eyewitness identification expert. Ground 9 addressed trial court error in refusing to suppress

eyewitness identification evidence. Ground 10 addressed IATC for failure to adequately test Petitioner's mental condition. Ground 11 addressed Ineffective Assistance of Trial Counsel for failure to investigate Petitioner's family and background sufficient to present a complete mitigation case to the jury. Grounds 12-13 addressed the error of allowing the jury to convict on two separate theories of guilt, and IATC for failure to object to the associate jury charge. Grounds 14-15 addressed Ineffective Assistance of Appellate Counsel (IAAC) for failure to raise and argue issues related to the jury charge. Grounds 16-18 addressed IATC and IAAC regarding the indictment containing two theories of guilt. Ground 19 addressed error in not granting a mistrial when the prosecution deliberately elicited testimony regarding an extraneous offense. Ground 20 addressed IATC for failure to move for a mistrial for prosecutorial misconduct. Ground 21 addressed IAAC for failure to raise that same point on appeal. Ground 22 addressed the constitutional violation incurred by the trial court's failure to properly instruct the jury regarding the "10-12" rule. Ground 23 addressed the failure to instruct the jury that there is no presumption in favor of death, and that the mitigation issue should be considered independently of the other special issues. Grounds 24-27 addressed the trial court's failure to define terms in the special issues. Ground 28 addressed the trial court's error in denying trial counsel's motion to preclude the death penalty as a sentencing option. Ground 29 addressed the trial court's refusal to hold article 37.071 unconstitutional because the grand jury had not considered and alleged facts legally essential to applicant's conviction and sentence.

On December 29, 2010, Mr. Jay Brandon filed a Motion to Withdraw as Mr. Gamboa's Attorney in his state habeas proceedings, noting that he had accepted a

position with the Bexar County District Attorney's Office. *See* Exhibit 9 (Obtained by counsel from the state district clerk's office. Is not in the electronic clerk's record provided counsel by that office.). While that motion was granted on January 12, 2011, due to a number of administrative issues not attributable to Mr. Gamboa, replacement habeas counsel was not appointed until January 12, 2012. *See* Exhibit 10 (Obtained by counsel from the state district clerk's office. Is not in the electronic clerk's record provided counsel by that office.).

The state trial court, acting as state habeas court, held a hearing on the issues raised in the state writ on March 18, 19, 26, and April 24, 2013. 1SHRR 1. The state habeas court recommended denial of all requested relief. The habeas court's findings of fact and conclusions of law and recommendation is 108 pages in length and is not attached to this petition. It is found in electronic file provided to counsel and identified as 2005CR7158A-W1, pages 18-127. The Texas Court of Criminal Appeals adopted the state habeas court's findings of fact and conclusions of law, and denied all requested relief on February 4, 2015. *Ex parte Gamboa*, WR-78,1110-1, 2015 Tex. Crim. App. Unpub. LEXIS 127 (Tex. Crim. App. Feb 4, 2015, Unpublished). *See* Exhibit 11.

V.

STATEMENT OF FACTS

A. FACTS ELICITED AT TRIAL

Petitioner here adopts the facts relating to the trial proceedings as detailed in his state writ application, and includes them here with minor modification.

This case concerned a shooting in a bar during a robbery. Three people were shot, including the bar owner.

Two of the victims died. One survived to testify. Two other eyewitnesses also testified.

Denise Koger had worked at the bar, Taco Land, for three years. (29RR 34) Douglas Morgan had worked there about a year and a half. (29RR 36) On the night of June 23, 2005, just after the Spurs had won a world championship, the bar opened, some time between ten and eleven p.m. (29 RR 38) No band was playing that night, and there weren't many customers. (29RR 47-48) Two Hispanic men Denise didn't know came in. (29RR 49) In court she identified Petitioner Joseph Gamboa as one of them, although she had failed to identify him in photo lineups.(29RR 24) Koger testified that this was the first day she had identified Petitioner. (29RR 72, 73)

In court, Denise identified Petitioner as the man in the maroon shirt, while his companion had worn a white Spurs shirt. (29RR 50, 51) The men got beer, sat near the bar, and asked for songs on the juke box. (29RR 52) They were the only customers. The other man (co-defendant) played pool, while the red-shirted man walked around. (29RR 54) At some point Petitioner (red shirt) began talking to Ramiro Ayala, the bar owner, who said to Petitioner, "No, fuck you." (29RR 56) Petitioner shot him, and Ayala fell to the floor.

Koger and Douglas Morgan hid behind the bar, and heard another shot. Denise testified the co-defendant told the robber to get the money. (29RR 57) The robber lifted Morgan from the floor to the cash register. But Morgan couldn't open the cash register. The robber shot him as well, and pulled Koger up by her hair. (29RR 58)

With the partner still telling him what to do, the robber got Koger to open the cash register and give him money. (29RR 58) The other man said, "Make her get the rest of it. Make the bitch get the rest of it." (29RR 58) As

Koger was taking the larger bills of of the drawer, the red-shirted robber shot her. (29RR 59) She fell to the ground, and felt herself kicked twice. (29RR 60) Then the shooter picked Morgan up from the floor and shot him again. (29RR 60) Both men ran out and she called 911. (29RR 61) She was in the hospital for ten days, had surgeries, but obviously survived. (29RR 63)

The next witness was Paul Mata, one of the eyewitnesses. Prior to his testimony, the defense also objected to his being allowed to identify Petitioner in court. Mata had identified Petitioner one previous time, when he was wearing an orange jail coverall. (29RR 98) The trial court overruled the objection. (29RR 99)

Mata testified that on the night in question he went to Taco Land after the Spurs game. (29RR 101) He went with a friend named Ashley Casas. There were maybe six people in the bar that night. (29RR 102) Paul and Ashley were playing pool when a stranger came up and asked to play; he said his name was Rick. (29RR 103-04) He was with another person, but Mata didn't see that guy very well. (29RR 104) Mata identified "Rick," the man in the red shirt, as Petitioner Joseph Gamboa. (29RR 106)

Rick seemed unfocused. He played for about ten minutes, then went to talk to the bar owner, Ramiro. (29RR 108, 109) Then Rick heard a gunshot, and saw Rick pull out a gun. (29RR 110) Mata grabbed Ashley, pulled her down to the floor, and they went into another room and locked the door behind them. (29RR 111) They heard more shots, and stayed where they were. After a few minutes, Mata emerged, found the robbers gone and Ramiro on the floor, and he tried to help the victims. (29RR 112, 115-16) When police arrived, he pointed out the beer can and pool stick the shooter had touched. (29RR 117) A few days later, Mata said he saw Petitioner

on television, and was sure he was the shooter from Taco Land. (29RR 117-19) The defense reserved the right to cross-examine this witness later. (29RR 120-21)

Next to testify was Ashley Casas. Outside the jury's presence, it was established that she had been unable to identify Petitioner from a photo lineup. (29RR 123-24) However, in court she identified Petitioner as the shooter. (29RR 126-27) She said she remembered him from Taco Land and "I remember him from today." (29RR 126-27) Before the jury she testified about the night of the murders. She went to Taco Land near midnight, and "purchased a few beers." (29RR 130) She noticed two other guys, and identified Petitioner, in court, as the one in the red shirt that night. (29RR 133) He played pool with Paul Mata, and was calm except for one time when he suddenly got mad at Paul. (29RR 135, 136) After a while this man went to the bar. They heard a gunshot, then saw the man in the red shirt with a gun in his hand, pointed at Ramiro. (29RR 137-3 8) She hid on the ground behind the pool table, heard "many" more shots fired, then she and Paul hid in a closet. (29RR 138, 139-41) When she came out she saw Ramiro down, Denise crawling, and Douglas standing. (29RR 142) On cross-examination Ashley testified that today, twenty months after the event, was the first time she had identified Petitioner. (29RR 146-47) She had seen two or three photo lineups containing pictures of Petitioner, but couldn't identify him. (29RR 147)

All the rest of the State's witnesses at guilt-innocence were police officers or other public officials. A patrol officer testified that the description given by Paul Mata was "kind of vague," and Ashley Casas couldn't give much information at all. (29RR 159, 161) A detective and evidence technicians testified to collecting evidence,

including the pool cue, beer can, and blood samples. (3ORR 12, 2 1-2)

Sergeant John Slaughter was the lead detective on the case. (3ORR 72) He discussed other theories he pursued, including a witness's statement that someone named "Tiny" had been after Denise Koger. (3ORR 80, 81) He also received multiple Crime stoppers tips. (3ORR 82) After one of these, he developed two suspects, Petitioner and Jose Najera. (3ORR 91) He showed photo lineups with those two in them to Denise Koger once, then on another day. (3ORR 93-4, 97) She picked out Najera "almost immediately." (3ORR 99) But she didn't ever identify Petitioner. (3ORR 144, 152) He talked to a woman named Anita Exon, who had been at Taco Land the night of the shootings but had left before the shooting started. (3ORR 113-16) Slaughter also testified that Ashley Casas couldn't identify Petitioner from photo lineups. (3ORR 153) Neither could another witness, Robert Flores. (3ORR 154)

A fingerprint examiner testified that there were no legible fingerprints on the beer can. (31RR 8) Two prints lifted from the cash register also were not legible. (31RR 14, 15) However, one print from a pool cue was legible, and matched Petitioner's fingerprints. (31RR 9, 14)

Catherine Haskins, testifying for the first time ever as a DNA analyst, said that she developed a DNA profile from the beer can that was submitted to her. (31RR 23-4, 31-2) She compared this to swabs from Petitioner and Jose Najera. (31RR 32-3) Najera was excluded as the person who had left material on the beer can; Petitioner was not excluded. (31RR 33) She did not find any DNA material on the two pool cues submitted to her. (31RR 35-6)

A firearms examiner testified that the bullet taken from Ramiro Ayala's body during his autopsy matched another fired bullet submitted to him. (31RR 46, 49, 52) However, he was never given a gun to compare to the bullets. (31RR 56)

Dr. Randall Frost, the medical examiner, performed the autopsies on both Ramiro Ayala and Douglas Morgan. (31RR 85) Morgan was in the hospital about three weeks before he died. (31RR 89) His gunshot wounds were actually healing, but he had other medical problems having nothing to do with the shooting. (31RR 91, 90) Two of those problems that contributed to his death were advanced cirrhosis of the liver and seizure disorder. (31RR 118) Ramiro Ayala's cause of death was a single gunshot wound, a contact wound. (31RR 96, 108, 110)

During Dr. Frost's testimony a female spectator yelled something which the judge heard as "You did that for 200 dollars." (31RR 100) She screamed it loudly and was crying. The defense moved for a mistrial, which was denied. (31RR 100, 101) The trial court instructed the jurors to disregard the outburst. (31RR 105-06)

The State rested. (31RR 118)

The defense called SAPD detective Roy Rodriguez to testify regarding the photo lineups that were shown to witnesses. (32RR 3) Rodriguez had shown photo spreads, which included a photo of Petitioner, to Paul Mata and Ashley Casas. (32RR 6, 8, 9) Neither identified anyone. (32RR 21) The witness testified that showing a photo of a suspect to a witness repeatedly is suggestive. (32RR 18) But on July 2nd he again showed Mata a photo spread that included Petitioner. (32RR 22, 23) This time Mata said he saw two people who looked familiar to him. (32RR 25) The detective said, "Of the two, which one do you recognize as

the one that was in the bar that night that did the murder." (32RR 25) Mata then pointed out Petitioner.

Then, on cross examination, the prosecutor asked the detective, "And he began to cry, didn't he?" to which the witness answered, "Yes, ma'am." In answer to "What did he tell you?" the witness said, "He said he had seen this person in a Crime Stoppers on an unrelated shooting that occurred like the following weekend." (32RR 37) The defense objected, and after a discussion outside the jury's presence the court denied a request for a mistrial. (32RR 37-44) The trial court then instructed the jury to disregard the question and answer. (32RR 47-48)

Next the defense called another detective, Jimmy Willingham. (32RR 51) After discussing identification procedures and guidelines in general, the detective testified that he had shown a photo lineup to Paul Mata. (32RR 56, 57-58, 60) Mata both identified Petitioner and said he had seen that lineup before. (32RR 64) So, the detective testified, the identification procedure was suggestive. (32RR 65) He said he hadn't done this on purpose, he didn't know Mata had already seen the photo array. (32RR 66)

The defense recalled Paul Mata to cross-examine him. (32RR 87) Mata testified that Detective Rodriguez had shown him a photo spread, and that Mata "recognized" two of the photos. (32RR 88) He then identified Petitioner's photo, but said it wasn't a positive identification. (32RR 89, 91, 93) He had also failed positively to identify Petitioner in court a little more than a month before trial. (32RR 94) Mata acknowledged that in describing the robbery suspect he hadn't mentioned tattoos, because he hadn't noticed any. (32RR 103, 105) In court he agreed that Petitioner in fact has lots of tattoos. (32RR 105)

The defense also called Anita Exon, who had told Detective Slaughter that she was at Taco Land the night of the murders. (32RR 112) She remembered the two guys playing pool. (32RR 113-14) However, the two guys did not leave before she did, even though she may have told Slaughter that they did. (32RR 116) Detective Slaughter was then recalled and testified that Anita Exon had told him that the two men playing pool, one wearing a white shirt, one a red shirt, left right before she did, at least an hour before the shootings. (32RR 122)

The defense rested. (32RR 126)

After deliberating, the jury found Petitioner guilty as charged in the indictment. (33RR 85) Before the punishment phase began there was another conference, because one of the jurors had a son who had been arrested overnight. (34RR 3, 5) The juror was brought to the courtroom without the other members present, and said she could still be fair. She had left her son in jail because he needed a good lesson. (34RR 5) There was another conference over the fact that another juror had overheard a prosecutor and a police detective discussing the case briefly. (34RR 6) The defense moved for a mistrial on both issues, which was denied. (34RR 20, 21)

At the Punishment Phase, both sides offered extensive evidence. Brent Houdman, a juvenile probation officer, had supervised Petitioner on juvenile probation for possession of marijuana in 1997 and 1998. (34RR 33) He testified that Petitioner was non-compliant with the conditions of his probation, mostly because his family moved so often. (34RR 44) As a result Petitioner failed to report, and missed school as well as counseling and substance abuse classes. (34RR 46-7) This first witness began one of the themes of the punishment phase: Petitioner did not get the advantage of services offered

because of his unstable family life. (34RR 44-45, 76) Houdman agreed that parental involvement is important to a probationer's success. (34RR 59) Two officers testified that in 1999 Petitioner was arrested driving a stolen car. (34RR 82, 85, 88)

In 2000, when Petitioner would have been 23, Detective Robert Breen was watching a convenience store. (34RR 91) He saw two guys break a window and go into the store. (34RR 105) The two stole beer and chips, and were arrested. (34RR 108) Petitioner was one of the two. (34RR 111) The detective characterized this as a "beer run." (34RR 112)

Petitioner's sister Victoria, who proved to be a hostile witness for the State, testified that she had an incident with her brother in 2003 that resulted in his arrest. (34RR 116, 119)

A sheriff's deputy testified more concerning that event. While on patrol he was flagged down by Victoria Gamboa and her boyfriend. (34RR 16) Both were bloody. (34RR 17) Petitioner had accused his sister of taking a ring from him, and had hit her in the back of the head. (34RR 19, 20) The deputy arrested Petitioner and charged him with two counts of assault and one of escape. (34RR 21, 30-31)

There was testimony of Petitioner's possible involvement in a drive-by shooting in 2004. A woman testified that she was at home when she heard shots. (35RR 36) She saw a car outside carrying two people who were shooting at her house. (35RR 37) She called 911, and police arrived. (35RR 41) A deputy Gamboa (no relation) stopped a car matching the description of the one involved in the drive-by. (35RR 49, 50) The driver, Petitioner, had no license or insurance. (35RR 51) There was a strong smell of marijuana in the car. (35RR 52) In a door panel,

the deputy found marijuana and a handgun. (35RR 53) Another deputy from the evidence unit recovered bullets, a small amount of marijuana, and a weapon. (35RR 57, 60, 62, 63) Yet another deputy recovered shell casings at the house. (35RR 71) They were .25 caliber, the same as bullets seized from Petitioner. (35RR 74)

A fingerprint classifier testified to Appellant's conviction records. (35RR 82) He was convicted of burglary of a building for the convenience store break-in. (35RR 86) He also had convictions for escape and failure to identify. (35RR 86-87) Those were Petitioner's only previous convictions.

Deeshawn Phelps testified that on Saturday night two days after the shootings at Taco Land, she and a friend went to the Prime Time night club. (35RR 114) At about 2 a.m., they were talking to three guys in the parking lot when a car pulled up. (35RR 116, 117) The passenger got out, went to the back of the car, fired a shot, and yelled to give him money. (35RR 118) Phelps ran and the gunman, whom she identified as Petitioner, followed her. (35RR 119, 120) Leaving her purse on the ground, she ran into an alley and no one followed. (35RR 121) A detective testified that both women identified Petitioner from a photo lineup. (35RR 136, 138, 139)

On the same night at about 2:30 a.m., a young woman was putting gas in her car at a Shell station. (35RR 158) A short, slender, young Hispanic man, Petitioner, pulled up and asked her to go to a party with him. (35RR 159, 160) When she declined, Petitioner said he was going to shoot another man in the parking lot. (3 5RR 162) A moment later she heard two gunshots and a man say, "He shot me." Bruce Robinson, the man in the Shell station parking lot, was sweeping up that night when a man with a gun came up to him, demanded money, then shot him and ran

away. (35RR 143, 144) Robinson identified Petitioner as this shooter. (35RR 146)

That same night, a young woman testified that she had been at a neighborhood bar. (36RR 4-5) A blue Corvette pulled up to her house. (36RR 6) Then a young guy put a gun to her head and was telling the guy in the Corvette to give him the car. (36RR 6-7) The Corvette driver drove away, and the young guy fired at him. (36RR 7) The woman identified Petitioner as the man with the gun. (36RR 8) She got away from him and hid, and he shot at her, then at her mother. (36RR 9) After he tried and failed to get her into the car with him, he took off. (36RR 11) Later she picked Petitioner out of a photo lineup, but only after she saw a single photo of him on a detective's desk. (36RR 14, 21- 2)

Julio Cuevas was Petitioner's driver on this night. He testified that Petitioner got mad about something and had a gun, which Cuevas saw him load. (36RR 55, 56) They left in Cuevas' car, and Petitioner told him to drive to the Prime Time night club. (36RR 13 58) There Petitioner got out, shot at some people, and got a woman's purse. (36RR 61) Then they went to the Shell station to get gas, but couldn't, because they had no money. (36RR 63, 64-5) Cuevas also testified that Petitioner talked to the woman then shot the man working at the station. (36RR 65, 68) Cuevas was also driving Petitioner during the incident with the Corvette. (36RR 7 1-9)

Cuevas testified that he was given immunity in exchange for his testimony, and claimed that he had only acted as Petitioner's driver because he was afraid of him. (36RR 81, 90)

A detention officer testified that during the trial Petitioner had been involved in a fight with another inmate. (36RR 120, 123) The other inmate went to the

hospital, and a shank was found on the ground. (36RR 125) The officer also testified that Petitioner was compliant when told to stop. (36RR 129) Two other detention officers testified to the same facts. (36RR 133-35; 140, 142) One of these had seen how the fight started - after the other inmate insulted Petitioner's mother. (36RR 147)

One officer also testified that Petitioner appeared to have jammed a toilet paper roll into his cell door to wedge it open. (36RR 146) The defense objected to lack of notice of this extraneous offense and once again moved for mistrial. (36RR 150) The trial court found there had been no notice, but denied the mistrial and gave the jury an instruction to disregard the evidence. (36RR 155-57)

There was testimony about two other fights in the jail in which Petitioner was involved. (36RR 162, 169-70) In both instances the officers testified they didn't know who had started the fights. (36RR 166, 172) After all this, the State asked to introduce new evidence that Petitioner had been involved in a fight in the holdover cell during trial. (36RR 188) The prosecutor claimed to have given oral notice of this misconduct to the defense, which the defense denied. (3 6RR 193, 198) Nevertheless, the trial court denied the defense's objection to this new evidence. (36RR 198) A deputy Timothy Brandon (no relation to Petitioner's state habeas attorney) testified that Petitioner had been in a fight in the holdover cell. (RR 36 203, 204) Petitioner appeared to be the aggressor in the fight. (36RR 205) However, he became compliant when the officer entered the cell. (37RR 18)

The State wanted to have Petitioner examined psychologically for the issue of future dangerousness. (37RR 3-16) The court disallowed this, saying, "I'm not real excited about the prospect of creating new law since we already have two problems with this case regarding

extraneous offenses that have come before the jury that I have had to instruct the jury to disregard." (37RR 4)

The State then tried to introduce evidence that Petitioner was a member of the Mexican Mafia, but the court disallowed it. (37RR 26, 39, 40) A classification officer had asked Petitioner if he was a member, to which Petitioner replied he was associated with the gang. (37RR 26, 27) The trial court held this was custodial interrogation, and sustained the defense objection.

Finally, there were two victim impact witnesses. A music promoter testified what Taco Land had meant to local musicians, that Ram Ayala would help out homeless people, and what Douglas Morgan was like. (37RR 44, 45, 46-7) Ayala's wife testified that the two of them had five children. (37RR 50)

The State rested. (37RR 51)

Dr. Daneen Milam, a defense expert, testified outside the jury's presence that Petitioner is "brain impaired." (37RR 69) He scored in the impaired range on six of the seven tests she had given him to measure social functioning. (37RR 69) The court again denied the State's request to have Petitioner interviewed by its own mental health expert. (37RR 87-88)

A custodian of records for San Antonio Independent School District testified that Petitioner attended six elementary schools between September of 1988 and May of 1995. (37RR 94) He attended three different middle schools between '95 and 1999. (37RR 94- 95) Finally, he began at Edison High School in August of 1999, but withdrew two months later. (37RR 95) She also testified that the district destroys its special education records after seven years. (37RR 95-96)

A records custodian for South San Antonio ISD testified that they also destroy their special education records after a few years. (37RR 100) She introduced Petitioner's academic records from the month and a half or so that he was enrolled in a middle school in that district. During that time he attended school thirteen days and was absent eighteen. (37RR 101)

A custodian of records for the Texas Department of Family and Protective Services authenticated Defendant's Exhibit 10, voluminous records of Child Protective Services referrals to the Gamboa family while Petitioner was a child. (37RR 108)

Petitioner's second grade teacher testified that he was very quiet and had no behavioral problems, but was "challenged academically." (37RR 115, 116, 123-24) She had seen very little parental involvement, none from his father. (3 7RR 117-18) She remembered Petitioner as being not very clean as a child, and that he flinched from being touched. (37RR 120)

Petitioner's oldest sister, Cynthia Gamboa Soto, 34, testified about their home life as children. She had five children, the first when she was fifteen. (37RR 127) She only went through sixth grade in school. (37RR 127) She was one of eleven siblings, all of whom had difficulties adjusting to life. (37RR 128-32) The family moved often, sometimes because they were evicted. (37RR 133, 134) There was also "domestic violence" in their home. (37RR 134) As the oldest sister, Cynthia was the substitute parent for the other children, but she left home when the Petitioner, was only four years old. (37RR 13 8-39) The reason the family needed a substitute parent was that the actual parents were neglectful to the point of never being home. They exhibited no parenting skills at all. (37RR 140) They were always out drinking. They would be out of

the house sometimes as early as noon and not return until the bars closed. (37RR 140) Cynthia had a little sister named Felicia, who was only eleven months old when she died. She suffocated. Felicia was sleeping with Cynthia at the time, and fell off the bed into a trash bag full of clothes. (37RR 141) Cynthia didn't hear her, and the baby suffocated. Her parents learned of the death the next afternoon when they woke up. "They just cried a little bit and that was it." (37RR 142) The next night, they were back in the bar. Cynthia testified that after she left home the oldest brother, Daniel, took care of his siblings. (37RR 143)

The defense's mental health expert witness was Daneen Milam, who had a doctorate in psychology and a post-doctorate fellowship in neuropsychology. (37RR 153) Dr. Milam testified that she didn't have many of Petitioner's school records to use in evaluating him, but she gave him a battery of tests herself, including tests for brain damage. (37RR 155, 156) She also reviewed Child Protective Services records, which comprised an "immense body of data," and met with several family members. (37RR 159-60, 160-6 1) Linda Mockridge, the mitigation specialist appointed in the case, also interviewed members of Petitioner's family, and Dr. Milam used her information as well. (37RR 161)

With that background, Dr. Milam testified that Petitioner is "most definitely brain impaired . . . He's not mentally retarded, but he's just not doing well." (37RR 165, 166) Specifically, he scored in the impaired range in six of seven tests of social functioning. (37RR 165) "And then in addition to that, the tests that I gave him, his IQ test, his achievement test, other measures of frontal lobe functioning, they are all just in this flat not functioning well range. And that was my finding; that he has – he is brain impaired." (37RR 166) She testified that

Petitioner's IQ was 79, which is in the eighth percentile of the population; 92 out of a hundred people of his age would do better than he had on such a test. (37RR 166) He was learning disabled, which was probably genetic. (37RR 167)

Dr. Milam also testified to what the CPS records showed about Petitioner's early life. Out of two or three thousand cases she had reviewed, she had never seen so much CPS documentation on one family. (37RR 175) Petitioner had attended sixteen schools in eight years; three in the first grade alone. (37RR 172) She mentioned the sister who had smothered to death, and that the parents were back in the bar that same night. (37RR 177-78) The family suffered "constant" shut-offs of power and water for lack of payment, plus evictions. (37RR 183) Petitioner had twenty-two documented addresses before the age of 18. (37RR 183) Essentially he was raised by his older siblings, who left home by the time he was eight years old. (37RR 184) Then his older brother Alex took over. (37RR 185) Alex was Joseph's caretaker and protector, but was killed when Joseph was 16. (37RR 186)

As an example, one year when Petitioner was eight, the Gamboa children were put into a shelter a week before Christmas. They were hungry. (37RR 186-87) Under current CPS standards, the parents' parental rights would have been terminated long before Petitioner had reached adulthood. (37RR 187)

After a conference outside the jury's presence, the defense returned to the question of Petitioner's intelligence. Dr. Milam had not written a report (37RR 201), but summarized her findings. One test measured his IQ at 68, but "I'm not willing to say he's mentally retarded." (37RR 210) He was "low-functioning and didn't

have the tools to get on in life." (37RR 204) His choices were limited. (37RR 219)

The final defense witness was Daniel Gamboa, Jr., the oldest of the eleven siblings. (37RR 228-29) He was still very bitter about his childhood, and had to be instructed several times not to curse when talking about his parents.

This is how he described the Gamboa children's childhood: The lights and water were always being turned off (37RR 229) There was never any food. (37RR 230) At one time there were two adults and seven kids (including Joseph) living in a one-bedroom efficiency apartment. (37RR 233) There was no food, no money for rent, and his parents were gone all the time. (37RR 231-32) Daniel had to be the parent. He took care of "my kids" until he left home at the age of seventeen. (37RR 234) He was scared all the time. (37RR 236-37) The family always lived in the worst parts of town: "Yeah the roughest part of town, the Alazan Courts, the Casiano Homes. Those are places that you don't want to grow up at, man, that all the bad people come from, man." (37RR 237) And their mother was never around to protect them or take care of them:

> You know her thought was, man, getting in the damn car, man, and shouting at my dad. And tell her, let's go let's go. And all she did was just turned around like she didn't have any no God – sorry. No kids at all. She just got in the car, and just got in the car and looked the other way. And all I could see was, all the kids crying, why you got to leave, why you got to leave; stay here stay here. She doesn't, man. She just takes off.

(37RR 238)

There wasn't one day when she wasn't drunk. (37RR 243) As for her parenting during the rare times when she was home, she never showed the children any love or

affection. (37RR 238) "The only affection she gave us was when she didn't see the dishes washed, or nothing like that. The only affection she had was with a belt or a damn broom, man." (37RR 238-39) Specifically, she never showed any affection to Joseph. (37RR 239) CPS came to their home all the time, and their mother would tell them to lie to the CPS workers. (37RR 239, 240)

Daniel, Jr., left home at the age of 18; Cynthia had already left home at age 14 by that time. (37RR 243-44) Their brother Alex "was the next in line." Alex and Joseph formed a bond. Alex was the father figure, and Joseph followed him everywhere. (37RR 244) But when Joseph was 14, Alex was shot and killed while trying to steal a car. (37RR 245-46) This had a "real bad impact" on Joseph, who closed himself up after that and shut everyone out. (37RR 246)

Daniel, Jr., made a plea to the jury to spare his brother's life, because he never had any guidance. "There was nobody to reach out and touch him and tell him, you know what, everything's going to be all right, I'm here for you, man. Not even from his own family. I tried, man. But I left. I left him there at an early age." (37RR 250) When the prosecutor reminded him on cross-examination that other families had wanted their family members to live, too, he responded, "I understand the pain. I understand the pain." (37RR 250)

The defense rested. (38RR 8)

After argument and deliberation, the jury answered the special issues yes, yes, and no, so that the death penalty was assessed. (38RR 65-66, 68)

B. ADDITIONAL FACTS ELICITED AT STATE HABEAS HEARING

Testimony at the state habeas hearing addressed only four Grounds for Relief raised in Petitioner's state habeas: Ground One (IATC for failure to uncover evidence of Petitioner's innocence); Ground Eight (IATC for failure to obtain eyewitness identification expert - note this was incorrectly identified as Ground Nine in the state habeas court's Findings of Fact and Conclusions of Law); Ground Nine (trial court refusal to suppress eyewitness identification - note this was incorrectly identified as Ground Eight in the state habeas court's Findings of Fact and Conclusions of Law); and Ground Ten (IATC for failure to adequately test Petitioner's mental condition). As none of those issues are addressed in the instant petition, no addition relevant facts were adduced at the state habeas hearing.

VI.

STANDARD OF REVIEW ON FEDERAL HABEAS

Because Mr. Gamboa files his federal habeas corpus action after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), this Court's review of petitioner's claims for federal habeas corpus relief is governed by the AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792, 121 S. Ct. 1910, 1918 (2001). Pursuant to 28 U.S.C. §2254(d), this Court cannot grant petitioner federal habeas corpus relief in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either;

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Williams v. Taylor, 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519 (2000); 28 U.S.C. § 2254(d).

The Supreme court has concluded the "contrary to" and "unreasonable application" clauses of Title 28 U.S.C. Section 2254(d)(1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002).

Under the "contrary to" clause, a federal habeas court may grant relief if:

> (1) the state court arrives at a conclusion opposite to that reached by the Supreme court on a question of law or
>
> (2) the state court decides a case differently than the Supreme court on a set of materially indistinguishable facts.

Mitchell v. Esparza, 540 U.S. 12, 15-16, 124 S.Ct. 7, 10 (2003) ("A state court's decision is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' "). A state court's failure to cite governing Supreme Court authority does not, *per se*, establish that the state court's decision is "contrary to" clearly established federal law: "the state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court decisions contradicts them'." *Id.* at 16.

Under the "unreasonable application" clause, a federal habeas court may grant relief 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. *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527,2534-35 (2003). Legal principles are "clearly established" for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state-court decision establish those principles. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S.Ct. 2140, 2147 (2004) ("We look for the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."); *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 1172 (2003). A federal court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Wiggins v. Smith*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court's application of clearly established federal law was objectively unreasonable; an "unreasonable" application is different from a merely "incorrect" one. *Wiggins v. Smith*, 539 U.S. at 520; see *Price v. Vincent*, 538 U.S. 634, 641, 123 S.Ct. 1848, 1853 (2003) ("It is the habeas applicant's burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner").

Two provisions of the AEDPA deal with review of factual determinations made by state courts - 28 U.S.C. §§2254(d)(2) and 2254(e)(1). Under §2254(d)(2), relief is warranted if the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). The second provision, §2254(e)(1), provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that "[t]he

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1). The Supreme Court has clarified that when reviewing a claim adjudicated on the merits by a state court under §2254(d)(l), the record is limited to the one before the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398, 1402 (2011). Nevertheless, in reviewing the correctness of a factual finding made by a state court, "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable, or that the factual premise was incorrect by clear and convincing evidence. *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029 (2003).

The Supreme Court has recognized the tension, and circuit split, regarding the proper interplay between §2254(d)(2) and 2254(e)(1). *Wood v. Allen*, 558 U.S. 290, 299, 130 S.Ct. 841 (2010) ("[W]e granted review granted of a question that has divided the courts of Appeals: whether, in order to satisfy §2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether §2254(e)(1) additionally requires petitioner to rebut a presumption that the determination was correct with clear and convincing evidence."). However, it has not yet resolved the question. *Id.* at 301. (Because the state court's finding that trial counsel made a strategic decision not to pursue or present evidence of the defendant's mental deficiencies was not an unreasonable determination of the facts under §2254(d)(2), the Court did not need to decide whether that determination should be reviewed "under the arguably more deferential standard" of §2254(e)(1)). The Court had indicated earlier that §2254(e)(1) "pertains only to state court determinations of factual issues, rather than decisions,"

while §2254(d)(2) "contains the unreasonable requirement and applies to the granting of habeas relief itself." *Miller-El v. Cockrell*, 537 U.S. at 341-342. Nevertheless, the *Wood* Court "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)." *Wood*, 558 U.S. at 300. (citing *Rice v. Collins*, 546 U.S. 333, 339, 126 5. Ct. 969 (2006)).

Notwithstanding this open question, the Fifth Circuit has held that §2254(e)(1) "pertains only to a state court's determinations of particular factual issue, while §2254(d)(2) pertains to the state court's decision as a whole." *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) (citing *Miller-El* at 537 U.S. at 341-342). As the Fifth Circuit explains:

> Whereas §2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, §2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. *See* §2254(e)(1). It is then a separate question whether the state court's *determination* of facts was unreasonable in light of the evidence presented in the state court proceeding. *See* §2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under §2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under §2254(d)(2).

Fields v. Thaler, 588 F.3d 270, 279 (5th Cir. 2009) (quoting *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir 2001)).

VI.

CLAIMS FOR RELIEF

A. CLAIM ONE

THIS COURT MUST REVERSE PETITIONER'S SENTENCE OF DEATH ION THE GROUND THAT ART. 37.071 §3(C) OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS AN "ELEMENT," REQUIRING THAT THE STATE NEGATE WITH A BURDEN OF BEYOND A REASONABLE DOUBT IN ACCORDANCE WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466, 120 S.CT.2348 (2000) AND *ALLEYNE V UNITED STATES*, 133 S.CT. 2151(2013).

At the punishment phase of Petitioner's trial, the court submitted a jury charge at punishment instructing the jury to first determine whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[2]. (CR 312-313) The burden of proof on the State is statutory defined as a "beyond a reasonable doubt standard[3]." TEX. CODE CRIM. PROC., art. 37.071 However, the jury is also allowed to negate their findings upon an affirmative

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[2] Art. 37.071 §3(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

[3] Art. 37.071 §3(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

finding of future dangerousness by finding in the third,[4] "mitigation" special punishment issue, that there exist sufficient mitigating evidence which allows imposition of a life sentence in lieu of a death sentence. sentence in lieu of a death sentence[5].

The Court of Criminal Appeals has consistently held that the mitigation issue at punishment does not violate the United States and Texas Constitutions either because it shifted the burden of proof to the defendant or omitted a burden of proof. These issues have been resolved adversely to Petitioner. *See Green v. State*, 912 S.W.2d 189 (Tex.Crim.App., 1995); *Barnes v. State*, 876 S.W.2d 316, 329-30 (Tex.Cr.App.), *cert. denied*, 513 U.S. 861, 115 S.Ct, 174 (1994). Also decided adversely to Petitioner is the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) to this question - in the context that the Texas sentencing scheme employs the mitigation special issue as a means to reduce a sentence from death, rather than increasing it to death. *See Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015), *Granados v. Quarterman*, 455 F.3d 529 (5th Cir. 2006). Petitioner contends that the

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[4] In Petitioner's case, the trial court also included a second special issue defined at Art. 37.071§2((b)(2), applicable only when conviction as a party to the offense was permitted. That special issue is not relevant to this discussion.

[5] Art. 37.071 §3(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Supreme Court opinion in *Apprendi*, in the context of *Alleyne v. United States*, 133 S.Ct. 2151 (2013), would require this question be resolved in Petitioner's favor.

Apprendi involved a sentencing under a New Jersey statute that increased the maximum term of imprisonment is the Judge, independent of the jury, found the defendant committed the crime with racial bias. 530 U.S. at 470. The *Apprendi* Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Alleyne involved a defendant whose minimum sentence following a conviction in federal court, was increased by a "sentencing factor" - brandishing a firearm - that was not submitted to a jury, and was found independently by the Court at a preponderance of the evidence. 133 S.Ct. at 2155-2157. The *Alleyne* court noted that "*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Id.* at 2158 (citing *Apprendi*, 530 U.S. at 483, n. 10). That Court further noted that "(f)acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." *Id.*

Petitioner contends that the minimum sentence in the Texas capital sentencing scheme is life in prison. To be sentenced at the high end of the sentencing range - death - a Texas capital jury must first find facts sufficient to answer yes to special issues one and two, where applicable. These facts must be found beyond a

reasonable doubt. However, to be sentenced to death, that jury must then also answer no to the mitigation special issue. A "yes" answer to that issue results in the lesser sentence of life. However, there is no burden of proof allocated to that mitigation issue. Clearly the capital defendant has a burden of production to provide evidence in support of mitigation, but with no burden of persuasion on either party, and thus no constraints on the jury's decision, the mitigation question allows unchanneled discretion in what the jury considers in answering the question. Indeed, that discretion could impermissibly permit the jury to under a balancing not only of aggravating and mitigation factors, but of "worthiness" of the victim's life with that of the defendant's - clearly not an appropriate bais for deciding that special issue.

Therefore, the Supreme Court decisions of *Apprendi* and *Allenye*, considered in context together, mandate that a burden of persuasion of beyond a reasonable doubt be assigned to the prosecution with regard to the mitigation special issue of the Texas capital sentencing scheme. As the current scheme fails to do so, it must be declared unconstitutional, and the Petitioner's death sentence must be vacated, and either reformed to a sentence of life in prison without the parole or remanded to the trial court for a new punishment hearing.

B. CLAIM TWO

PETITIONER WAS DENIED DUE PROCESS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL FAILED TO PROVIDE THE JURY WITH ADEQUATE INSTRUCTION REGARDING THE TERMS USED IN THE SPECIAL ISSUES FOR A DEATH SENTENCE

The jury was not furnished definitions of the terms in the special issue questions. Among the terms and phrases that were not defined were the operative terms of the first special issue: "probability," "criminal acts of violence," and "continuing threat to society," and the operative terms of the third special issue: "personal moral culpability", "moral blame worthiness," and "mitigating circumstances." (CR 311-319).

In *Jurek v. Texas*, 428 U.S. 262, 272, 96 S. Ct, 2950 (1976), the United States Supreme Court conditionally upheld the Texas capital punishment statute, while acknowledging that the Texas Court of Criminal Appeals had not yet defined "criminal Acts of violence" or "continuing threat to society" in the first special issue. To date this has not been done.

In Petitioner's case there occurred an arbitrary sentencing procedure because the trial court failed to define the operative terms in the special issue. This, combined with the Texas Court of Criminal Appeals' historic refusal to improve any limiting construction on the special issue question, has resulted in violation of Petitioner's due process. Each necessary predicate to a sentence of death must rationally channel the sentencer's discretion. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130(1992); *Maynardv. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct, 1759 (1980). Because there is no court-mandated rational process justifying the imposition of a death sentence (i.e., failure to require any limiting construction on the terms of the special issues questions), Petitioner's Eighth and Fourteenth Amendment U.S. Constitutional rights were violated.

To avoid creating a substantial risk of arbitrary and capricious infliction of the death penalty, capital

sentencing schemes since *Furman* have been required to meet "twin objectives:" to be at once consistent and principled but also humane and sensible to the uniqueness of the individual. *Eddings v. Okalahoma*, 455 U.S. 104, 110 (1982). These twin objectives are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. The guidance is sufficient only if it channels the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gregg v. Georgia*, 428 U.S. 198 (1976). The process must accord proper significance to the relevant facts of the character and record of the offender, especially the "compassionate or mitigating factors stemming from the diverse-frailties of human kind." *Woodson v. North Carolina*, 428 U.S. 304 (1976).

In light of the Court of Criminal Appeals' own interpretation of the function of special issues, they act as "aggravating circumstances." Whether they are called "special issues" or "aggravating circumstances," their function is clearly the same: they "circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983). As defined by *Stephens*, therefore, each special issue functions as an aggravating circumstance because an affirmative finding to the special issues is an absolute prerequisite to any death sentence. Because the Texas Legislature has said that no person shall be sentenced to death without the state first proving beyond a reasonable doubt the existence of statutorily mandated factors, the courts are required to ensure that these predicate factors are not

vague or ambiguous. Petitioner challenges the decision of the Texas Court of Criminal Appeals to refuse to rationally channel the legislated sentencing scheme by defining the numerous vague terms and phrases in the special issue questions as being contrary to clearly established federal law, and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The lack of definitions for the terms "deliberately," "probability," "criminal acts of violence," "continuing threat to society" and "mitigating circumstances" equal the failure to define "heinous," "atrocious," and "cruel" so often condemned by the United States Supreme Court. *Walton v. Arizona*, 497 U.S. 639(1990); *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Jurek v. Texas*, 428 U.S. 262 (1976); *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853 (1988).

The United States Supreme Court has mandated that there must be guided discretion in the imposition of the death sentence, i.e., juries must be carefully and adequately guided in their deliberations. *Gregg v. Georgia*, 428 U.S. 153, 193, 96 S. Ct. 2909 (1976). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct.2909 (1976). Aggravating factors, which are essential to the constitutionality of any death penalty scheme, must "genuinely narrow the class of death-eligible persons in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983). Both on

their face and as applied, aggravating circumstances must permit the sentences to make a "principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 497 U.S. 764(1990). The construction or application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty. A state may conduct the required "narrowing function" at either the guilt/innocence phase of the proceedings or at the sentencing phase with the creation of aggravating circumstances. *Lowenfield v. Phelps*, 484 U.S. 231(1988)

C. CLAIM THREE

THE TEXAS CODE OF CRIMINAL PROCEDURE, ART. 44.251(a), WHEN INTERPRETED IN CONJUNCTION WITH TEXAS CODE OF CRIMINAL PROCEDURE ART. 37.071 §2(e), IS FACIALLY UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION[6]

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[6] Article 44.25 1(a) of the Texas Code of Criminal Procedure provides that:

> The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice for life if the court finds that there is insufficient evidence to support an affirmative answer to an issue submitted to the jury under section 2(b), Article 37.07, or Section 3(b), Article 37.011, of this code or a negative answer to an issue submitted to a jury under Section 2(e), Article 37.071, or Section 3(e), Article 37.0711, of this code. TEX. CODE CRIM PROC. art, 44.25 1(a) (Vernon 2000)

Article 37.071 §2(e)(1) provides that:

The jury that sentenced Petitioner to death was confused on the role of determining the mitigating issues at punishment. Petitioner contends that the jury did not have the proper guidance in weighing mitigating versus aggravating circumstances. (CR CR 311-319).

In Texas the special issues of the punishment phase do not specify the types of mitigating (or aggravating) factors relevant to a capital sentencing jury's deliberations during the punishment phase. The jury is simply asked whether there are "sufficient mitigating circumstance or circumstances" to warrant a life sentence rather than a death sentence. TEX. CRIM. PROC. CODE ANN. Art. 37.07 1, §2 (e). The *Penry* special issue requires Texas juries to perform the same functions that other states' post-*Furman* capital sentencing juries perform: 1) the threshold findings of particular aggravating and mitigating circumstances; and 2) the balancing process whereby jurors determine whether the mitigating factors outweigh aggravating factors. *Gregg v. Georgia*, 428 U.S. 153, 98 S.Ct, 2909 (1976) (discussing Georgia's post-*Furman* statute). Petitioner contends that Texas' unstructured sentencing scheme is unconstitutional because it does not permit meaningful appellate review, which is not only required by Texas statute but is also a prerequisite to a constitutionally implemented capital sentencing scheme. Because the *Penry* statutory special

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The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Section (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

issue is open-ended -- not enumerating a list of mitigating and aggravating factors and not requiring jurors to make specific findings in this regard -- the Court has no way of knowing which aggravating and mitigating factors jurors considered. The Court, therefore, has no way of knowing whether the sentencer considered all of the constitutionally relevant mitigating evidence offered at trial, making meaningful appellate review impossible.

The U.S. Supreme Court has recognized that an appellate court is in a virtually impossible position to review a jury's consideration of mitigating and aggravating evidence without knowing which factors were considered. *Sawyer v. Whitley*, 505 U.S. 303, 112 S. Ct.2514(1992) (noting how difficult a task a reviewing court faces in assessing how jurors reacted to mitigating and aggravating evidence, particularly considering the breadth of those factors that a jury must be allowed to consider without knowing how jurors actually considered the totality of the evidence). The point in *Sawyer* and in Petitioner's case is that without actually knowing whether and how a particular jury considered evidence during a capital sentencing phase, it is difficult to assess the jury's decision making. Petitioner challenges the decision of the Texas Court of Criminal Appeals to refuse to provide the proper guidance in weighing mitigating versus aggravating circumstances as being contrary to clearly established federal law, and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

D. CLAIM FOUR

THE TEXAS CAPITAL SENTENCING STATUTE'S DEFINITION OF "MITIGATING EVIDENCE" IS UNCONSTITUTIONAL BECAUSE IT LIMITS THE EIGHTH AMENDMENT CONCEPT OF

"MITIGATION" TO FACTORS THAT RENDER A CAPITAL DEFENDANT LESS MORALLY "BLAMEWORTHY" FOR COMMISSION OF THE CAPITAL MURDER.

At the punishment phase the trial court instructed the jury, pursuant to TEX. CRIM. PROC. CODE ANN. Article 37.071, §2(f) (4): "mitigating evidence is evidence that a juror might regard as reducing the defendant's blameworthiness," (CR 315)

As presently written, the Texas Capital sentencing statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE. CRIM. PROC. ANN. Article 37.07 1 §2(f) (4) and 37.0711 §3(f)(3). Petitioner contends that the statutory definition is unconstitutionally narrow under the Eighth and Fourteenth Amendments to the United States Constitution, and is in violation of clearly established federal law. The United States Supreme Court has held that constitutionally relevant mitigating evidence is not simply that type of mitigating evidence that relates to a capital defendant's moral culpability or blameworthiness for the crime, but also includes any mitigating evidence relevant to a defendant's character, history, or circumstances of the crime that militates in favor of a life sentence. *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669 (1986). "The fundamental respect for humanity underlying the Eight Amendment, [mandates the] . . . consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Roberts (Hariy) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Evidence about a defendant's background and

character is relevant because of the belief, held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. *California v. Brown*, 479 U.S. at 545 (J. O'Connor concurring, 1987). This is accomplished only through a process which requires the sentencer to consider in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The *Lockett* principle "is the product of considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. *California v. Brown*, 479 U.S. at 562 (1987).

The underlying principle in *Lockett* and *Eddings* is that punishment should be directly related to the personal culpability of the criminal defendant. *Penny v. Lynaugh*, 492 U.S. 302, 109 5. Ct, 2934 (1989). Thus, jury instructions must be sufficient to provide the jury "with a vehicle for expressing its reasoned moral response to that evidence in rendering its decision." *Penny v. Lynaugh Id.* at 38. Furthermore, an individual juror must be free to consider a mitigating factor, regardless of whether other members of the jury agree as to its existence. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990) (each juror must be permitted to consider and give effect to mitigating evidence). In other words, it is not enough "simply to allow the defendant to present mitigating evidence to the sentencer, rather there must not be any impediment - - through evidentiary rules, jury instructions or prosecutorial argument - - to the sentencer's full consideration and ability to give effect to mitigating evidence." *Penry v. L. naugh*, 492 U.S. 302 at

327, S. Ct. 2934 (1989). Numerous types of constitutionally relevant mitigating evidence thus have nothing to do with a capital defendant's moral culpability or blameworthiness - such as a history of positive character traits, kindness shown toward children, or artistic talent. Although the statutory special issue speaks of "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," Article 37.071, § two (e), the statute's limited definition of "mitigating evidence," violates the Eighth and Fourteenth Amendments to the Unites States Constitution.

E. CLAIM FIVE

THE STATUTORY "*PENRY*" SPECIAL ISSUE IS FACIALLY UNCONSTITUTIONALLY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT PERMITS THEY VERY TYPE OF OPEN-ENDED DISCRETION CONDEMNED BY THE UNITED STATES SUPREME COURT IN *FURMAN V. GEORGIA*

In *Furman*, the United States Supreme court struck down the death penalty as it was then being administered. The Court's chief complaint was that of arbitrariness. In particular, the Court condemned the open ended, unstructured discretion that was given to capital sentencing juries. *Furman v. Georgia*, 408 U. S. 238, 92 S. Ct. 2726 (1972); See also *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct, 2909 (1976).

Pursuant to *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989), the Texas Legislature enacted a new capital sentencing scheme that sought to cure the constitutional defect in the former capital sentencing scheme identified by the United States Supreme Court in

Penry. The present statutory "*Penry*" special issue contained in TEX. CRIM. PROC. CODE ANN. Articles 37.071 and 37.0711 (Vernon 1994), states:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, including the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Open-ended, unstructured capital sentencing instructions - - such as Texas' *Penry* special issue - - have been condemned by the United States Supreme Court because they violate the Eighth and Fourteenth Amendments to the United States Constitution. *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Kennedy, J.) ("In holding that the jury had to be free to deem *Penry*'s mental retardation and sad childhood for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned."); *Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892 (1993) (Thomas, J., concurring) ("*Penry*" reintroduces the very risks that we had sought to eliminate through the simple directive that states in all events provide rational standards for capital sentencing.") In dicta, Justice Thomas has explicitly suggested that the type of sentencing scheme in operation at Petitioner's trial violates *Furman*. The Eighth Amendment requires submission of a charge that adequately structures the jury's sentencing discretion regarding mitigating and aggravating factors. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976) (discussing Georgia's post-*Furman* Capital sentencing statute). Petitioner contends that his

Eighth and Fourteenth Amendment rights were violated, and that the decision of the Texas Court of Criminal Appeals on this question is in violation of the Eighth and Fourteenth Amendments, and of clearly established federal law.

F. CLAIM SIX

THE STATUTORY "*PENRY*" SPECIAL ISSUE IN THE TEXAS CODE OF CRIMINAL PROCEDURE ART. 37.071 IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PLACE THE BURDEN OF PROOF ON THE STATE REGARDING AGGRAVATING EVIDENCE. IT THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Eighth Amendment to the United States Constitution requires the State to prove the existence of aggravating factors during the capital punishment phase. *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990) (State's "method of allocating the burdens of proof" during capital sentencing phase cannot "lessen the State's burden ... to prove the existence of aggravating factors"). *Walton* applies to the Texas *Penry* special issue because the issue is a conduit for aggravating as well as mitigating factors. By asking jurors to determine whether there are sufficient mitigating circumstances, the statutory special issue in effect tells jurors to consider any possible aggravating factor that may outweigh the mitigating factors present in the case. Although the statute does not explicitly use the term "aggravating circumstance," clearly that is how a reasonable juror would interpret the statute. *Johnson v. Texas*, 509 U.S. 350, 113 5. Ct. 3658 (1993). Because the statute is silent on whether the State or the defense has the burden of proof on aggravating factors, and, moreover, because the language of the

special issue implies that the burden to disprove aggravating circumstances is on Petitioner, the statute is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner contends that the decision of the Texas Court of Criminal Appeals on this question is in violation of the Eighth and Fourteenth Amendments, and of clearly established federal law.

G. CLAIM SEVEN

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS UNCONSTITUTIONAL BECAUSE ITS 12-10 RULE MAY ARBITRARILY FORCE THE JURY TO CONTINUE TO DELIBERATE AFTER A JUROR VOTED TO ANSWER A SPECIAL ISSUE IN FAVOR OF PETITIONER. THE SENTENCING STATUTES' FAILURE TO INFORM THE JURY THAT A SINGLE HOLDOUT JUROR ON ANY SPECIAL ISSUE WOULD RESULT IN AN AUTOMATIC LIFE SENTENCE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Article 37.071 of the Texas Code of Criminal Procedure does not allow the trial judge to inform the jurors that a failure to agree on the special issues will force the trial judge to sentence a defendant to life in prison. Article 37.071 allows an instruction that merely states that a life sentence will be imposed if ten or more jurors vote for special issue number two. Counsel is prohibited from informing the jurors that a deadlocked jury will result in a life sentence. *Draughton v. State*, 831 S.W. 2d 331 (Tex. Crim. App. 1991). It is arbitrary and capricious, however, to prevent jurors from sentencing a defendant to life in prison if each juror believes that a

different mitigating circumstance made the death penalty inappropriate. *Mckoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990); *Mills v. Maryland*, 486 U.S. 367, 10 (1988). Because jurors are instructed that they are not required to agree on the evidence that supports their answers to the special issues, the 12-10 rule is unconstitutional since it may still arbitrarily force the jury to continue deliberating after one juror voted to answer special issue two in favor of Petitioner. Petitioner's jury was not instructed about Texas' "one holdout juror" rule.

Article 37.071, §2(a), violates the Eighth and Fourteenth Amendments to the United States Constitution. *Andres v. United States*, 33 U.S. 740, 752, 68 S. Ct. 880 (1948). *Caldwell v. Mississippi*, 472 U.S. 320,105 S. Ct. 2633 (1985) (Eighth Amendment violation if capital sentencing jury not informed of relevant state sentencing law); *Dugger v. Adams*, 489 U.S. 401, 109 5. Ct. 1211(1989) ("To establish a *Caldwell* violation the defendant must necessarily show that the instructions to the jury improperly described local law.") Petitioner contends that the decision of the Texas Court of Criminal Appeals on this question is in violation of the Eighth and Fourteenth Amendments, and of clearly established federal law.

VII.

PRAYER FOR RELIEF

Wherefore, Mr. Weathers prays that this Court vacate Mr. Gamboa's sentence of death, and impose a sentence of life. In the alternative, he prays that this Court vacate his sentence and remand the matter to the Texas state court for a new sentencing trial.

Respectfully submitted,

_____/s/_____
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Texas Bar No. 00794533

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of February, 2016 I served a copy of the foregoing by forwarding a copy via the U.S Postal Service to Mr. Jay Clendenin, Office of the Attorney General, P.O. Box 12548 Capitol Station, Austin, TX 78711

_____/s/_____
JOHN J. RITENOUR, JR.

LIST OF EXHIBITS

1. CR, 6. (Indictment)
2. CR, 343 (Criminal Docket Sheet)
3. CR, 283 (Jury Verdict Form – G/I)
4. CR, 308-311 (Jury Verdict Form - Punishment)

5. CR 313-314 (Judgment)
6. Writ Appointment Order, Jay Brandon (no record page number assignment)
7. Motion for Extension of Time to File Writ (no record page number assigned)
8. District Clerk Acknowledgment of Receipt of Application for Writ of Habeas Corpus (no record page number assigned)
9. Mr. Brandon's Motion to Withdraw as Habeas Counsel (no record page number assigned)
10. Order Appointing Richard Langlois as habeas counsel (no record page number assigned)
11. *Ex parte Gamboa*, WR-78,1110-1, 2015 Tex. Crim. App. Unpub. LEXIS 127 (Tex. Crim. App. Feb 4, 2015, Unpublished)

APPENDIX N

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. WR-78,111-01

EX PARTE JOSEPH GAMBOA

ON APPLICATION FOR WRITE OF HABEAS CORPUS CAUSE NO. 2005-CR 7168A IN THE 379TH DISTRICT COURT BEXAR COUNTY

Per curiam. HERVEY, J., RICHARDSON, J., and YEARY, J., not participating.

ORDER

This is a post conviction application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.[1]

[1] Unless otherwise indicated, all references to Article are to the Texas Code of Criminal Procedure.

Applicant was convicted in March 2007 of capital murder committed in June 2005. TEX. PENAL CODE ANN. § 19.03(a). Based on the jury's answers to the special issues set forth in Article 37.071, sections 2(b) and 2(e), the trial court sentenced him to death. Art. 37.071, § 2(g). This Court affirmed applicant's conviction and death sentence. *Gamboa v. State,* 296 S.W. 3d 574 (Tex. Crim. App. 2009).

Applicant presented twenty-nine grounds in his application challenging both his conviction and his sentence. The trial court held a live evidentiary hearing to hear from both of applicant's trial counsel and other witnesses. As to all of the allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 4TH DAY OF FEBRUARY, 2015.

Do Not Publish

APPENDIX O

NO. 2005-CR-7168A-W1

EX PARTE	§	IN THE DISTRICT
	§	COURT
	§	
	§	379TH DISTRICT
	§	COURT OF
JOSEPH GAMBOA	§	
	§	BEXAR COUNTY,
	§	TEXAS

APPLICATION FOR POST-CONVICTION
WRIT OF HABEAS CORPUS IN
A DEATH PENALTY CASE,
PURSUANT TO ARTICLE 11.071,
CODE OF CRIMINAL PROCEDURE

Returnable to the Court of Criminal Appeals
at Austin

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TABLE OF CONTENTS

[omitted]

GROUNDS FOR RELIEF

GROUND FOR RELIEF ONE
APPLICANT RECEIVED INEFFECTIVE

ASSISTANCE OF COUNSEL UNDER THE TEXAS AND UNITED STATES CONSTITUTIONS WHEN HIS TRIAL ATTORNEYS FAILED TO INVESTIGATE SUFFICIENTLY TO UNCOVER EVIDENCE OF HIS INNOCENCE.

GROUND FOR RELIEF TWO
THE TRIAL COURT ERRED IN *SUA SPONTE* EXCLUDING A QUALIFIED JUROR OVER DEFENSE OBJECTION, AFTER THE JUROR HAD ALREADY BEEN SELECTED.

GROUND FOR RELIEF THREE
THE TRIAL COURT ERRED IN REFUSING TO REMOVE A JUROR WHOSE SON WAS ARRESTED DURING TRIAL, OVER DEFENSE OBJECTION OF IMPLIED BIAS.

GROUND FOR RELIEF FOUR
THE TRIAL COURT ERRED IN APPLYING DIFFERENT STANDARDS TO THESE TWO SITUATIONS, TO DEPRIVE THE DEFENSE OF ONE ACCEPTABLE JUROR AND IMPOSE AN OBJECTIONABLE JUROR ON THE DEFENSE IN VIOLATION OF APPLICANT'S RIGHT TO THE EQUAL PROTECTION OF LAWS.

GROUND FOR RELIEF FIVE
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IF HIS ATTORNEYS FAILED TO PRESERVE THE ERROR OF *SUA SPONTE* DISMISSAL OF A QUALIFIED JUROR.

GROUND FOR RELIEF SIX
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL

ATTORNEYS FAILED TO OBJECT THAT HE WAS DENIED THE EQUAL PROTECTION OF THE LAW BY THE TRIAL COURT'S DIFFERENT RULINGS.

GROUND FOR RELIEF SEVEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE ON APPEAL WHEN HIS ATTORNEYS DID NOT RAISE THIS "DIFFERENT STANDARDS TO DIFFERENT JURORS" CLAIM ON DIRECT APPEAL, AS WELL AS A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESERVING THE ERROR.

GROUND FOR RELIEF EIGHT
APPLICANT RECEIVED INEFFECTIVE ASSITANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO REQUEST A CONTINUANCE TO OBTAIN EXPERT TESTIMONY CONCERNING EYEWITNESS IDENTIFICATION AFTER THEY WERE SURPRISED BY WITNESS' IDENTIFICATIONS OF APPLICANT IMMEDIATELY PRIOR TO THE BEGINNING OF TRIAL.

GROUND FOR RELIEF NINE
THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EYEWITNESS IDENTIFCATION THAT WAS TAINTED BY SUGGESTIVE IDENTIFICATION PROCEDURES, AS ADMITTED BY STATE WITNESSES.

GROUND FOR RELIEF TEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO HAVE HIS MENTAL CONDITION ADEQUATELY TESTED TO

PRESENT A COMPLETE MITIGATION CASE TO THE JURY TRYING APPLICANT.

GROUND FOR RELIEF ELEVEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO INVESTIGATE FULLY ENOUGH APPLICANT'S FAMILY AND OTHER BACKGROUND IN ORDER TO PRESENT A COMPLETE MITIGATION CASE TO THE JURY TRYING APPLICANT.

GROUND FOR RELIEF TWELVE
THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONVICT OF CAPITAL MURDER ON EITHER OF TWO SEPARATE THEORIES OF GUILT, LEAVING THE POSSIBILITY THAT APPLICANT WAS CONVICTED BY A LESS THAN UNANIMOUS JURY, IN VIOLATION OF THE TEXAS AND U.S. CONSTITUTIONS.

GROUND FOR RELIEF THIRTEEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO THE JURY CHARGE BECAUSE IT ALLOWED FOR A NON-UNANIMOUS VERDICT.

GROUND FOR RELIEF FOURTEEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS COUNSEL ON DIRECT APPEAL FAILED TO RAISE THIS INEFFECTIVE ASSISTANCE CLAIM IN REGARD TO THIS CHARGE ERROR, AND FURTHER FAILED TO MAKE THIS CLAIM AS ARGUED HEREIN.

GROUND FOR RELIEF FIFTEEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS COUNSEL FAILED TO MAKE A PROPER ARGUMENT AS TO THE HARM CAUSED BY THIS CHARGING ERROR.

GROUND FOR RELIEF SIXTEEN
APPLICANT WAS DEPRIVED OF HIS RIGHTS UNDER THE TEXAS AND UNITED STATES CONSTITUTIONS TO GRAND JURY INDICTMENT WHEN THE GRAND JURY WAS ALLOWED TO VOTE TO APPROVE EITHER OF TWO SEPARATE THEORIES OF APPLICANT'S GUILT OF CAPITAL MURDER.

GROUND FOR RELIEF SEVENTEEN
APPLICANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO THE GRAND JURY'S BEING PRESENTED WITH TWO SEPARATE THEORIES OF GUILT.

GROUND FOR RELIEF EIGHTEEN
APPLICANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS ON DIRECT APPEAL FAILED TO RAISE THESE CLAIMS REGARDING THE GRAND JURY INDICTMENT.

GROUND FOR RELIEF NINETEEN
THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AFTER THE PROSECUTION DELIBERATELY ELICITED TESTIMONY THAT APPLICANT HAD COMMITTED AN EXTRANEOUS OFFENSE.

GROUND FOR RELIEF TWENTY
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE WHEN HIS ATTORNEYS FAILED TO MOVE FOR A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT.

GROUND FOR RELIEF TWENTY-ONE
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS ATTORNEYS FAILED TO RAISE THE ISSUE OF PROSECUTORIAL MISCONDUCT IN HIS DIRECT APPEAL.

GROUND FOR RELIEF TWENTY-TWO
APPLICANT'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT A VOTE BY ONE OF THEM WOULD RESULT IN A LIFE SENTENCE, DESPITE THE STATUTORY "10-12" DEATH SENTENCING SCHEME.

GROUND FOR RELIEF TWENTY-THREE
THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO INSTRUCT THE JURY THAT THERE IS NO PRESUMPTION IN FAVOR OF DEATH, EVEN IF THEY FOUND APPLICANT TO BE A FUTURE DANGER IN ANSWER TO SPECIAL ISSUE NUMBER ONE, AND THAT SPECIAL ISSUE NUMBER THREE, REGARDING MITIGATING CIRCUMSTANCES, IS TO BE TAKEN UP AND CONSIDERED INDEPENDENTLY, WITHOUT REGARD TO THE JURY'S FINDING ON SPECIAL ISSUE NUMBER ONE.

GROUND FOR RELIEF NUMBER TWENTY-FOUR
THE TRIAL COURT VIOLATED THE FIRST, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO DEFINE THE WORD "MILITATES" SO AS TO PRECLUDE CONSIDERATION OF APPLICANT'S AGE, RACE, SEX, NATIONAL ORIGIN, RELIGION, POLITICAL VIEWS OR SEXUAL ORIENTATION AS A FACTOR SUPPORTING A DEATH SENTENCE.

GROUND FOR RELIEF NUMBER TWENTY-FIVE
THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE THE WORD "PROBABILITY" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL.

GROUND FOR RELIEF NUMBER TWENTY-SIX
THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE "CRIMINAL ACTS OF VIOLENCE" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL.

GROUND FOR RELIEF NUMBER TWENTY-SEVEN
THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE "CONTINUING THREAT TO SOCIETY" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL.

GROUND FOR RELIEF NUMBER TWENTY-EIGHT

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION TO PRECLUDE THE DEATH PENALTY AS A SENTENCING OPTION DUE TO EQUAL PROTECTION VIOLATIONS.

GROUND FOR RELIEF NUMBER TWENTY-NINE
THE TRIAL COURT ERRED WHEN IT REFUSED TO HOLD THAT ARTICLE 37.071 IS UNCONSTITUTIONAL BECAUSE A GRAND JURY HAD NOT CONSIDERED AND ALLEGED IN AN INDICTMENT THE FACTS LEGALLY ESSENTIAL TO APPLICANT'S CONVICTION AND SENTENCE OF DEATH.

INDEX OF AUTHORITIES

[omitted]

CONFINEMENT AND RESTRAINT

Applicant Joseph Gamboa is unlawfully confined and restrained of his liberty by the Director of the Texas Department of Corrections – Institutional Division, pursuant to a judgment of conviction from the 379th District Court of Bexar County in Cause No. 2005-CR-7168A, for the offense of capital murder. Punishment was assessed at death. (RR38 68)

A copy of the judgment is attached as Exhibit A, Appendix Volume.

STATEMENT OF THE CASE

Applicant Joseph Gamboa was charged by indictment with capital murder. (CR 6) Applicant pleaded not guilty and was tried by a jury. (RR29 12) The Honorable Judge Bert Richardson of the 379th District Court presided. The

jury found Applicant guilty of capital murder as charged in the indictment. (RR33 85) After the punishment phase the jury answered "yes" to special issues numbers one and two and "no" to the mitigation special issue. (RR38 65-66) In accordance with those answers, the trial court sentenced Applicant to death. (RR38 68)

A motion for new trial was filed and overruled by operation of law. (CR 317) Automatic appeal to the Court of Criminal Appeals followed. Angela J. Moore, Chief Public Defender of Bexar County, was appointed to represent Applicant on direct appeal. (CR 334) Also appearing in that appeal was Assistant Appellate Public Defender Roderick B. Glass. Oral argument was held in the Court of Criminal Appeals on September 10, 2008.

Undersigned counsel Jay Brandon was appointed to represent Applicant in this application. The State's brief on direct appeal was filed July 14, 2008. The trial court granted one 90-day extension of time for the filing of this application, making this application due on November 27, 2008. This application is timely filed prior to that date.

STATEMENT OF FACTS

This case concerned a shooting in a bar during a robbery. Three people were shot, including the bar owner. Two of the victims died. One survived to testify. Two other eyewitnesses also testified.

Denise Koger had worked at the bar, Taco Land, for three years. (RR29 34) Douglas Morgan had worked there about a year and a half. (RR29 36) On the night of June 23, 2005, just after the Spurs had won a world championship, the bar opened, some time between ten and eleven p.m. (RR29 38) No band was playing that night, and there weren't many customers. (RR29 47-48)

Two Hispanic men Denise didn't know came in. (RR29 49) In court she identified Applicant Joseph Gamboa as one of them.[1] She identified him as the man in the maroon shirt, while his companion had worn a white Spurs shirt. (RR29 50, 51) The men got beer, sat near the bar, and asked for songs on the juke box. (RR29 52) They were the only customers. The other man (co-defendant) played pool while the red-shirted robber walked around. (RR29 54) At some point Applicant (red shirt) began talking to Ramiro Ayala, the bar owner, who said to Applicant "No, fuck you." (RR29 S6) Applicant shot him, and Ayala fell to the floor.

Koger and Douglas Morgan hid behind the bar, and heard another shot. The co-defendant told Applicant to get the money. (RR29 57) Applicant lifted Morgan from the floor to the cash register. But Morgan couldn't open the cash register. The robber shot him as well, and pulled Koger up by her hair. (RR29 58)

With the partner still telling him what to do, the robber got Koger to open the cash register and give him money. (RR29 58) The other man said, "Make her get the rest of it. Make the bitch get the rest of it." (RR29 58) So Koger opened a drawer where the larger bills were kept. As she was taking out the money, the red-shirted robber shot her. (RR29 59) She fell to the ground, and felt herself kicked twice. (RR60) Then the shooter picked Morgan up from the floor and shot him again. (RR29 60) The robbers ran out and she called 911. (RR29 61) She was in the hospital for ten days, had surgeries, but, obviously, survived. (RR29 63)

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[1] She had failed to identify Applicant in photo lineups, and only had for the first time immediately before the trial started, after the State's opening statement (RR29 24)

Koger testified that this was the first day she had identified Applicant. (RR29 72, 73)

The next witness was Paul Mata, one of the eyewitnesses. Prior to his testimony, the defense also objected to his being allowed to identify Applicant in court. Mata had identified Applicant one previous time, when he was wearing an orange jail coverall. (RR29 98) The trial court overruled the objection. (RR29 99)

Mata testified that on the night in question he went to Taco Land after the Spurs game. (RR29 101) He went with a friend named Ashley Casas. There were maybe six people in the bar that night. (RR29 102) Paul and Ashley were playing pool when a stranger came up and asked to play; he said his name was Rick. (RR29 103-04) He was with another person, but Mata didn't see that guy very well. (RR29 104) Mata identified "Rick," the man in the red shirt, as Applicant Joseph Gamboa. (RR29 106)

Rick seemed unfocused. He played for about ten minutes, then went to talk to the bar owner, Ramiro. (RR29 108, 109) Then Rick heard a gunshot, and saw Rick pull out a gun. (RR29 110) Mata grabbed Ashley and pulled her down to the floor. Then he and she went into another room and locked the door behind them. (RR29 111) They heard more shots and stayed where they were.

After a few minutes, Mata emerged, found the robbers gone and Ramiro on the floor, and tried to help the victims. (RR29 112, 115-16) When police arrived, he pointed out the beer can and pool stick the shooter had touched. (RR29 117)

A few days later, Mata said he saw Applicant on television, and was sure he was the shooter from Taco Land. (RR29 117-19)

The defense reserved the right to cross-examine this witness later. (RR29 120-21)

Next to testify was Ashley Casas. Outside the jury's presence, it was established that she had been unable to identify Applicant from a photo lineup. (RR29 123-24) However, in court she identified Applicant as the shooter. (RR29 126-27) She said she remembered him from Taco Land and "I remember him from today." (RR29 126-27)

Before the jury she testified about the night of the murders. She went to Taco Land near midnight, and "purchased a few beers." (RR29 130) She noticed two other guys, and identified Applicant, in court, as the one in the red shirt that night. (RR29 133) He played pool with Paul Mata, and was calm except for one time when he got mad at Paul suddenly. (RR29 135, 136) After a while this man went to the bar. They heard a gunshot, then saw the man in the red shirt with a gun in his hand, pointed at Ramiro. (RR29 137-38)

She hid on the ground behind the pool table, heard "many" more shots fired, then she and Paul hid in a closet. (RR29 138, 139-41) When she came out she saw Ramiro down, Denise crawling, and Douglas standing. (RR29 142)

On cross-examination Ashley testified that today, twenty months after the event, was the first time she had identified Applicant. (RR29 146-47) She had seen two or three photo lineups with pictures of Applicant, but couldn't identify him. (RR29 147)

All the rest of the State's witnesses at guilty-innocence were police officers or other public officials. A patrol officer testified that the description given by Paul Mata was "kind of vague," and Ashley Casas couldn't give much information at all. (RR29 159, 161) A detective and evidence technicians testified to collecting evidence

including the pool cue, beer can, and blood samples. (RR30 12, 21-2)

Sergeant John Slaughter was the lead detective on the case. (RR30 72) He discussed other theories he pursued, including a witness's statement that someone named "Tiny" had been after Denise Koger. (RR30 80, 81) He also received multiple Crimestoppers tips. (RR30 82) After one of these, he developed two suspects, Applicant and Jose Najera. (RR30 91) He showed photo lineups with those two in them to Denise Koger once, then another day. (RR30 93-4, 97) She picked out Najera "almost immediately." (RR30 99) But she didn't identify Applicant, ever. (RR30 144, 152) He talked to a woman named Anita Exon, who had been at Taco Land the night of the shootings but had left before the shooting started. (RR30 113-16)

Slaughter also testified that Ashley Casas couldn't identify Applicant from photo lineups. (RR30 153) Neither could another witness, Robert Flores. (RR30 154)

A fingerprint examiner testified that there were no legible fingerprints on the beer can. (RR31 8) However, one from a pool cue was legible, and matched Applicant's fingerprints. (RR31 9, 14) Two prints lifted from the cash register also were not legible. (RR31 14, 15)

Catherine Haskins, testifying for the first time ever as a DNA analyst, said that she developed a DNA profile from the beer can that was submitted to her. (RR31 23-4, 31-2) She compared this to swabs from Applicant and Jose Najera. (RR31 32-3) Najera was excluded as the person who had left material on the beer can; Applicant was not excluded. (RR3l 33) She did not find any DNA material on the two pool cues submitted to her. (RR31 35-6)

A firearms examiner testified that the bullet taken from Ramiro Ayala's body during his autopsy matched another fired bullet submitted to him. (RR3l 46, 49, 52) However, he was never given a gun to compare to the bullets. (RR3l 56)

Dr. Randall Frost, the medical examiner, performed the autopsies on both Ramiro Ayala and Douglas Morgan. (RR3l 85) Morgan was in the hospital about three weeks before he died. (RR3l 89) His gunshot wounds were actually healing, but he had other medical problems having nothing to do with the shooting. (RR31 91, 90) Two of those problems that contributed to his death were advanced cirrhosis of the liver and seizure disorder. (RR3l 118)

Ramiro Ayala's cause of death was a single gunshot wound, a contact wound. (RR31 96, 108, 110)

During Dr. Frost's testimony a female spectator yelled something which the judge heard as "You did that for 200 dollars." (RR31 100) She screamed it loudly and was crying. The defense moved for a mistrial, which was denied. (RR3l 100, 101) The trial court instructed the jurors to disregard the outburst. (RR3l 105-06)

The State rested. (RR31 118)

In an unusual move, the defense called SAPD detective Roy Rodriguez to testify to the facts of the photo lineups that were shown to witnesses. (RR32 3) Rodriguez had shown photo spreads to Paul Mata and Ashley Casas which included a photo of Applicant. (RR32 6, 8, 9) Neither identified anyone. (RR32 21)

The witness testified that showing a photo of a suspect to a witness repeatedly is suggestive. (RR32 18) But he did. On July 2nd he again showed Mata a photo spread that included Applicant. (RR32 22, 23) This time

Mata said he saw two people who looked familiar to him. (RR32 25) The detective said, "Of the two, which one do you recognize as the one that was in the bar that night that did the murder." (RR32 25) Mata then pointed out Applicant.

Then, while the prosecutor was questioning the witness she said, "And he began to cry, didn't he?" to which the witness answered, "Yes, ma'am." In answer to "What did he tell you?" the witness said, "He said he had seen this person in a Crime Stoppers on an unrelated shooting that occurred like the following weekend." (RR32 37) The defense objected (RR32 37), and after a discussion outside the jury's presence the court denied a request for a mistrial. (RR32 44) The trial court then instructed the jury to disregard the question and answer. (RR32 47-48)

Next the defense called another detective, Jimmy Willingham. (RR32 51) After discussing in general identification procedures and guidelines, the detective testified that he had shown a photo lineup to Paul Mata. (RR32 56, 57-58, 60) Mata both identified Applicant and said he had seen that lineup before. (RR32 64) So, the detective testified, the identification procedure was suggestive. (RR32 65) He said he hadn't done this on purpose, he didn't know Mata had already seen the photo array. (RR32 66)

The defense recalled Paul Mata to cross-examine him. (RR32 87) Mata testified that Detective Rodriguez had shown him a photo spread, and that Mata "recognized" two of the photos. (RR32 88) He then identified Applicant's photo, but said it wasn't a positive identification. (RR32 89, 91, 93) He had also failed positively to identify Applicant in court a little more than a month before trial. (RR32 94)

Mata acknowledged that in describing the robbery suspect he hadn't mentioned tattoos, because he hadn't noticed any. (RR32 103, 105) In court he agreed that Applicant in fact has lots of tattoos. (RR32 105)

The defense also called Anita Exon, who had told Detective Slaughter that she was at Taco Land the night of the murders. (RR32 112) She remembered the two guys playing pool. (RR32 113-14) However, the two guys did not leave before she did, even though she may have told Slaughter that they did. (RR32 116)

In fact, she had. Detective Slaughter was recalled and testified that Anita Exon had told him that the two men playing pool, one wearing a white shirt, one a red shirt, left right before she did, at least an hour before the shootings. (RR32 122)

The defense rested. (RR32 126) After deliberating, the jury found Applicant guilty as charged in the indictment. (RR33 85)

Before the punishment phase began there was another conference, because one of the jurors had a son who had been arrested overnight. (RR34 3, 5) The juror was brought to the courtroom without the other members present, and said she could still be fair. She had left her son in jail because he needed a good lesson. (RR34 5)

There was another conference over the fact that another juror had overheard a prosecutor and a police detective discussing the case briefly. (RR34 6)

The defense moved for a mistrial on both issues, which was denied. (RR34 20, 21)

Punishment Phase

Both sides offered extensive evidence on the punishment issues.

Brent Houdman, a juvenile probation officer, had supervised Applicant on juvenile probation for possession of marijuana in 1997 and '98. (RR34 33) He testified that Applicant was non-compliant with the conditions of his probation, mostly because his family moved so often. (RR34 44) As a result Applicant failed to report, and missed school as well as counseling and substance abuse classes. (RR34 46-7) This first witness began one of the themes of the punishment phase: Applicant did not get the advantage of services offered because of his unstable family life. (RR34 44-45, 76) Houdman agreed that parental involvement is important to a probationer's success. (RR34 59)

Two officers testified that in 1999 Applicant was arrested driving a stolen car. (RR34 82, 85, 88)

In 2000, when Applicant would have been 23, Detective Robert Breen was watching a convenience store. (RR34 91) He saw two guys break a window and go into the store. (RR34 105) The two stole beer and chips, and were arrested. (RR34 108) Applicant was one of the two. (RR34 111) The detective characterized this as a "beer run." (RR34 112)

Applicant's sister Victoria, who proved to be a hostile witness for the State, testified that she had an incident with her brother in 2003 that resulted in his arrest. (RR34 116, 119)

A sheriff's deputy testified more concerning this event, that while on patrol he was flagged down by Victoria Gamboa and her boyfriend. (RR34 16) Both were bloody. (RR34 17) Applicant had accused his sister of taking a ring from him, and had hit her in the back of the head. (RR34 19, 20) The deputy arrested Applicant and charged him with two counts of assault and one of escape. (RR34 21, 30-31)

There was testimony of Applicant's possible involvement in a drive-by shooting in 2004. A woman testified that she was at home when she heard shots. (RR35 36) She saw a car outside carrying two people who were shooting at her house. (RR35 37) She called 911, and police arrived. (RR35 41)

A deputy Gamboa (no relation) stopped a car matching the description of the one involved in the drive-by. (RR35 49, 50) The driver, Applicant, had no license or insurance. (RR35 51) There was a strong smell of marijuana in the car. (RR35 52) In a door panel, the deputy found marijuana and a handgun. (RR35 53) Another deputy from the evidence unit recovered bullets, a small amount of marijuana, and a weapon. (RR35 57, 60, 62, 63)

Yet another deputy recovered shell casings at the house. (RR35 71) They were .25 caliber, the same as bullets seized from Applicant. (RR35 74)

A fingerprint classifier testified to Appellant's conviction records. (RR35 82) He was convicted of burglary of a building for the convenience store break-in. (RR35 86) He also had convictions for escape and failure to identify. (RR35 86-87) Those were Applicant's only previous convictions.[2]

Deeshawn Phelps testified that on Saturday night two days after the shootings at Taco Land, she and a friend went to the Prime time night club. (RR35 114) At about 2 a.m., they were talking to three guys in the parking lot when a car pulled up. (RR35 116, 117) The

[2] So the evidence of the drive-by shooting did not result in a conviction. As is apparent from the summary, that evidence was not strong enough to prove Applicant's guilt beyond a reasonable doubt, except possibly of possession of marijuana.

passenger got out, went to the back of the car, fired a shot, and yelled to give him money. (RR35 118) Phelps ran and the gunman, whom she identified as Applicant, followed her. (RR35 119, 120) Leaving her purse on the ground, she ran into an alley and no one followed. (RR35 121) A detective testified that both women identified Applicant from a photo lineup. (RR35 136, 138, 139)

On the same night at about 2:30, a young woman was putting gas in her car at a Shell station. (RR35 158) A short, slender, young Hispanic man, Applicant, pulled up and asked her to go to a party with him. (RR35 159, 160) When she declined, Applicant said he was going to shoot another man in the parking lot.(RR35 162) A moment later she heard two gunshots and a man say, "He shot me."

Bruce Robinson, the man in the Shell station parking lot, was sweeping up that night when a man with a gun came up to him, demanded money, then shot him and ran away. (RR35 143, 144) Robinson identified Applicant as this shooter. (RR35 146)

That same night, a young woman testified that she had been at a neighborhood bar. (RR36 4-5) A blue Corvette pulled up to her house. (RR36 6) Then a young guy put a gun to her head and was telling the guy in the Corvette to give him the car. (RR36 6-7) The Corvette driver drove away, and the other young man fired at him. (RR36 7) The woman identified Applicant as the man with the gun. (RR36 8) She got away from him and hid, and he shot at her, then at her mother. (RR36 9) After he tried and failed to get her into the car with him, he took off. (RR36 11) Later she picked Applicant out of a photo lineup, but only after she saw a single photo of him on a detective's desk. (RR36 14, 21-2)

Julio Cuevas was Applicant's driver on this night. He testified that Applicant got mad about something and had a gun, which Cuevas saw him load. (RR36 55, 56) They left in Cuevas' car, and Applicant told him to drive to the Prime Time night club. (RR36 58) There Applicant got out, shot at some people, and got a woman's purse. (RR36 61) Then they went to the Shell station to get gas, but couldn't, because they had no money. (RR36 63, 64-5) Cuevas also testified that Applicant talked to the woman then shot the man working at the station. (RR36 65, 68)

Cuevas was also driving Applicant during the incident with the Corvette. (RR36 71-9) He testified that he was given immunity in exchange for his testimony, and claimed that he had only acted as Applicant's driver because he was afraid of him. (RR36 81, 90)

A detention officer testified that during the trial Applicant had been involved in fight with another inmate. (RR36 120, 123) The other inmate went to the hospital, and a shank was found on the ground. (RR36 125) The officer also testified that Applicant was compliant when told to stop. (RR36 129)

Two other detention officers testified to the same facts. (RR36 133-35; 140, 142) One of these had seen how the fight started, after the other inmate insulted Applicant's mother. (RR36 147)

One officer also testified that Applicant appeared to have jammed a toilet paper roll into his cell door to wedge it open. (RR36 146) The defense objected to lack of notice of this extraneous offense and once again moved for mistrial. (RR36 150) The trial court found there had been no notice, but denied the mistrial and gave the jury an instruction to disregard the evidence. (RR36 155-57)

There was testimony about two other fights in the jail in which Applicant was involved. (RR36 162, 169-70) In both instances the officers testified they didn't know who had started the fights. (RR36 166, 172)

After all this, the State asked to introduce new evidence that Applicant had been involved in a fight in the holdover cell, during trial. (RR36 188) The prosecutor claimed to have given oral notice of this misconduct to the defense, which the defense denied. (RR36 193, 198) Nevertheless, the trial court denied the defense's objection to this new evidence. (RR36 198) A deputy Timothy Brandon (no relation to Applicant's attorney) testified that Applicant had been in a fight in the holdover cell. (RR 36 203, 204) Applicant appeared to be the aggressor in the fight. (RR36 205) However, he became compliant when the officer entered the cell. (RR37 18)

The State wanted to have Applicant examined psychologically for the issue of future dangerousness. (RR37 3-16) The court disallowed this, saying, "I'm not real excited about the prospect of creating new law since we already have two problems with this case regarding extraneous offenses that have come before the jury that I have had to instruct the jury to disregard." (RR37 4)

The State then tried to introduce evidence that Applicant was member of the Mexican Mafia, but didn't have the necessary evidence to prove this, so the court disallowed it. (RR37 26, 39, 40) A classification officer had asked Applicant if he was a member, to which Applicant replied he was associated with the gang. (RR37 26, 27) The trial court held this was custodial interrogation and sustained the defense objection.

Finally, there were two victim impact witnesses. A music promoter testified what Taco Land had meant to local musicians, that Ram Ayala would help out homeless

people, and what Douglas Morgan was like. (RR37 44, 45, 46-7) Ayala's wife testified that the two of them had five children. (RR37 50) The State rested. (RR37 51)

Dr. Daneen Milam, a defense expert, testified outside the jury's presence that Applicant is "brain impaired." (RR37 69) He scored in the impaired range on six of the seven tests she had given him to measure social functioning. (RR37 69)

The court again denied the State's request to have Applicant interviewed by its own mental health expert. (RR37 87-88)

A custodian of records for San Antonio Independent School District testified that Applicant attended six elementary schools between September of 1988 and May of 1995. (RR37 94) He attended three different middle schools between '95 and 1999. (RR37 94-95) Finally, he began at Edison High School in August of 1999, but withdrew two months later. (RR37 95) She also testified that the district destroys its special education records after seven years. (RR37 95-96)

A records custodian for South San Antonio ISD testified that they also destroy their special education records after a few years. (RR37 100) She introduced Applicant's academic records from the month and a half or so that he was enrolled in a middle school in that district. During that time he attended school thirteen days and was absent eighteen. (RR37 101)

Finally some explanations began to emerge. A custodian of records for the Texas Department of Family and Protective Services authenticated Defendant's Exhibit 10, voluminous records of Child Protective Services referrals to the Gamboa family while Applicant was a child. (RR37 108)

Applicant's second grade teacher testified that he was very quiet and had no behavioral problems, but was "challenged academically." (RR37 115, 116, 123-24) She had seen very little parental involvement, none from his father. (RR37 117-18) She remembered Applicant as being not very clean as a child, and that he flinched from being touched. (RR37 120)

Applicant's oldest sister, Cynthia Gamboa Soto, 34, testified about their home life as children. She had five children, the first when she was fifteen. (RR37 127) She only went through sixth grade in school. (RR37 127) She was one of eleven siblings, all of whom had had difficulties adjusting to life. (RR37 128-32)

The family moved often, sometimes because they were evicted. (RR37 133, 134) There was also "domestic violence" in their home. (RR37 134) As the oldest sister, Cynthia was the substitute parent for the other children, but she left home when Joseph, the Applicant, was only four years old. (RR37 138-39)

The reason the family needed a substitute parent was that the actual parents were neglectful to the point of never being home. They exhibited no parenting skills at all. (RR37 140) They were always out drinking. They would be out of the house sometimes as early as noon and not return until the bars closed. (RR37 140)

Cynthia had a little sister named Felicia, who was only eleven months old when she died. She suffocated. Felicia was sleeping with Cynthia at the time, and fell off the bed into a trash bag full of clothes. (RR37 141) Cynthia didn't hear her, and the baby suffocated. Her parents learned of the death the next afternoon when they woke up. "They just cried a little bit and that was it." (RR37 142) The next night they were back in the bar.

Finally, Cynthia testified that after she left home the oldest brother, Daniel, took care of his siblings. (RR37 143)

The defense's mental health expert witness was Daneen Milam, who had a doctorate in psychology and a post-doctorate fellowship in neuropsychology. (RR37 153) Dr. Milam testified that she didn't have many of Applicant's school records to use in evaluating him, but she gave him a battery of tests herself, including tests for brain damage. (RR37 155, 156)

She also reviewed Child Protective Services records, which comprised an "immense body of data," and met with several family members. (RR37 159-60, 160-61) Linda Mockridge, the mitigation specialist appointed in the case, also interviewed members of Applicant's family, and Dr. Milam used her information as well. (RR37 161)

With that background, Dr. Milam testified that Applicant is "most definitely brain impaired…. He's not mentally retarded, but he's just not doing well." (RR37 165, 166) Specifically, he scored in the impaired range in six of seven tests of social functioning. (RR37 165) "And then in addition to that, the tests that I gave him, his IQ test, his achievement test, other measures of frontal lobe functioning, they are all just in this flat not functioning well range. And that was my finding; that he has – he is brain impaired." (RR37 166)

She testified that Applicant's IQ was 79, which is in the eighth percentile of the population; 92 out of a hundred people of his age would do better than he had on such a test. (RR37 166) He was learning disabled, which was probably genetic. (RR37 167)

Dr. Milam also testified to what the CPS records showed about Applicant's early life. Out of two or three

thousand cases she had reviewed, she had never seen so much CPS documentation on one family. (RR37 175) Applicant had attended sixteen schools in eight years; three in the first grade alone. (RR37 172)

She mentioned the sister who had smothered to death, and that the parents were back in the bar that same night. (RR37 177-78) The family suffered "constant" shut-offs of power and water for lack of payment, plus evictions. (RR37 183) Applicant had twenty-two documented addresses before the age of 18. (RR37 183) Essentially he was raised by his older siblings, who left home by the time he was eight years old. (RR37 184) Then his older brother Alex took over. (RR37 185) Alex was Joseph's caretaker and protector, but was killed when Joseph was 16. (RR37 186)

As an example, one year when Applicant was eight, the Gamboa children were put into a shelter a week before Christmas. They were hungry. (RR37 186-87) Under current CPS standards, the parents' parental rights would have been terminated long before Applicant had reached adulthood. (RR37 187)

After a conference outside the jury's presence, the defense returned to the question of Applicant's intelligence. Dr. Milam had not written a report (RR37 201), but summarized her findings. One test measured his IQ at 68, but "I'm not willing to say he's mentally retarded." (RR37 210) He was "low-functioning and didn't have the tools to get on in life." (RR37 204) His choices were limited. (RR37 219)

The final defense witness was Daniel Gamboa, Jr., the oldest of the eleven siblings. (RR37 228-29) He was still very bitter about his childhood, and had to be instructed several times not to curse when talking about his parents.

This was the Gamboa children's childhood: The lights and water were always being turned off. (RR37 229) There was never any food. (RR37 230) At one time there were two adults and seven kids (including Joseph) living in a one-bedroom efficiency apartment. (RR37 233) There was no food, no money for rent, and his parents were gone all the time. (RR37 231-32) Daniel had to be the parent He took care of "my kids" until he left home at the age of seventeen. (RR37 234) He was scared all the time. (RR37 236-37) The family always lived in the worst parts of town: "Yeah the roughest part of town, the Alazan Courts, the Casiano Homes. Those are places that you don't want to grow up at, man, that all the bad people come from, man." (RR37 237)

And their mother was never around to protect them or take care of them:

> You know her thought was, man, getting in the damn car, man, and shouting at my dad. And tell her, let's go let's go. And all she did was just turned around like she didn't have any no God – sorry. No kids at all. She just got in the car, and just got in the car and looked the other way. And all I could see was, all the kids crying, why you got to leave, why you got to leave; stay here stay here. She doesn't, man. She just takes off.

(RR37 238)

There wasn't one day when she wasn't drunk. (RR37 243) As for her parenting during the rare times when she was home, she never showed the children any love or affection. (RR37 238) "The only affection she gave us was when she didn't see the dishes washed, or nothing like that. The only affection she had was with a belt or a damn broom, man." (RR37 233-39) Specifically, she never showed any affection to Joseph. (RR37 239)

One of Applicant's mental health experts will testify that Applicant did not know the meaning of the word "affection" until it was explained to him. See attached affidavit.

CPS came to their home all the time, and their mother would tell them to lie to the CPS workers. (RR37 239, 240)

Daniel, Jr., left home at the age of 18; Cynthia had already left home at age 14 by that time. (RR37 243-44) Their brother Alex "was the next in line." Alex and Joseph formed a bond. Alex was the father figure, and Joseph followed him everywhere. (RR37 244) But when Joseph was 14, Alex was shot and killed while trying to steal a car. (RR37 245-46) This had a "real bad impact" on Joseph, who closed himself up after that and shut everyone out. (RR37 246)

Daniel, Jr., made a plea to the jury to spare his brother's life, because he never had any guidance. "There was nobody to reach out and touch him and tell him, you know what, everything's going to be all right, I'm here for you, man. Not even from his own family. I tried, man. But I left. I left him there at an early age." (RR37 250) When the prosecutor reminded him on cross-examination that other families had wanted their family members to live, too, he responded, "I understand the pain. I understand the pain." (RR37 250)

The defense rested. (RR38 8) After arguments and deliberation, the jury answered the special issues yes, yes, and no, so that the death penalty was assessed. (RR38 65-66, 68)

GROUNDS FOR RELIEF

GROUND FOR RELIEF ONE

APPLICANT RECEIVED INEFFECTIVE

ASSISTANCE OF COUNSEL UNDER THE TEXAS AND UNITED STATES CONSTITUTIONS WHEN HIS TRIAL ATTORNEYS FAILED TO INVESTIGATE SUFFICIENTLY TO UNCOVER AVAILABLE EVIDENCE OF HIS INNOCENCE.

SUMMARY OF THE EVIDENCE

Applicant was charged with capital murder with a co-defendant, Jose Najera. Jose Najera has a brother, Efren, who also has a criminal history. Applicant's father Daniel Gamboa, Sr., used to drink with the Najera brothers, who bragged that someday they would rob Taco Land.

Since Applicant's conviction, the co-defendant's brother Efren has boasted that he committed the crime for which Applicant has been convicted. Efren Najera's file photo from the Bexar County Sheriff's Office shows a close resemblance to Applicant at the time of this offense (Exhibit B, Appendix volume).

Given the flaws in the identification procedures used to identify Applicant, the witnesses could have identified Efren Najera as Applicant.

This evidence was available at the time of Applicant's trial and his trial attorneys failed to discover it. Therefore their investigation was inadequate, and Applicant received ineffective assistance of counsel. If Applicant's jury had heard this evidence, their already existing doubts would have been increased, so that the State's proof of guilt beyond a reasonable doubt would have failed.

ARGUMENT

Newly-discovered evidence is cognizable in a post-conviction writ of habeas corpus. *Ex parte Brown*, 205 S.W.3d 538, 544 (Tex.Crim.App. 2006). It is important to

note, however, that this is not a "bare claim" of actual innocence, but a claim of ineffective assistance of counsel for failing to discover that evidence. This is in the nature of a "*Schlup*-type claim," in which the evidence of actual innocence is entwined with a constitutional claim.[3] Therefore this claim is governed by the standards for ineffective assistance of counsel claims.

Under *Strickland v. Washington*, 466 U.S. 668 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), a defendant must show that his attorney's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687 and 694.

This standard has been adopted in Texas for all claims of ineffective assistance of counsel. *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex.Crim.App.1986).

If the defense fails to conduct an independent investigation thorough enough to uncover crucial witnesses, the defendant has received ineffective assistance of counsel. *Butler v. State*, 716 S.W.2d 48, 56 (Tex.Crim.App. 1986).

Facts

Applicant's father used to be a drinking companion of the Najera brothers, Jose and Efren. They would say that some day they planned to commit a robbery at Taco Land. See affidavit of Daniel Gamboa, Sr., in Appendix. Within a few years, at least one of them did. Jose Najera was charged with capital murder as Applicant's co-defendant in the Taco Land murders and robbery. He was tried

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[3] *Brown*, *supra*, at 544-45; *Schlup v. Delo*, 513 U.S. 298, 315, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

separately and pled guilty to the charge. Jose Najera is now serving a life sentence without the possibility of parole.

Since Applicant's conviction, Jose's brother Efren has been boasting that Applicant was convicted of a crime that Efren actually committed. In fact, there is some evidence that Efren had been bragging about committing the crime even before Applicant's trial, and that Applicant's attorneys heard this rumor. But they failed to investigate thoroughly enough to find evidence that Efren Najera was actually guilty of this offense, or at least had claimed he was.

Applicant's current attorney has obtained a file photo of Efren Najera, who was arrested for a different offense (one of several arrests in his short life) a few months after the Taco Land robbery. In this file photo, Efren Najera bears a strong resemblance to Applicant. They are about the same age and size. Exhibit B, Appendix volume.

As detailed below, three eyewitnesses identified Applicant as the shooter in the Taco Land murders, but there were significant problems with all their identifications. Two of them could never identify Applicant prior to trial. Most significantly, the shooting victim who survived, Denise Koger, identified Jose Najera's photograph "almost immediately," according to the police detective who showed it to her. (RR30 99) But Koger was never shown a photo spread that included Efren Najera, because police never developed him as a suspect.

Applicant was also linked to the crime scene by a palm print and DNA evidence on a beer can, but Applicant has never denied that he was in Taco Land the night of the robbery there. He did tell his attorneys that he left the bar well before the shootings. A witness also told a police

detective that a man fitting Applicant's description was in the bar that night but left before the shootings. (RR32 122)

This evidence was available at the time of trial and Applicant's attorneys failed to uncover it. Therefore their investigation was inadequate. Failure to investigate thoroughly represents ineffective assistance of counsel. If the defense attorney fails to discover crucial witnesses because of inadequate investigation, the attorney has provided ineffective assistance of counsel. *Butler*, *supra*.

Applicant's jury already harbored doubts as to his guilt, as demonstrated by their jury notes during deliberations. (CR 284, 290) These notes specifically questioned the eyewitnesses' identifications of Applicant. Given these doubts, if Applicant's jury had been informed of this other suspect, and shown the evidence of his guilt, they would not have found Applicant guilty beyond a reasonable doubt. Therefore the defense was harmed by the ineffective assistance of Applicant's trial attorneys.

Applicant requests a hearing on the factual issues raised in these claims.

GROUND FOR RELIEF TWO
THE TRIAL COURT ERRED IN *SUA SPONTE* EXCLUDING A QUALIFIED, SELECTED JUROR OVER DEFENSE OBJECTION, AFTER THE JUROR HAD ALREADY BEEN SELECTED, A DENIAL OF APPLICANT'S RIGHTS TO DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT

GROUND FOR RELIEF THREE
THE TRIAL COURT ERRED IN REFUSING TO REMOVE A JUROR WHOSE SON WAS

ARRESTED DURING TRIAL, OVER DEFENSE OBJECTION OF IMPLIED BIAS, A DENIAL OF APPLICANT'S RIGHTS TO DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT.

GROUND FOR RELIEF FOUR

THE TRIAL COURT ERRED IN APPLYING DIFFERENT STANDARDS TO THESE TWO SITUATIONS, TO DEPRIVE THE DEFENSE OF ONE ACCEPTABLE JUROR ON THE DEFENSE IN VIOLATION OF APPLICANT'S RIGHT TO THE EQUAL PROTECTION OF LAWS.

GROUND FOR RELIEF FIVE

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IF HIS ATTORNEYS FAILED TO PRESERVE THE ERROR OF *SUA SPONTE* DISMISSAL OF A QUALIFIED JUROR.

GROUND FOR RELIEF SIX

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEYS FAILED TO OBJECT THAT HE WAS DENIED THE EQUAL PROTECTION OF THE LAW BY THE TRIAL COURT'S DIFFERENT RULINGS.

GROUND FOR RELIEF SEVEN

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE ON APPEAL WHEN HIS ATTORNEYS DID NOT RAISE THIS "DIFFERENT STANDARDS TO DIFFERENT JURORS" CLAIM ON DIRECT APPEAL, AS WELL AS A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESERVING THE ERROR.

These six grounds will be argued together as they rely on similar evidence and legal arguments.

These same facts formed the basis for Applicant's points of error numbers one and eight in his direct appeal, but are addressed differently here. In particular, there was no claim of ineffective assistance of counsel in Applicant's direct appeal, and the facts were not as fully developed.

SUMMARY OF THE ARGUMENTS

During jury selection, a young man named Wesley Aulds was accepted by both sides as a juror. Jury selection continued for weeks, and shortly prior to trial Mr. Aulds was arrested for driving while intoxicated. A conference was held, the trial court expressing the opinion that the juror had to be removed because he now suffered from an "implied bias" under a recent Fifth Circuit decision. The court persisted in this opinion in spite of vehement objections by the defense, silence on the part of the state, and testimony from Mr. Aulds that he could still be a fair juror. The trial court removed the juror on its own motion and added an alternate juror, to which the defense also objected.

Then, during trial, a juror's seventeen-year-old son was arrested. The court held a conference outside the jury's presence and heard testimony from the juror that she could still be fair and impartial. The defense objected that this juror now suffered from "implied bias" because of the hold the State had over her son. The trial court overruled the objection, kept the juror on the jury, and the trial proceeded to verdict.

The trial court erred by removing Mr. Aulds on the court's own motion, when the prosecution did not ask for that removal and the defense strenuously objected to it.

The defense had a right to this already-accepted juror, in full knowledge of his possible bias because of his arrest.

The trial court erred in applying different standards to these two similar situations, one to deprive the defense of the juror it most wanted, the other to impose a juror on the defense who was impliedly biased in favor of the State.

These errors violated Applicant's rights under the Texas Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, to due process, equal protection of the law, fair trial, and the effective assistance of counsel.

ARGUMENT

These same actions of the trial court's formed the basis of appellant's points of error one and six in his direct appeal, but were not as fully developed by the facts developed in this writ. Applicant also relies on some different legal claims in this ground for relief, so that this ground should be addressed on its own merits.

Facts

Juror Wesley Aulds

Wesley Aulds, 25, seemed very open to possibilities in the evidence. (RR20 62) He had written on his juror questionnaire that some people do bad things now that in time they would not do. (RR20 28) Asked by the prosecutor to explain, he said:

> I guess it's sometimes you know, you get – you get – you do something and you go to jail for life, have a sentence and you find God or something else, and maybe they wouldn't do that again, you know, 20 years down the line, I guess. Maybe they grow up. I think people can change.

> Q. And do you think that's a possibility with everybody, or just some people, or –
>
> A. I mean there are people who can't change, I guess. I don't really know. I couldn't really say because I haven't met everybody, you know.

(RR20 28-29) He himself had gotten into trouble over marijuana and had friends who were arrested for DWI when he was in high school. (RR20 29-30)

Aulds seemed to have a rapport with defense counsel Pat Hancock. (RR20 58-59) In defense questioning be expanded on his opinion that people could change. His own mother had gone to prison for but now "[s]he's found God and she's on the straight and narrow." (RR20 62) As a consequence, he believed people could be rehabilitated, including in prison. (RR20 62-64, 74) He also said that he would speak up and express opinions in deliberations. (RR20 66)

Mr. Aulds was accepted by both sides. (RR20 82)

Two weeks later, after the entire jury had been selected, including an alternate (RR27 38), but still before the state of the trial, the trial court learned that Wesley Aulds had been arrested the night before for driving while intoxicated. (RR28 3) The court convened a conference with attorneys for both sides, and immediately brought up the Fifth Circuit Court of Appeals' decision in *Brooks v. Dretke*, 444 Fd.3d 328 (CA5 2006), which had addressed a similar situation.

The facts known to the court were that Mr. Aulds had been arrested over the weekend and had refused a blood test. (RR28 8) He had been released on an $800.00 bond. (RR28 4) The prosecutor added that his case was pending "and our office would be the office prosecuting him."(RR28 5)

The court appointed a lawyer to represent Mr. Aulds just during the questioning that was to follow. The defense objected to this appointment because the juror would be informed that his answers could be incriminating and used against him, and therefore "the Court has made it adversarial before we've even begun to inquire about his prejudice." (RR28 6)

Ironically, one of defense counsel had run into Mr. Aulds in a bar the night of his arrest. (RR28 6) They had had a brief exchange of greetings, no more. (RR28 7) The defendant, Joseph Gamboa, had been informed of this encounter and had no problem concerning it. (RR28 7)

Then Mr. Aulds was questioned by the court. He said that in spite of his arrest he could still be a fair and impartial juror. (RR28 9) He could set aside any biases arising from his arrest and base his decision on the evidence at trial (RR28 9)

Both sides declined to question the juror. (RR28 10)

The court then discussed the *Brooks* opinion, particularly the fact that the juror in that case had said he could still be impartial after his arrest and the trial court had believed him. (RR28 11) The court read into the record passages of the opinion. (RR28 11-14)

The defense distinguished the *Brooks* case by pointing out that the defense in that trial had asked that the juror be removed. "We have never, and we are not now asking for that particular relief." (RR28 15) The defense reminded the court of what the defense had liked about Mr. Aulds as a juror, that he could be fair, that his mother had been to prison and been rehabilitated. "Mr. Gamboa remembers, in particular, his response that people can change. And that was a juror that we really wanted on this jury." (RR28 16) They still wanted him. (RR28 17) The

defendant said personally that he still wanted Mr. Aulds as a juror. (RR28 18)

The defense concluded that "this young man [the defendant] wants that juror. And it's his jury and it's his life on the line." The court respond "The objection is noted for the record. The juror is off."(RR28 21)

During the long exchanges between the court and the defense, the prosecutors didn't say a word. (RR28 10-22) The prosecution's only response, after the court had already announced the removal of the juror, was over how to proceed next: "We don't have any suggestions, Judge. I think it's completely up to you. I think you have all the discretion." (RR28 22)

The defense objected that placing the alternate on the jury required the finding that Mr. Aulds was disabled as a juror, and the defense objected to such a finding. (RR28 22) The court again said that "he's off." (RR28 23, 27)

The defense then objected to the alternate's being placed on the jury, but the court did so anyway, saying a new alternate would be chosen. (RR28 24-26) A new alternate was chosen and accepted by both sides. (RR28 64)

Olga Lincoln

Olga Lincoln was accepted by both sides and served on the jury. (RR21 70; RR22 4) After the jury had found Joseph Gamboa guilty, just before the start of the punishment phase, a similar situation was brought to the attention of the trial court, which again had a conference outside the presence of the jury. Ms. Lincoln had informed the bailiff that her son had been arrested overnight. (RR34 3) The charge is unclear from the record:

> THE JUROR: He was just being stupid with them kids at the park and thought he was mightier than thou. He needs to learn a lesson. He wanted me to bail him out. And I said no, you stay there and do your time. He's got to learn. He's 17. He's got to learn.

(RR34 3-4) Ms. Lincoln did think she would have to get her son out of jail so he could maintain his grades, and she was concerned about that. He'd been given a three thousand dollar bail (in contrast to the eight hundred dollar bond imposed on Mr. Aulds). (RR34 4)

The court asked her to keep the court informed if the situation might interfere with her ability to serve as a juror:

> THE JUROR: It won't bother me. It's my decision to leave him in there. He needs to learn. We've always told him. If he ever ended up there, he needs to stay there.
>
> MS. HEWITT [prosecutor]: We might not want to go too much into this.
>
> THE COURT: Okay.
>
> THE JUROR; But anyway, no it won't.
>
> THE COURT: It's not going to affect your ability to be fair and impartial?
>
> THE JUROR: No.

(RR34 5)

One defense lawyer said, "I think that was handled the best way it could be handled." (RR34 6)"[4]

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[4] This is also what the Fifth Circuit said about the trial court's handling of a similar situation in *Brooks v. Dretke*, but nonetheless reversed that court's decision. 418 F.3d at 433.

Later, after dealing with another situation involving a juror, it came to light that Ms. Lincoln's son had been charged with three offenses, interference with duties of a public servant, evading arrest, and failure to identify. (RR34 15) He had now been released on a PR bond. (RR34 14)

Speaking of Ms. Lincoln, the defense said, "…the record will speak for itself on the events of that arrest last night regarding her son. We think that may prevent her from being a fair juror in this case at the punishment phase, too." Accordingly, the defense moved for a mistrial. (RR34 20) That request was denied. (RR34 20)

The trial court questioned Ms. Lincoln again, who said that what had happened with her son would "not affect [her] ability to pay attention to the evidence" and "That's something totally different." (RR34 22-23) She also answered yes when asked if she could still be fair and impartial to both sides. (RR34 23)

The defense then restated its request for a mistrial:

> Judge, so with regard to Ms. Lincoln, we would ask for a mistrial based upon the event that happened to her son last night. We think it will cause her not to be able to be a fair and impartial juror in this case. I know you gave her an instruction and inquired, but in light of being in the punishment phase and in light of all the other things that have happened in front of this jury[5], we think that once again it's just a – it further taints this jury in a bias against Mr. Gamboa and with regard to Ms. Lincoln we move for a mistrial.

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[5] The defense had made several requests for mistrial, over spectator outbursts in the courtroom, the State's eliciting of an extraneous offense, and a juror's overhearing a prosecutor and police officer discussing the trial, as detailed in Appellant's brief on direct appeal.

THE COURT: That's denied.

(RR3424)

Law and Application

The most important opinions to all these claims of error are those of the United States Court of Appeals for the Fifth Circuit in *Brooks v. Dretke*, 418 F.3d 430 (CA5 2005) and 444 F.3d 328 (CA5 2006)(denying rehearing and rehearing *en banc*). The facts of the *Brooks* case are very similar to the facts involving Ms. Lincoln in this case. A juror Garcia was arrested at the beginning of the punishment phase in Brooks' capital murder trial in San Antonio. 418 F.3d at 431. He was charged with the misdemeanor offense of carrying a weapon, and released on a P.R. bond. Therefore he was available to continue serving on the jury. The trial judge questioned the juror, who said that he could still be fair and impartial toward the defendant. The court denied a defense motion for mistrial. *Id.*

After the defendant's conviction and death sentence were affirmed by the Court of Criminal Appeals and in a state habeas proceeding, the Fifth Circuit Court of Appeals reversed the sentence of death, because the error had happened after the guilt-innocence phase, at the start of the punishment phase. Though the Fifth Circuit found that everyone including the trial judge had responded appropriately to the unexpected development, *Id.* at 433, the court should still have granted the mistrial, dismissed the jury, and granted a punishment hearing with a new jury.

Once the juror had been arrested, he was subject to the power of the district attorney's office, the same prosecuting authority prosecuting the case in which he was supposed to serve as an impartial juror. This hold

over the juror by one of the parties to the trial was too great for the juror to remain impartial, even if he thought he could and testified that he could:

> We do not suggest that being charged with unlawfully carrying a weapon alone disqualified Garcia for jury service under state law or that any outstanding misdemeanor charge should support a finding of implied bias. It is rather the sum of all factual circumstances surrounding this juror – in particular the power of the District Attorney, and the timing and sequence of events – that compels this conclusion. As Lord Coke put it, a juror must be as "indifferent as he stands unsworne." That there is no evidence that the District Attorney did anything to exploit his power over juror Garcia is of no moment. That the power presents an intolerable risk of working its will without the raising of a hand or a nod is the vice here.

418 F.3d at 435.

The situation in *Brooks v. Dretke* has not arisen often, so its holdings have not been often applied, but the Court of Criminal Appeals has addressed it in *Morales v. State*, 253 S.W.3d 686 (Tex.Crim.App. 2008). In this case from El Paso, the defense left an assistant district attorney on the jury. The El Paso Court of Appeals reversed the conviction, holding that the assistant D.A. suffered from an implied bias even though she swore that she could be fair and impartial. *Id* at 688. The case was actually reversed for ineffective assistance of counsel because of defense counsel's decision to leave this inherently biased juror on the jury. This reversal was based in part on affidavits and testimony from both defense lawyers saying in fact that they had been ineffective for not exercising a peremptory strike on the assistant district attorney. *Id.* at 689.

The Court of Criminal Appeals held, however, that this had not represented ineffective assistance of counsel, and so reversed the Eighth Court of Appeals, affirming the conviction. *Id.* at 698. The Court held that defense counsel were well aware of the possibility of the prospective juror's implied bias. But the defense has the right to waive the right to an impartial juror in the exercise of overall trial strategy if it chooses. *Id.* at 696-97.

Application to Juror Wesley Aulds

Juror Wesley Aulds' arrest presented a situation similar to that in *Brooks*, and the trial court was obviously very concerned with following the Fifth Circuit's decision in that opinion. But there was one crucial difference: In *Brooks* the defense asked that the impliedly biased juror be removed. In this case the defense asked – pleaded – that the juror be left on the jury. The defendant personally said that he was aware of the juror's possible bias in favor of the prosecution, but still wished him to remain on the jury.

In fact, as the attached affidavit of trial attorney Patrick Hancock demonstrates, Wesley Aulds was the defense's favorite juror. He had given answers that the defense considered so favorable to their position that they were amazed the prosecution had left him on the jury. Mr. Aulds said not just that he believed a person could be rehabilitated in prison, he knew that could happen. He had seen it in the case of his mother. He had said that even a person who committed a horrible crime might not be the same person twenty years later. People could change. They could be worth saving.

Of course this was exactly the defense's position in the punishment phase, that Joseph Gamboa had committed terrible crimes but was still redeemable. Going

into trial, the defense was staking much of its hopes on having Wesley Aulds on the jury. He had not only said favorable things, but had also said he would speak up during jury deliberations.

So the defense wanted to retain Wesley Aulds on the jury, in spite of the implied bias caused by his arrest. And they had the right to do so. The trial court expressed the concern that he could not leave the juror on the jury in spite of the defense's request because "somebody's going to wave the red flag that you guys were ineffective because the caselaw said that this juror had an inherent bias. And that is a legal conclusion that's not subject to review." (RR28 20)

But according to *Morales*, these attorneys could not have been held ineffective for keeping a juror on the jury they wanted, even knowing that he might suffer from implied bias in favor of the other party. That was the defendant's right The Court of Criminal Appeals has held:

> For purposes of argument, we will assume that Wyatt [the assistant district attorney on the jury] was challengeable for cause under the implied bias doctrine. Moreover, we recognize that when a constitutional claim of juror partiality is properly preserved for appeal and borne out by the appellate record, the service of even "a single partial juror will vitiate a conviction." Even so, the Sixth Amendment right to an impartial jury is just that – a right. We have held that the right to trial by impartial jury, like any other right, is subject to waiver (or even forfeiture) by the defendant in the interest of overall trial strategy. Indeed, the Legislature has expressly made a defendant's right to challenge a prospective juror for cause on the basis of an actual bias subject to waiver. It is not to be regarded, therefore, within

> the rubric of *Marin v. State* [, 851 S.W.2d 275, 279 (Tex.Crim.App. 1993)] as a fundamental feature of the system which is not optional with the parties. And because it is a right which is to be exercised at the option of the defendant, it is also subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of trial.

253 S.W.3d at 697 (footnotes omitted), quoting *Delrio v. State*, 840 S.W.3d 443, 445 (Tex.Crim.App. 1992).

Removing a supposedly biased juror "is a right which is to be exercised at the option of the defendant." The defense vehemently declined to exercise that right. The trial court erred by forcing this decision on the defense, and in the process removing the defense's best hope for a life sentence from the jury.[6]

Preservation of the Error or Ineffective Assistance of Counsel

On direct appeal Appellant argued that this error was not subject to harm analysis under *Gray v. Mississippi*, 481 U.S. 648 (1987). Appellant's Brief at 36. The State countered that *Gray* only applies if a qualified juror is dismissed based on his views concerning the death penalty, citing *Ross v. Oklahoma*, 487 U.S. 81, 87-88 (1988). State's Brief at 28-29. According to the State, the standard for harm is whether the jury that actually sat is impartial. *Jones v. Dretke*, 375 F.3d 352, 355 (CA5 2004).

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[6] Furthermore, the State never took any position, in fact never said a word, even though supposedly they had the right to ask to remove a juror for bias, even though it was bias in the State's favor. But the prosecution didn't choose to exercise that option either. From the record, both parties were satisfied that juror Aulds should remain on the jury.

Applicant adheres to the position that the *sua sponte* removal of a qualified juror is error not subject to harm analysis, and therefore reversal is required on no more showing than what Applicant has made to this point.

However, even if the State is correct in its position, the error here was still preserved. If it was not, then Applicant received ineffective assistance of counsel when his attorneys failed to preserve this error.

In *Green v. State*, 764 S.W.2d 242, 246 (Tex.Crim.App. 1989), the Court of Criminal Appeals set out several steps for preserving the error of a *sua sponte* excusal of a qualified juror. The defendant must (1) object to the excusal of the juror; (2) at the conclusion of the voir dire claim that he is to be tried by a jury to which he has a legitimate objection; (3) identify the objectionable juror or jurors; and (4) exhaust all his peremptory challenges and request additional peremptory challenges. *Id.* at 247.

The defense attorneys were familiar with this procedure, as demonstrated by their attached affidavits, but in this case it was not available to them.

The defense certainly performed the first of these steps, objecting to the removal of the qualified juror, and performed the rest sufficiently to preserve this error.

After definitively removing the juror, the trial court proposed to place the alternate juror on the jury and select another alternate or two. (RR28 21) The defense objected that the alternate juror had become the alternate only because the defense had run out of peremptory challenges in the alternate selection process. "[J]uror number 12, our alternate, was basically chosen because we had used our one peremptory in the alternate juror procedure." (RR28 21) The defense requested that instead the alternate remain an alternate and the court

reopen the jury selection to choose a twelfth juror, with each side retaining whatever peremptory challenges it had had left at the end of the voir dire. (RR28 22)

The defense again objected: "The question becomes whether we go with the procedure that the alternate now becomes our next juror. And when we probably would have made a different choice possibly. And of course, that's all a little bit of speculation on our part, but the problem is that we had two, the State still had five. I can't speak for them, but I don't know that – I don't remember the alternate's name – but that he would have wound up being on the jury or even an alternate if we had additional strikes. That's the problem." (RR28 23-24)

The defense reiterated more than once that they did not want the alternate on the jury, but wanted to be able to pick a new twelfth juror, using their remaining peremptory challenges. (RR28 24-26) Nevertheless the court placed the alternate juror on the jury, and another alternate was chosen. (RR28 27, 64) After that both sides used up the one strike each had been allocated in choosing an alternate, the court ran out of panel members, and decided not to call another panel to choose one more alternate. (RR28 72)

In the next volume of the reporter's record the jury was sworn in. (RR29 10) Neither side specifically objected to this jury or had the opportunity to do so.

So the defense did identify Mr. Ortiz, the alternate who became a juror, as objectionable and did object to his being placed on the jury. At that point the defense had peremptory challenges remaining, but did not exercise one on Mr. Ortiz, or have the opportunity to do so. In the phase of jury selection in which Mr. Ortiz was chosen as the alternate, the defense did exhaust the one peremptory challenge it was allotted in that process. So even though

the defense had peremptory challenges remaining at the end of voir dire, it was not allowed to use one on the twelfth juror. The court simply placed Mr. Ortiz on the jury, over the defense's repeated objections. See again the affidavits of Michael Ugarte and Patrick Hancock, trial attorneys.

The defense attorneys never said specifically that their client was going to be tried by a jury to which he had a legitimate objection. But it was clear from the context that was the defense's position. This was not something that happened in passing. The court held a lengthy hearing on this matter, with everyone having ample opportunity to express a position. The defense's position was clear to the trial court that they objected to the composition of the jury once Mr. Aulds had been removed and Mr. Ortiz had replaced him. The error was preserved, as best the defense could have preserved it under these unusual, indeed unprecedented, circumstances.

If this Court holds that the defense failed to preserve this error, then Applicant received ineffective assistance of counsel in this regard. The standards of ineffective assistance are well known and hardly need repeating. Under *Strickland v. Washington*, 466 U.S. 668 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), a defendant must show that his attorney's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687 and 694.

If a defendant loses his only viable defense through his attorney's error, the defendant has received ineffective assistance of counsel. *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex.Crim.App. 1992)(counsel ineffective for failing to request a charge on necessity).

Applicant's attorneys certainly attempted to preserve the error of the *sua sponte* dismissal of Wesley Aulds, as their attached affidavits make clear. Any failure to do so on their part was not a matter of trial strategy, but of being unfamiliar with the law regarding preservation of error or simply failing to follow it. In either event, Applicant received ineffective assistance of counsel when his attorneys failed to preserve this error. If they had done so, the outcome of this proceeding would have been different, because the conviction and death sentence would have to be reversed.

Application to Olga Lincoln

If the situation involving Wesley Aulds was the flip side of *Brooks v. Dretke*, the one that arose from the arrest of Olga Lincoln's son is more directly analogous to that case. It happened after the guilt-innocence phase of trial, right before the start of the punishment phase. Ms. Lincoln's son was arrested for misdemeanors, as was the juror in *Brooks*, although Ms. Lincoln's son was charged with three misdemeanors while juror Garcia had only been charged with one. And in both cases the arrested person had been released on a P.R. bond. Each juror told the trial judge he or she could still be fair and impartial in spite of the arrest, and in each case the trial court kept the juror on the jury in spite of defense objections.

The difference in this case is that it was the juror's son rather than the juror herself who had been arrested. She testified that it had been her decision not to bail him out of jail, and that he had gotten what was coming to him. But this was before the prosecution of her son was well under way, before she knew what was going to happen to him. She was concerned that he get back to school so he could keep his grades up. And she hadn't yet considered all the possible implications for her son's future.

Finally, anyone who thinks that a parent takes less seriously a potential threat to her child than one to herself does not understand being a parent.

This case was exactly analogous to the situation in *Brooks*. Though the juror testified she could be fair and impartial, from the time she learned of her son's arrest and jailing, the district attorney's office, the same prosecuting authority prosecuting the case in which she was a juror, had a hold over her without lifting a hand or nodding a head. This, as the fifth Circuit said, was "the vice."

So in spite of what the juror said, she was inherently biased in favor of the prosecution throughout the punishment phase of trial. The defense understood this and asked that a mistrial be declared, because Applicant now had an objectionable jury deciding whether he would live or die. The trial court refused. This was the same error as in *Brooks v. Dretke*, and is equally reversible. As this Court said in *Morales, supra*, "a single partial juror will vitiate a conviction." 253 S.W.3d at 697. And this juror was inherently biased in favor of the State.

The error is even worse in this case than it was in *Brooks*. Here the trial court failed to apply the same standards to the same situation, both times to the detriment of the defense. The defendant was denied equal protection of the law. Applicant had the holding of *Brooks v. Dretke* imposed on him (inappropriately) to remove a juror the defense badly wanted on the jury. Then the trial court refused to apply that same standard to remove a juror to which the defense now had an objection. Applicant did not receive the protection of the law that the trial court believed was afforded by *Brooks*.

This objection was not made in the trial court, which was another denial of effective assistance of counsel.

Applicant claims relief on that basis under the same standards set out above.

But even without that objection, the trial court applied the law embodied in *Brooks v. Dretke* unevenly, and both times it was Applicant who suffered from the treatment. He was tried and sentenced by a jury that included two objectionable jurors. Applicant's rights to effective assistance of counsel and equal protection of laws under both the Texas and United States Constitutions were denied, as well as his fundamental right under both the Texas and United States Constitutions to be tried by an impartial jury.

Harm

If the State is correct that the standard of showing harm is whether Applicant was tried by an impartial jury, *Jones v. Dretke, supra*, then Applicant has demonstrated harm. The defense objected to Mr. Ortiz, the alternate, and also to Ms. Lincoln. Under the standard of *Brook*s, *supra*, Ms. Lincoln had an implied bias in favor of the State that could not be undone, or disproven by her testimony to the contrary. Therefore Applicant was tried by a jury that included two jurors who were not impartial. Applicant has demonstrated harm, and reversal is required.

The harm from Applicant's equal protection claim is simply that he was deprived of that constitutional right. As a result he was tried by a jury to which he objected. Specifically the jury contained one juror from the beginning to which Applicant objected, and a second during the punishment phase. Because these jurors voted in such a way that Applicant was convicted and sentenced to death, this Court cannot find that this denial of Applicant's constitutional right was harmless beyond a reasonable doubt.

Furthermore, this error was structural in nature and cannot be reviewed for harmless error, because Applicant was tried by a jury to which he had a legitimate objection. This infected his entire trial.

Ineffective Assistance

To the extent that Applicant's attorneys on direct appeal did not make the arguments made herein, he was denied the effective assistance of counsel on appeal. The harm Applicant suffered was that the outcome of his appeal would have been different, resulting in a reversal, if his counsel had made a complete argument.

The trial court erred by removing a qualified juror from his jury, and substituting a juror to which the defense objected, without giving the defense the benefit of using their remaining peremptory challenges. To the extent Applicant's attorneys failed to preserve this error (if any), he was denied the effective assistance of counsel.

The trial court further erred in retaining on the jury during the punishment phase of trial a juror inherently biased against Applicant. Applicant was tried by an unfair jury. Mistrial should have been granted.

GROUND FOR RELIEF EIGHT

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EYEWITNESS IDENTIFICATION THAT WAS TAINTED BY SUGGESTIVE IDENTIFICATION PROCEDURES, AS ADMITTED BY STATE WITNESSES.

This and the following ground rely on most of the same evidence.

SUMMARY OF THE ARGUMENT

There were three eyewitnesses in this case. The identification procedure used by police to try to obtain

identifications from them were seriously flawed. The witnesses were shown more than one photo spread including a picture of Applicant. In one case the witness had his choice narrowed to only two candidates, and this after having seen a photo of Applicant on television, identified as a suspect in a shooting.

The trial court erred in refusing to suppress the tainted identifications that resulted from the suggestive identification proceedings. As this was the primary evidence against Applicant, the defense was harmed by this error.

ARGUMENT

This claim for relief was presented as Applicant's point of error number seven on direct appeal, but was not as fully developed by other facts.

Facts

Pre-Trial

The trial court held a pretrial hearing on the defense's Motion for Identification Hearing Outside the Presence of the Jury. (RR1 22) The first witness was Detective Roy Rodriguez. On July 2nd, after the shootings in June, he showed a second photo spread to the witnesses Paul Mata and Ashley Casas. (RR1 30-31)[7] This one included Joseph Gamboa, who had become a suspect. (RR1 31)

Paul Mata said that he saw two people in the spread who resembled the Taco Land shooting. The officer told him of the two people, which one was he most sure did the shooting, and Mata pointed to the photo of Applicant.

[7] He had shown both an earlier photo spread that included a different suspect, not Applicant Joseph Gamboa. Neither was able to identify the other suspect. (RR1 27, 29-30)

(RR1 33) Mata also became teary and said that he had seen Applicant in a Crimestoppers commercial for an unrelated shooting at a Shell station. (RR1 35)

Paul Mata, the witness, then testified. He testified that he was shown more than one photo lineup, weeks after the crime. (RR1 59) The previous witness first showed him a black and white photo spread from which he picked someone out, but wasn't sure. (RR1 62) But the detective had another photo lineup with him that was in color. "He showed that one to me that was in color, and that's when I made my decision because it was a – it was a better picture." (RR1 62)

In other words, be was shown the same photo lineup of Joseph Gamboa on two different occasions, and "signed it both times." (RR1 73)

The witness also identified Applicant in court. (RR1 74) He recognized him from the night of the shooting. (RR1 76)

Finally, Mata testified that his identifications of Applicant from the black and white photo spread were not positive. (RR1 87-8, 89)

Detective Jimmy Willingham testified that he showed photo lineups to Paul Mata three days later, on July 5th. (RR1 95-6) Mata pointed to Applicant's photo and said detectives had already shown him photos of Applicant. (RR1 98, 99)

The detective testified he wouldn't have shown the photo lineup to Mata if he'd known Mata had already seen one, because that would be suggestive. (RR1 121)

A few days later the trial court ruled that the photo lineup shown to the witness on July second would be admissible, but the July 5th one was "out." (RR6 5) He

further ruled that the in-court identification would be admissible. (RR6 5) The trial court added that police had followed very few of their own procedures, but that wasn't a due process violation. (RR6 10-11) The prosecutor added that there were two other witnesses who could not pick Applicant out of a lineup. (RR6 13)

Trial

The State's first witness of trial was very brief. She was the daughter of one of the victims and simply identified his picture. (RR29 21) Then a bench conference was held before the eyewitness Denise Koger testified. The prosecutor informed the court that though Ms. Koger had never identified Applicant from a photo lineup, she could now identify him in court. (RR29 22) Defense counsel responded, "Judge, everything we've seen says this lady is unable to identify him."

Ms. Koger testified outside the jury's presence at first. She first said she had picked the defendant out of a photo lineup, then said, "Not in the photo lineup. I recognized him from the night." (RR29 24, 25) She identified Applicant in court and said she remembered him not because she'd seen pictures of him but "from the night." (RR29 25)

Ms. Koger then testified confusingly as to whether she'd identified Applicant from a photo lineup. First she was asked, "…you were unable to identify this individual over here in the photo lineup?" and answered, "No. What it was was, when I – when I was first in the hospital, I was on a lot of medication...." (RR29 25-6) Finally she agreed she was not able to identify "this man" from a photo lineup. (RR29 26)

The defense objected to allowing the witness to make an in-court identification because the pretrial

identifications had been suggestive. (RR29 28) The defense also objected to allowing her to testify before the detective who had shown her photos testified to the procedure. (RR29 31-32)

The defense pointed out that the in-court identification would be very easy for the witness, since there would only be one 23 year old Hispanic man at the counsel tables. The judge said "I agree with you on all that." (RR29 31)

Ms. Koger then testified, including identifying Applicant as the person she had seen in Taco Land the night of the shootings, who had done the shooting. (RR29 50, 56, 58, 59)

The witness testified that she herself was shot the night of the shootings. She spent ten days in the hospital and had surgeries. (RR29 63) She had used cocaine earlier on the day of the shootings, but didn't feel she was under its influence by the night. (RR29 64, 65) She also had two beers.

On cross-examination. Ms. Koger said that today was the first time she had identified Applicant. (RR29 72, 73) Then she said she had never seen photos of him. (RR29 73) She changed that to say she had, but didn't identify him. (RR29 74) She gave police a very general description of the suspect, not saying he had tattoos, though Applicant has extensive tattoos. (RR29 75, 76-7) See the attached affidavit of Daniel Gamboa, Jr.

Before Paul Mata testified as the next witness, the defense objected that the pretrial identification procedures used on him had been suggestive, "and it's going to be a tainted identification." (RR29 98) Defense counsel also pointed out that the last time Mr. Mata had identified Applicant in court, Applicant had been wearing

an orange jail uniform. The trial court overruled the objection. (RR29 99)

So in trial before the jury Mr. Mata identified Applicant as the person with whom he'd played pool in Taco Land. (RR29 106) A few days later, he saw Applicant on television. There was no doubt in his mind Applicant was the shooter. (RR29 117-19)

Ashley Casas, the final eyewitness, had not been able to identify Applicant from a photo lineup at all. (RR29 123-24) Outside the jury's presence she said she was shown two or three photo lineups but couldn't identify anyone. (RR29 125, 126) In court, though, she identified Applicant as the shooter. (RR29 126) She said she remembered him from Taco Land. And "I remember him from today." (RR29 127)

Before the jury, she identified Applicant. (RR29 133) On cross-examination she agreed that it had been approximately twenty months since the shootings at Taco Land and "today in this courtroom setting is the first time [she] had ever identified Joseph Gamboa." (RR29 146, 147) She had been shown two or three photo lineups that included Applicant, but had not identified him. (RR29 147)

Detective John Slaughter testified to the identification procedure with Denise Koger. On July 2nd while Ms. Koger was still in the hospital, he had shown her a photo lineup that included Applicant. (RR30 94) He showed her the same photo spread a few days later when she was out. She asked to see it again when she was off her medication. (RR30 97) It also included co-defendant Jose Najera. Ms. Koger identified him "almost immediately." (RR30 99)

She could not, however, identify Applicant. (RR30 144) In fact she didn't ever identify Applicant. (RR30 152)

The detective agreed that his showing the witness the same lineup twice a few days apart may have been suggestive. (RR30 149-50)

Det. Slaughter testified that Ashley Casas couldn't identify Applicant either. (RR30 153)

In the defense's own case, they recalled Det. Rodriguez for cross-examination. (RR32 3) He agreed that showing a witness a photo of a suspect repeatedly is suggestive. (RR32 18) On July 2nd he showed a photo including Applicant to Paul Mata. (RR32 22-3) This was a six-person photo array. (RR32 26) Mr. Mata said he saw two people who looked familiar to him. (RR32 25) The detective asked him, of the two which one do you recognize as the murderer in the bar that night. That was when Mr. Mata pointed to Applicant. (RR32 25)

The defense also recalled Det. Willingham. He testified that when Mr. Mata identified Applicant in the photo spread the witness showed him, Mr. Mata said he'd seen that lineup before. (RR32 64) So the array the witness showed was suggestive. (RR32 65) Later under questioning by the state the witness said he hadn't been deliberately suggestive. (RR32 76)

The last testimony on the identifications issue came from Paul Mata, whom the defense recalled. He testified essentially the same as Det. Rodriguez, that Det. Rodriguez showed him a photo spread in which he "recognized" two of the photos. (RR32 88) He had said before, though, that this was not a positive identification. (RR32 90 91) A second detective came and showed him two more photo lineups. (RR32 91) He also identified Applicant out of this one, but later came to court and said that was not a positive identification. (RR32 92)

Mr. Mata agreed that within days of the crime he had been unable to identify Applicant positively. (RR32 92-93) In spite of this, he had identified him in court. (RR32 93) He also remembered sitting in the pretrial hearing about a month before trial and identifying Applicant, who was wearing a bright orange jail jumpsuit at the time, but said that he hadn't positively identified him on that day. (RR32 94)

On cross-examination by the State Mr. Mata said he had identified Applicant at the pretrial hearing and again during trial. (RR32 96-97) He was not confused at all as to who had shot Ramiro Ayala. (RR32 97-98)

However, he also agreed that he had played pool with Applicant the night of the shootings but hadn't seen any of his tattoos, even though he agreed in court that Applicant has lots of tattoos. (RR32 103-05)

Defense counsel told the jury in final argument that he was "shocked" that the witnesses could identify his client. (RR33 29-30)

Law and Application

To determine whether an unduly suggestive identification procedure should lead to suppression of the in-court identification by the witness, a trial court should determine whether the procedure created an irreparable likelihood of misidentification. This test is determined by employing five non-exclusive factors, as first set out by the U.S. Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The first factor concerns the opportunity of the eyewitness to view the criminal. *Id.*

The second factor asks the court to determine the eyewitness's degree of attention.

The third *Biggers* factor is the accuracy of the witness's prior description of the criminal, before viewing the suspect.

The fourth *Biggers* factor is the degree of certainty of the witness.

The fifth *Biggers* factor is the time between the offense and the identification.

Under these standards, the trial court should have granted the defense motions to suppress the in-court identifications of Applicant. Identification of the defendant in a manner that suggests whom the witness should identify is a denial of the defendant's right to due process of law. *Dispensa v. Lynaugh*, 847 F.2d 211 (CA5 1988). In this case the identification procedures used with every one of the three eyewitnesses was so flawed as to be suggestive. Each witness was shown more than one photo lineup that included Applicant. The police witnesses admitted that these techniques were suggestive.

In the case of Paul Mata, his identification was probably the most positive at trial, but that identification was tainted in nearly every way an identification can be discredited. Part of the suggestiveness was no fault of police but nevertheless tainted his identification. Mata saw Applicant on television in connection with another crime. He saw Applicant's face labelled as a suspect in a shooting crime. Still shaken from the trauma of his presence at the Taco Land crime scene, he latched onto that image. When he was shown that same face multiple times, it imprinted itself on his memory as the killer.

Then police showed him a photo spread in which he said he "recognized" two people – which he clearly did not, because one of them was just added to fill the array, and was not a suspect. So the helpful police detective

narrowed the problem for him, and asked him to make an identification from only those two people. He picked the one he had seen before on television, Applicant Joseph Gamboa.

But this time the layers of suggestiveness had imprinted Applicant's image in Mata's mind, but it was a false image. He "remembered" playing pool with a man who had no tattoos (which perhaps he did), whereas it would be impossible to try to describe Applicant without immediately mentioning tattoos.

The effects of the suggestiveness are proven by the fact that Mr. Mata could not identify Applicant positively a few days after the shooting, but after all the suggestive techniques and mistakes had implanted Applicant's image in his mind he did identify him positively at trial, nearly two years later.

Mr. Mata seemed sincere in his testimony, but his in-court testimony was hopelessly tainted by the suggestive identification procedures. It should have been suppressed.

It was impossible to undo this damage in court. Mata identified Applicant in a pretrial hearing which, as the trial court acknowledged, was suggestive in itself: he identified the only person in the courtroom who remotely fit the description of the suspect, and was wearing a jail coverall as well, in case there was any doubt whom he should identify. That was the final solidifying affirmation of his misidentification.

Under the *Biggers* factors, Mata had opportunity to view the suspect with whom he played pool, though his degree of attention to him is questionable, in light of the third factor, the accuracy of his description before being shown a picture of Applicant. The identification he gave

police of the suspect was only of clothing, hair type, age, and height. (RR1 79-80) The first police officer on the scene confirmed that the description Paul Mata gave him of the suspect was "kind of vague." Ashley Casas gave even less information. (RR29 159)

The fourth and fifth *Biggers* factors are the degree of certainty of the witness and the length of time between the crime and the identification. Both these factors weigh in favor of suppressing the in-court identification. Mata was far from certain of his initial identification. He had to be shown two photo lineups that included Applicant, and even in the second one he said he saw two people who resembled the shooter, and only picked out Applicant after being told just to confine himself to those two choices. He needed a hint, in other words.

For Paul Mata, the length of time between the crime and his identification of Applicant from a photo lineup was only a month or so. For the other two witnesses, though, the length of time was much greater. Ashley Casas testified that the day of the trial, twenty months after the crime, was the first time she had identified Applicant. (RR29 146-47) Denise Koger also acknowledged that "today," the first day of trial, was the first time she had identified Applicant. (RR29 72, 73) Picking out the defendant from the front of the courtroom is not a difficult job, as the trial court acknowledged. (RR29 31)

Denise Koger also gave a very general description of the suspect, by her own admission. (RR29 75) She did not mention tattoos. (RR29 76-77) In fact, none of the three eyewitnesses mentioned tattoos in the descriptions they gave police of the shooter. This is significant, as Applicant is heavily tattooed, and was at the time of the Taco Land murders.

One court has called the accuracy of the description witnesses gave prior to an identification procedure as the most important of the *Neil v. Biggers* factor. *Loserth v. State*, 985 S.W.2d 536, 546 (Tex.App.–San Antonio 1999, pet. ref'd), citing *Dispensa v. Lynaugh, supra.* The accuracy of the witness's description is the only way to tell whether that witness really has a good memory of the suspect before another image – from a photo lineup or a televised photo – can be superimposed on the witness's memory.[8]

Of course, Denise Koger and Ashley Casas were uncertain of their identifications as well, since they couldn't pick Applicant out of a photo spread prior to seeing him at the defense table at trial.

Applying all the *Biggers* factors, the trial court should have suppressed the in-court identifications.

Harm

As the defense lawyers knew, the identifications were the most important aspect of the trial. There was also DNA and fingerprint evidence, but those only placed Applicant in Taco Land some time, not necessarily at the time of the murders. The defense knew they had testimony that one witness had said she saw men fitting the description of Applicant and his companion who left Taco Land when she did, well before the murders. Applicant would have acknowledged being there earlier in the evening, just not at the time of the shootings.

So the identifications were the crucial evidence, and they were tainted.

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[8] Applicant intends to offer expert testimony on this point, and asks for a hearing for the opportunity to do so. See attached affidavit of Charles Weaver, Ph.D., which is incorporated herein for all purposes.

If the identifications had been suppressed or had been further called into question either of these events would have been decisive in raising reasonable doubt, given the explanation for Applicant's DNA and fingerprints at the scene. All the State's evidence of guilt would have been called into question, questions serious enough that the State's proof would no longer have established guilt beyond a reasonable doubt.

GROUND FOR RELIEF NINE

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO REQUEST A CONTINUANCE TO OBTAIN EXPERT TESTIMONY CONCERNING EYEWITNESS IDENTIFICATION AFTER THEY WERE SURPRISED BY WITNESSES' IDENTIFICATIONS OF APPLICANT IMMEDIATELY AFTER THE BEGINNING OF TRIAL.

SUMMARY OF THE ARGUMENT

The defense was surprised when one witness identified Applicant for the first time immediately after the start of trial. Identification was a central issue in the case. Expert testimony would have been very helpful to the defense to explain to the jury how the suggestive identification procedures had tainted the in-court identifications that ensued. The expert testimony would also have aided the trial court in evaluating the defense's motion to suppress the eyewitnesses' in-court identifications. The defense should have requested a continuance in order to be able to present such testimony, which is now available.

Law and Application

Applicant relies on the basic standards of ineffective assistance of counsel, from *Strickland v. Washington*, 466 U.S. 668 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), which are as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
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> * * *
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> A defendant must show that counsel's representation fell below an objective standard of reasonableness.
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> * * *
>
> [Finally, he] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to under-mine confidence in the outcome.

466 U.S. at 687, 688, and 694.

The Strickland standard has been adopted in Texas for resolving allegations of ineffective assistance of counsel under both the federal and state constitutions. *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex.Crim.App.1986).

In this case Applicant received ineffective assistance of counsel because his trial lawyers were surprised. They were going into trial thinking the primary eyewitness

against Applicant could not identify him in court, because she never had prior to trial. Defense counsel said in court that as far as he knew, Denise Koger could not identify Applicant. But then, suddenly, as soon as trial started, she could. See also the affidavits of trial attorneys Patrick Hancock and Michael Ugarte, attached.

Defense counsel should have been prepared on this issue already, though. The defense attorneys knew that eyewitness identification was going to be the most important aspect of the guilt-innocence case, as they say in their attached affidavits. They were prepared to point out the suggestiveness of the identification procedures used, even getting a couple of police officers to admit that the procedures they used might have been suggestive.

However, they were not prepared to tell the jury how to use that evidence. Eyewitness identification has been the subject of much study in the last few years. There are expert witnesses who can explain why seemingly credible eyewitness testimony in fact is often unreliable. Applicant attaches an affidavit from one such expert, who is available to testify in a hearing in this case. Applicant requests such a hearing. Applicant also incorporates the affidavit of Charles Weaver in this claim for relief.

Many of the factors that make eyewitness testimony unreliable applied in this case. The witnesses were shown the photos all together rather than sequentially. One witness had his choice narrowed to two suspects, and was told only to say which of the two looked more like the shooter. All the witnesses saw pictures of Applicant multiple times, so that image planted itself in their memories. In-court identification procedures, which were the only way two of the witnesses identified Applicant, are inherently suggestive, as the trial court in effect found.

Harm

Applicant's trial attorneys provided ineffective assistance by not providing the expert testimony that would have buttressed their arguments to the trial court and the jury.

As the attached affidavit of Dr. Charles Weaver explains, many of the factors that will make an eyewitness identification unreliable applied in Applicant's case. Some of these factors are not just matters of common sense; the jury couldn't have figured them out on their own. Such expert testimony would have been decisive in the defense case at trial. The police detectives had already admitted that their techniques were suggestive. Expert testimony would have provided the evidence to allow the jurors to assess just how suggestive those procedures were.

The expert testimony would also have been helpful to the trial court in evaluating the defense request to the suppress the identifications. If expert testimony had been used in the way the defense should have used it, either the identifications would have been suppressed or the jury would have decided to give those identifications much less credence.

Finally, expert assistance would have better prepared defense counsel for questioning the witnesses, demonstrating how the suggestive identification procedures infected their identifications. The defense did elicit responses from police officers that the procedures had been potentially suggestive (though one changed his opinion on that when questioned by the State), but did not have testimony as to how that suggestiveness lessened the credibility of the identifications. Expert assistance on the subject would have made that possible, such as by showing that a false image planted in a witness's mind by multiple viewings of the same suspect can actually make

that false image supplant the real memory. Applicant has expert testimony to present on this issue.

The jury had questions about the identifications that did not go fully answered, as demonstrated by their juror notes. If the identifications had been suppressed or had been further called into question, either of these events would have been decisive in raising reasonable doubt, given the explanation for Applicant's DNA and fingerprints at the scene. All the State's evidence of guilt would have been called into question, questions serious enough that the State's proof would no longer have established guilt beyond a reasonable doubt.

As trial began, defense attorneys thought they were going to have two eyewitnesses who couldn't identify Applicant and one whose testimony on the issue could be seriously questioned. Partly defense counsel were surprised by the turn of events just as trial started: Denise Koger's saying she could identify Applicant for the first time. That was when the defense should have requested a continuance in order to present necessary evidence on what had become - and what the defense knew going in - the most important aspect of the guilt-innocence phase.

Either through surprise or lack of preparation, the result was the same. Applicant received ineffective assistance of counsel on this vital issue, and the defense was harmed by that ineffective assistance.

Applicant requests a hearing on the factual issues raised under this claim.

GROUND FOR RELIEF TEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS

ATTORNEYS FAILED TO HAVE HIS MENTAL CONDITION ADEQUATELY TESTED TO PRESENT A COMPLETE MITIGATION CASE TO THE JURY TRYING APPLICANT.

SUMMARY OF THE ARGUMENT

New evidence is now available concerning Applicant's mental condition and how that condition affected both his ability to make rational decisions and the mitigation issue. The attached affidavits detail that new evidence. This evidence would have changed the outcome of the trial, demonstrating that Applicant wasn't entirely responsible for his actions.

ARGUMENT

Law

Applicant again relies on the standards of ineffective assistance of counsel by both Texas and federal standards, as set out above and incorporated herein as if fully set out.

Facts and Application

The defense presented one mental health expert witness at trial, neuropsychologist Daneen Milam. Some of her testimony has been summarized in the Statement of Facts at pages 18-20, which Applicant incorporates herein. Other relevant testimony from Dr. Milam was as follows: She badly wanted to see Applicant's school records with any prior testing. Those would have been "invaluable"; however, they had been destroyed. (RR37 169-70) The testing she had done showed that Applicant is "most definitely brain impaired." Out of seven tests she gave him measuring social functioning, he scored in the impaired range on six of them. (RR37 165)

Dr. Milam did not write a report. (RR37 201) At the end of her testimony, a defense objection was overruled, and the State was allowed to ask Dr. Milam if she thought Applicant was a future danger. She answered that she did not believe such a thing could be accurately predicted. (RR37 222)

Dr. Milam did not do certain testing, as set out in her attached affidavit. She could not test for whether Applicant had post-traumatic stress disorder because of his low reading level. Applicant read at about a fourth grade level, and the written test for PTSD required a higher reading level.

She also rehearsed certain testimony with Applicant's trial lawyers that the jury didn't hear, because the defense didn't ask her these questions at trial. The most obvious of these was that she didn't explain the meaning of her findings. What did it mean to say Applicant is "brain-impaired" and "low-functioning"? It meant that the frontal lobes of his brain are damaged. Those frontal lobes perform complex mental processes. They deal with social and ethical behavior. Applicant was impaired in those areas. He could not plan ahead or make a plan, but could only respond to what was happening at the moment. He was a follower, less capable of resisting orders than an average person.

Applicant is also the type of person who would do well in prison, as he had in his one incarceration in a state jail. He needs structure, routine, and clear rules, which prison provides.

The defense did not elicit some of this testimony, which would have lessened Applicant's culpability. This was exactly the kind of mitigating evidence that reduced Applicant's "moral blameworthiness" for the crimes. He was less capable of resisting orders such as the order

witnesses testified the co-defendant gave the shooter, primarily to shoot the second two victims.

The defense also didn't provide the jury with the testimony to assess the defense's own best evidence. They told the jury that Applicant was brain-impaired, but not how that reduced his moral blameworthiness.

Furthermore, Dr. Milam's testing and testimony were not adequate to provide the jury with a complete picture of Applicant's mental states. Applicant has now had more complete testing performed. This new evidence demonstrates that Applicant received ineffective assistance of counsel because those counsel did not have enough data available.

The attached affidavit of Dr. Jon DeFrance, which is incorporated herein for all purposes, details this additional evidence. After more extensive testing of Applicant Joseph Gamboa, Dr. DeFrance has found that his "executive functioning" is impaired. This is the ability to make decisions. Because of this impairment, Applicant was not able to do the kind of thinking that allow him to form the intention of killing a person, which is relevant to special issue number two. His impairment coupled with his horribly neglected childhood[9] means that he perceives danger where an average person would not - such as when the complainant in this case said, "No, fuck you, get away." He is also not capable of thinking out a less violent way to react to this perceived threat.

Also because of Gamboa's reduced executive functioning, he is more easily manipulated and led than the average person - as when the co-defendant in this case instructed him to commit robbery after the first shooting.

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[9] Another affidavit says that when asked about the affection he'd received as a child, Gamboa did not know the meaning of the word.

This evidence goes directly to the question of Applicant's "moral blameworthiness" for the offense, which is relevant to the mitigation special issue. With this testimony, Applicant's attorneys would have been able to make a compelling argument that he was not as blameworthy for what happened. Given the evidence the jury had already heard, this additional testimony of further testing would have tipped the punishment verdict in favor of a life sentence.

Applicant's attorneys provided ineffective assistance of counsel by not having Applicant adequately tested to reveal all his mental deficiencies and allow the defense to present the best possible case on punishment. Applicant was harmed by this lack because the jury did not hear relevant evidence that would have resulted in a different punishment verdict.

GROUND FOR RELIEF TEN

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO INVESTIGATE FULLY ENOUGH APPLICANT'S FAMILY AND OTHER BACKGROUND IN ORDER TO PRESENT A COMPLETE MITIGATION CASE TO THE JURY TRYING APPLICANT.

SUMMARY OF THE ARGUMENT

At the punishment phase the defense presented a great deal of evidence concerning Applicant's miserable childhood - the complete lack of parental attention, the deprivation, the death or departure of anyone to whom be got close - but the picture was not full enough. Especially given the lack of explanation of how the jury could apply the testimony of the mental health expert, the testimony

concerning Applicant's family history was the most crucial to the defense in mitigation.

But the picture the defense presented to the jury was not complete. The attached affidavits demonstrate that there was much more to tell. There was evidence that even further lessened Applicant's "moral blameworthiness" for his offenses. This evidence would have resulted in a different jury finding on the issue of mitigation if it had been presented.

ARGUMENT

Applicant again relies on the standards of ineffective assistance of counsel under Texas and federal law, as set out above and incorporated herein.

The defense presented evidence of Applicant's very difficult childhood, as set out in the Statement of Facts at pages 17 - 20, and relied on herein. This testimony came from Dr. Milam, testifying from Child Protective Service records about the many evaluations that agency had done of the Gamboa household, and from two of Applicant's siblings. It was a terrible childhood, especially as testified to by the oldest brother, Daniel Gamboa, Jr. The parents were seldom at home, and when they were provided no parental affection or support. The children went to sleep every night in crowded conditions and woke up uncertain of everything a child shouldn't have to worry about: whether there would be food, shelter, electricity, or water. The family also moved very often, disrupting Applicant's schooling.

Yet this picture was incomplete. The attached affidavits show that the problems for the Gamboa children were even deeper and more frightening.

The affidavits are from Martin Martinez, Applicant's maternal uncle, and his wife Linda. There is also an

affidavit from Daniel Gamboa, Jr. (who testified at trial), which gives more information about the family than the jury heard at trial. The Martinezes' affidavit affirms that the Gamboa children, including Applicant, grew up in terribly neglectful circumstances. The neglect and abuse go back more than one generation.

Daniel Jr.'s affidavit shows that there was much more relevant information he could have shared with the jury than what was brought forth at trial. Two particularly significant pieces of information are (1) two of Applicant's siblings were raised in special education classes, and (2) all the Gamboa siblings with the exception of Daniel himself have been in trouble with the law or other authorities. Three sisters have had children removed by Child Protective Services. A brother and a sister are currently incarcerated. This is a family in which the children's perceptions of the world were warped by their upbringing, so that they see the world as a hostile place.

Applicant incorporates these affidavits herein.

The testimony from Daniel Gamboa, Jr., was the most effective the jury heard from the defense. This is demonstrated both by common sense and by the attached juror letter. But there was much more material available if the defense had investigated adequately in order to find and present it.

That evidence would have been determinative of the outcome of the punishment phase of trial. If it had been presented, no rational jury could have found that there were not sufficient mitigating circumstances to warrant a sentence of life rather than death. Applicant received ineffective assistance because his attorneys failed to present all the available evidence, and the defense was harmed as a result.

This claim is coupled with the previous claim, that defense counsel's expert did not test Applicant's mental condition adequately. The mental condition and the family history are intimately connected. Applicant has poor executive functioning. He does not process information as well as the great majority of people. In this condition, he was raised by largely absent and always indifferent parents who didn't act as parents at all. Young Joseph had his brother Daniel, Jr., as his first father figure, but Daniel, Jr., left home when Applicant was about eight. Next Joseph attached to his brother Alex.

This attachment was very important because Joseph had nothing else. His family moved so often he was always a stranger in school - 16 schools in eight years of schooling - without friends or significant guidance. He only had Alex. Then, when Applicant was sixteen, Alex was killed while trying to steal a car.

Every father figure Joseph Gamboa had left him. He was someone who functioned poorly in the world, in social situations and especially in making plans. He is much more easily led than the average person. Given this tendency, reinforced by his family history - lack of parental figures - it was almost inevitable that he fell under the influence of someone who could make plans. But be was less morally blameworthy than the average person. The testimony of the eyewitnesses to the shootings and robbery at Taco Land are of one person, identified as Joseph, doing the shootings and taking the money, but under the constant direction of the other robber. "Get the money behind the bar." "Shoot her if she doesn't give you the key." (RR29 57, 58)

Because defense counsel didn't do a complete investigation of Applicant's background, or simply through poor strategic decisions, coupled with the fact

that their mental health expert had not given them all the information they needed, defense counsel did not present to the jury the best mitigating evidence available - that Applicant was less morally blameworthy for this crime because of his family history and mental conditions, which combined to make him someone easy to manipulate into crime.

The information that Applicant has two siblings who were raised in special education classes would also have been important to the neuropsychologist who tested him for the defense. She very much wanted Applicant's own school records, but they had been destroyed. Evidence of sibling retardation would have been significant to her too, though, if the defense had shared that information with her. It would have changed her diagnosis as to Applicant's mental retardation.

If the jury had heard all the evidence that was available, they would have answered yes to the third special issue, the mitigation issue, and Applicant would have been sentenced to life imprisonment rather than death. The defense was harmed by the ineffective assistance of Applicant's attorneys. For this reason Applicant's sentence of death should be vacated and this case should be remanded to the trial court for a new punishment hearing.

GROUND FOR RELIEF TWELVE

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONVICT OF CAPITAL MURDER ON EITHER OF TWO SEPARATE THEORIES OF GUILT LEAVING THE POSSIBILITY THAT APPLICANT WAS CONVICTED BY A LESS THAN UNANIMOUS JURY, IN VIOLATION OF THE TEXAS AND U.S. CONSTITUTIONS.

GROUND FOR RELIEF THIRTEEN

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO THE JURY CHARGE BECAUSE IT ALLOWED FOR A NON-UNANIMOUS VERDICT.

GROUND FOR RELIEF FOURTEEN

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS COUNSEL ON DIRECT APPEAL FAILED TO RAISE THIS INEFFECTIVE ASSISTANCE CLAIM IN REGARD TO THIS CHARGE ERROR, AND FURTHER FAILED TO MAKE THIS CLAIM AS ARGUED HEREIN.

GROUND FOR RELIEF FIFTEEN

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS COUNSEL FAILED TO MAKE A PROPER ARGUMENT AS TO THE HARM CAUSED BY HIS CHARGING ERROR.

SUMMARY OF THE ARGUMENT

A claim similar to this one (but not identical) was presented on direct appeal as Appellant's Point of Error

Number Two. However, the claim was not as well developed on direct appeal as it is herein where the argument is partially based on an opinion from this Court handed down since the appellant's brief was filed in this case. Because the error was not properly argued on direct appeal, Applicant received ineffective assistance.

The jury was instructed to find Applicant guilty of capital murder based on either of two theories: either that he intentionally killed Ramiro Ayala in the course of committing robbery, or that he intentionally killed Ramiro Ayala and also intentionally killed Douglas Morgan during the same criminal transaction.

Both these theories were supported by the evidence, but the way the theories were presented meant that the jurors could disagree on which theory of guilt applied, but still find Applicant guilty of capital murder. In other words, the jury could convict Applicant on a less than unanimous verdict, which is forbidden by the Texas and United States constitutions.

The gravamen of the offense of capital murder is causing the death of an individual while also committing some other act. In this case half the jurors could have found Applicant guilty of committing one act of capital murder while half could have found him guilty of the other act, resulting in a less than unanimous jury convicting him of the overall offense of capital murder.

ARGUMENT

Law

The Texas constitution requires unanimous verdicts in all felony cases. TEX. CONST. Art. V, §13; *Stuhler v. State,* 218 S.W.3d 706, 716 (Tex.Crim.App. 2007). When the State alleges different criminal acts, even if those acts constitute violations of the same criminal statute, the jury

must be instructed that it cannot return a guilty verdict unless it unanimously agrees on the commission of either one of these criminal acts. *Ngo v. State,* 175 S.W.3d 738, 744 (Tex.Crim.App. 2000).

Because the trial court did not follow these laws, Applicant was deprived of the due process of law guaranteed by the United States Constitution. *Schad v. Arizona,* 501 U.S. 624, 632, 115 L.Ed.2d *555* (1991), holds that the due process clause limits "a State's capacity to define different courses of conduct, or states of mind as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." *See also, Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999)(jury my must "agree unanimously" which specific violations constitute the offense in "continuing criminal enterprise").

The Court of Criminal Appeals recently addressed a similar claim in *Landrian* v. *State,* __ S.W.3d ___, No. PD-1561-07 (Tex.Crim.App., delivered October 8, 2008). In that case the defendant was convicted of aggravated assault, alleged to have been committed either by causing serious bodily injury or by using a deadly weapon in the course of the assault. But this Court held that the gravamen of the offense of assault is causing bodily injury. The other two allegations are simply aggravating factors that elevate the crime to aggravated assault. They are not different offenses, and therefore Landrian did not face the possibility of being convicted by a less than unanimous jury. *Id. slip op.* at 1, 6, and throughout.

Applicant also relies on the law concerning ineffective assistance of counsel, the standards of which have been set out above and which Applicant incorporates in these claims for relief.

Facts and Application

Applicant's indictment and the application paragraph of the jury charge presented two theories of Applicant's guilt of capital murder. Paragraph A of the indictment alleged that Joseph Gamboa intentionally caused the death of Ramiro Ayala by shooting him with a firearm in the course of committing robbery of Ayala, Douglas Morgan, and Denise Koger. Paragraph B charged that Joseph Gamboa intentionally caused the death of Ramiro Ayala by shooting him with a firearm and intentionally caused the death of another individual, Douglas Morgan the same criminal transaction. (CR 6) The application paragraph of the jury charge offered the jury the same two possibilities, and did not require the jury to reach either conclusion unanimously:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 24th day of June, 2005, in Bexar County, Texas, the defendant, Joseph Gamboa, either acting alone or with Jose Najera as a party, did intentionally cause the death of an individual, namely: Ramiro Ayala, by shooting Ramiro Ayala with a deadly weapon, namely: a firearm, and Joseph Gamboa, either acting alone or together with Jose Najera as a party, was in the course of committing or attempting to commit the offense of robbery of Ramiro Ayala, Douglas Morgan, or Denise Koger;
>
> Or, if you find from the evidence beyond a reasonable doubt that on or about the 24th day of June, 2005, in Bexar County, Texas, the defendant, Joseph Gamboa either acting alone or with Jose Najera as a party, did intentionally cause the death of an individual, namely: Ramiro Ayala, by shooting Ramiro Ayala with a deadly weapon, namely: a firearm, and did

> intentionally or knowingly cause the death of another individual, namely: Douglas Morgan, by shooting Douglas Morgan with a deadly weapon, namely: a firearm, and both murders were committed during the same criminal transaction,
>
> Then, you will find the defendant guilty of capital murder as charged in the indictment.

(CR277)

The defense objected to these two possibilities being presented to the jury, and requested during the charge conference that the State be required to elect one or the other. (RR33 3) The trial court denied that request. (RR33 4) The defense also objected because such an indefinite verdict would have collateral consequences as to another, nearly identical indictment pending against Applicant. *See*, RR2 6-9. If the jury's verdict would not show on which theory the jury convicted, there would be no double jeopardy protection as to the other pending indictment. (RR33 3)

The State in argument reinforced this error by telling the jury they did not have to reach a unanimous verdict: "And remember I told you in jury selection that all of you do not have to agree under which paragraph he's guilty. Six of you could believe he's guilty of the murder plus robbery, and six of you could believe he's guilty of the two murders in the same criminal transaction. That equals a guilty verdict." (RR33 20-21)

So the jury was told explicitly that they could reach a non-unanimous verdict. This is directly contrary to the Texas Constitution and statutes that require a unanimous verdict. *Ngo, supra*, 36 S.W.3d at 126; TEX. CONST. Art. V §13; Texas Code of Criminal Procedure Arts. 36.29(a), 37.02, 37.03, 45.034 - 45.036). It also offends the due

process clause of the United States Constitution. *Schad, supra.* Applicant was denied the effective assistance of counsel when his attorneys failed to object to this argument – although such objection would have been futile as the trial court had already ruled against them on this issue.

Other federal law also protects the defendant's right to a unanimous verdict. This requirement helps effectuate the requirement of proof beyond a reasonable doubt. *See, United States v. Gipson*, 553 F.2d 453,457 n.7 (5th Cir. 1977). The unanimity requirement means that each juror must be convinced beyond a reasonable doubt that the defendant committed the same criminal act. *Ngo, supra.* 175 S.W.3d at 745.

This Court has held that there was no error when a defendant was disjunctively charged with one offense of capital murder under two different theories. *Martinez v. State,* 129 S.W.3d 101, 103 (Tex.Crim.App. 2004); *Kitchens* v. *State,* 823 S.W.2d 256, 258 (Tex.Crim.App. 1991).[10] However, in *Martinez* and *Kitchens* the jury only had to find the defendant guilty of one act. In Applicant's case, they had the possibility of finding one murder and another murder, or one murder and another fact: two different acts. Applicant will address this further, below.

The most thorough analysis of this issue was in this Court's opinion in *Landrian, supra.* In that case, the defendant was charged with aggravated assault by throwing a bottle at the victim, causing him to lose an eye.

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[10] *But see, Ervin v. State,* 991 S.W.2d 804, 808 (Tex.Crim.App. 1999), for an in-depth discussion of different jurisdictions' treatment of this situation. This Court concluded that though murder in the course of robbery and murder in the course of rape are different offenses under *Blockburger.* Texas would join the majority of jurisdictions in holding that one murder can only support one capital murder conviction.

The two different application paragraphs charged that the defendant did this intentionally and that he caused serious bodily injury. or that he did it recklessly but used a deadly weapon (the bottle). Either of these would elevate the crime to aggravated assault.

Performing an analysis as much grammatical as legal. this Court concluded that the gravamen of the offense of aggravated assault is causing bodily injury:

> The gravamen of the offense of aggravated assault is the specific type of assault defined in Section 22.01. Thus, the *actus reus* for "bodily injury" aggravated assault is "causing bodily injury." Turning to the eighth-grade grammar test, the subject is "the defendant." the verb is "cause" and the direct object is "bodily injury." The precise act or nature of conduct in this result-oriented offense is inconsequential. "What matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified."

Id., slip op. at 5 (citations in footnotes omitted; italics in original). The reason the dual submission to the jury was permissible in *Landrian* is because each paragraph described the defendant committing the same act: hitting the victim with a bottle. One paragraph simply added that he caused bodily injury while performing this act and the other that he used a deadly weapon (the bottle) in the same act. So the jury still had to find unanimously that the defendant had committed the same act, hitting the victim with a bottle: "It is still the same single criminal act and still the same single bodily injury to the victim." *Id.; slip op.* at 6 (emphasis added).

It is this logic that distinguishes Joseph Gamboa's case. The gravamen of committing capital murder is not

simply causing the death of the victim; that is the gravamen of murder. *See, Castillo* v. *State.* 186 S.W.3d 21, 27 (Tex.App.–Corpus Christi 2006, pet. ref'd)(the gravamen of murder is the intentional killing of a human being, while the gravamen of attempted capital murder is the intentional attempt to kill a human being plus another act). In *Beets* v. *State*, 767 S.W.2d 711 at n.2 (Tex.Crim.App. 1987), this Court held that the gravamen of capital murder was that the defendant had been promised compensation for killing the victims "and on that basis killed them." (emphasis added). *See also, Lookingbill* v. *State,* 855 S.W.2d 66, 74 (Tex.App.--Corpus Christi 1993), pet. ref'd, citing *Gribble* v. *State,* 808 S.W.2d 65, 70 (Tex.Crim.App. 1990), *cert. denied* 501 U.S. 1232: "The corpus delicti of capital murder requires more than homicide by a criminal agency; it includes the elements which raise the offense from murder to capital murder." What makes the offense into the distinct crime of capital murder is committing another act either at the same time or during the same transaction. In this case the only crime that all the jurors had to find Applicant committed was murder: intentionally causing the death of Ramiro Ayala The other portions of the two charging paragraphs described different crimes and different acts.

This is one way to distinguish *Kitchens* and *Martinez* both *supra.* In those cases each defendant was convicted of capital murder by juries that were charged they could convict by finding that the defendant caused the death of the victim in the course of attempting to commit either robbery or aggravated sexual assault. The State did not have to prove that either defendant actually committed robbery or aggravated sexual assault, but only that he was attempting to do so. Those juries needed to make a finding as to the defendant's intent, in other words. What course was he pursuing when he killed the victim? But in

each instance, as in *Landrian,* what the jury had to find the defendant did, what act be committed was the same. He killed the victim in the course of committing a different offense. This is why these were not two separate offenses. The jury would have to find true some facts which indicated the defendant's intent, but have to find unanimously that he committed one act, the murder of the victim. In the words quoted in *Landrian,* "What matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified." *Slip op.* at *5,* quoting *Alvarado* v. *State.* 704 S.W.2d 36, 39 (Tex.Crim.App. 1985).

Applicant's jury, by contrast, was presented with two distinct choices in the charge as to what acts Applicant committed. They must first find not only that the defendant caused the death of Ramiro Ayala, but that either this was in the course of committing robbery or that he then also caused the death of Douglas Morgan, in the same transaction, an entirely separate act.

In *Landrian* every member of the jury had to find beyond a reasonable doubt that the defendant committed one act that was the gravamen of the offense: hitting the victim with a bottle. That is not true here. Some of the jurors could have found that Applicant caused the death of Ramiro Ayala in the course of committing robbery. and some could have found he did so and then caused the death of Douglas Morgan as well.[11]

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[11] Furthermore. Judge Womack pointed out in concurring that there was no possibility the *Landrian* jury found a non-unanimous verdict, because to find the victim suffered serious bodily injury necessarily meant the defendant used a deadly weapon. *Id.* (Womack, J., concurring). Judge Price questioned whether simple assault and aggravated assault are the same offense under this analysis. since

Landrian provides another test that dictates the result in this case:

> Yet another way of testing whether the State charged one aggravated assault or two distinct and separate aggravated assault offenses is to ask whether the State could have obtained two aggravated assault convictions stemming from appellant's criminal conduct. Would double jeopardy allow appellant to be punished for causing serious bodily injury by putting out Mr. Brizuela's left eye and also punished for putting out Mr. Brizuela's left eye with a deadly weapon by throwing a bottle at or in his direction? The answer is obvious: appellant committed only one assault during a single incident and may be punished for only one assault.

Id, slip op. at 8 (footnote with citation to Alaska case omitted).

When applying this test, this case gives a different answer. Under the *Blockburger*[12] test, Applicant could have been convicted of two different offenses of capital murder under the two paragraphs of the indictment. The murder of Ramiro Ayala in the course of committing robbery requires proof of a fact that the murder of Ramiro Ayala in the same transaction as causing the

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aggravated assault will always require an additional finding. an observation that is even more pertinent to this case. *Id.* (Price, J., concurring).

[12] "…the test to be applied to determine whether there are two offenses or only one. is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 535 (1932).

death of Douglas Morgan does not, and vice versa.[13] One requires proof of an attempt to commit robbery; the other requires proof of the murder of a different victim. These were not simply paragraphs stating the same offense in different ways. These were two separate counts alleging capital murder. *See, Ervin v. State, supra.*

In *Landrian* the gravamen of the offense was causing serious bodily injury. In this case the gravamen of the two offenses was the murder of Ayala and something else. Both paragraphs began with the killing of Ayala. but that does not make them the same crime. The identical portion of the two paragraphs describes murder. Capital murder requires at least one other element and those elements were very different in this case. Not simply different states of mind, but different criminal acts.

In *Lawton v. State.* 913 S.W.2d 542, 550 (Tex.Crim.App. 1995), this Court approved the submission of two theories of capital murder but with a difference: the jury was required to find unanimously that the defendant committed murder in the course of robbery or to find unanimously that he committed murder in the course of burglary of a motor vehicle.

The double-unanimity charge from *Lawton* was what should have been given in *Ngo,* according to this Court: "Thus, a clearly correct version of the application paragraph would have read: "Now, if you **unanimously**

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[13] Arguably these paragraphs could have supported even more capital murder convictions, since the first paragraph describes murder in the course of committing robbery of three different victims. Each of these victims could have formed the basis of a different capital murder conviction which required proof of a different fact -from all the others. *Ex parte Hawkins,* 6 S.W.3d 554 (Tex.Crim.App. 1999)(assaulting more than one victim in the course of a single theft supports multiple robbery convictions).

find from the evidence beyond a reasonable doubt that [appellant]...or

"If you **unanimously** find from the evidence beyond a reasonable doubt that [appellant]..." 175 S.W.3d at n. 44 (emphases in original). As can be seen from Applicant's jury charge that is set out above, Applicant's jury was not instructed that they must unanimously find that one paragraph or the other was true. As this Court said, "The error here is not in submitting the three separate offenses 'in the disjunctive.' The error is in failing to instruct the jury that it must be unanimous in deciding which one (or more) of the three disjunctively submitted offenses it found appellant committed." *Ngo, supra* at 749. Or stated differently, "When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts." *Id.* at 744 (citation in footnote omitted.

Applicant's jury was not so instructed. To convict under the two theories submitted the jury in this case could find that the defendant committed one act, or they could find he committed another act. They were distinct offenses, punishable as two separate capital murders. That was the defense's concern, that conviction in this case wouldn't bar retrial in another case pending with an almost identical indictment. And they wouldn't have.

What that means in this context is that the jury did not have to find unanimously that Applicant did one or the other. That is what the constitution forbids.

It was quite possible in this case that different jurors believed that different events had occurred. and that these different events made Applicant guilty of capital

murder. But it was possible at the same time for those different jurors to have been convinced beyond a m1Sonable doubt of different facts, meaning they weren't all convinced of the same facts. This jury charge meant the State could win a conviction without convincing a unanimous jury of Applicant's guilt of only one act. The Texas constitution forbids such a finding of guilt without unanimity. The due process clause of the United States Constitution also forbids this result.

Harm or Ineffective Assistance of Counsel

Applicant's attorneys objected to the submission of both theories to the jury, preserving this error under *Almanza* v. *State,* 686 S.W.2d 157, 171 (Tex.Crim.App. 1985). However, the defense did not specifically object that the charge would allow a non-unanimous verdict. If this Court finds that this error was not preserved, then Applicant received ineffective assistance of counsel when his attorneys did not preserve it. Furthermore, Applicant received ineffective assistance of counsel on appeal when his direct appeal attorneys did not mise this claim of ineffective assistance on the part of trial counsel. Applicant also received ineffective assistance of counsel on appeal to the extent his appellate attorneys did not raise and argue this claim of error as it is raised herein (although they did not have the benefit of this Court's opinion in *Landrian, supra.)* Specifically, Applicant's attorneys on direct appeal did not properly demonstrate the harm caused by this charge error, and did not properly distinguish *Kitchens* and *Martinez, supra.*

Under *Almanza.* a showing of "some harm" is required for reversal. Applicant was harmed because there was evidence raising the possibility Applicant was not guilty of either of the offenses alleged Even if the jury was convinced beyond a reasonable doubt that Applicant

shot and killed Ramiro Ayala. there was testimony that this happened after Joseph Gamboa asked Ayala something and Ayala responded obscenely and insultingly. (RR29 56) The gunman then shot him, suddenly, in the heat of that moment. It was only after the shooting that the co-defendant began instructing the shooter to get the money from behind the bar. These were two different acts. It certainly was not a well-planned scheme to commit robbery. to hang around the bar drinking and shooting pool for two hours. making strangers into eyewitnesses.

So there was evidence that the shooting of Ayala was a spontaneous killing, not done in the course of committing robbery. A robbery committed as an afterthought following a murder is not capital murder. *Alvarado v. State.* 912 S.W.2d 199. 207 (Tex. Crim.App. 1995). As a planned robbery. this offense made no sense. the way Applicant was alleged to have lingered in the bar for a long time before the offense. even playing pool with potential witnesses. Especially given the evidence of Applicant's nature, shooting Ayala as a spontaneous angry response to Ayala's insult made more sense. Applicant is not claiming he proved this conclusively, only that there was evidence from which some jurors could have concluded the first shooting was not in the course of robbery.

It was also possible for jurors to disbelieve that Applicant intentionally caused the death of Douglas Morgan. There was evidence that Morgan's wounds were not in themselves life-threatening, and that in fact he was recovering from the gunshots, but then actually died from complications of his other medical conditions, such as cirrhosis of the liver. (RR31 91, 90, 118) The medical doctor testified that these complications were unrelated to the shooting.

In this state of the evidence, it was quite possible for six jurors to believe that Applicant shot Ramiro Ayala in the course of a robbery but did not intentionally kill two people, and for six others to believe that the robbery was an afterthought rather than the object of the shooting of Ayala, but that Applicant intentionally killed two people. This is exactly the possibility that is prohibited by the requirement of a unanimous verdict.

This possibility means that Applicant suffered some harm as a result of the erroneous jury charge. This harm was exaggerated by the prosecutor's telling the jury explicitly that they did not have to decide unanimously that Applicant had committed one crime or the other. Given the evidence, the arguments, and the trial court's instructions, Applicant lost his right to a unanimous jury. *Ngo, supra,* 175 SW3d at 752 (finding egregious harm from the court's failure to require a unanimous verdict, especially given the prosecutor's argument that told the jurors they did not have to reach a unanimous verdict).

Ngo holds that this identical charging error results in egregious harm. So even if the charge error in this case was unobjected to, this case should still be reversed, because Applicant suffered egregious harm as well, through the possibility that the charge denied him one of the most fundamental rights of trial the right to a unanimous jury verdict. *Ngo, supra,* 175 S.W.3d at 752.

And if trial counsel rendered ineffective assistance of counsel resulting in harm to the defense, then counsel on direct appeal also rendered ineffective assistance of counsel for not raising the ineffective assistance of trial counsel as a point of error. If direct appeal counsel had been effective, Applicant's conviction and death sentence would have been reversed, resulting in a different outcome to the appeal. So Applicant was harmed by that

ineffective assistance of counsel as well, if it was ineffective assistance.

But direct appeal counsel also failed to make a proper showing of harm as it has been demonstrated herein. If this error had been properly raised and argued in direct appeal, Applicant's conviction would have been reversed So Applicant suffered harm from this denial of effective assistance of counsel.

Either way, relief should be granted by setting aside his conviction.

CONCLUSION

Applicant's indictment and jury charge presented two different counts of capital murder to the jury, each requiring proof of the commission of an act that the other did not Because these were presented as one charge, the jury was not required to reach a unanimous verdict. The evidence raised the possibility that some jurors might have acquitted of either separate count. The prosecutor told them they were free to do so, exacerbating the error.

Applicant's attorneys objected to the charge, asking the Court to require the State to elect one charge or the other. This objection should have been sustained. If it had this error would not have been committed. So this error was preserved, and should be reviewed under the lower, "some harm" standard. However, this case should be reversed even if the error was not preserved, because Applicant suffered egregious harm as a result.

Applicant received ineffective assistance of counsel on appeal because his appellate lawyers did not properly address the issue of harm. If they had, this case would have been reversed on direct appeal.

This Court should reverse the conviction and remand for trial on a proper charge that requires a unanimous verdict.

GROUND FOR RELIEF SIXTEEN

APPLICANT WAS DEPRIVED OF HIS RIGHTS UNDER THE TEXAS AND UNITED STATES CONSTITUTIONS TO GRAND JURY INDICTMENT WHEN THE GRAND JURY WAS ALLOWED TO VOTE TO APPROVE EITHER OF TWO SEPARATE THEORIES OF APPLICANT'S GUILT OF CAPITAL MURDER.

GROUND FOR RELIEF SEVENTEEN

APPLICANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO THE GRAND JURY'S BEING PRESENTED WITH TWO SEPARATE THEORIES OF GUILT.

GROUND FOR RELIEF EIGHTEEN

APPLICANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS ON DIRECT APPEAL FAILED TO RAISE THESE CLAIMS REGARDING THE GRAND JURY INDICTMENT.

SUMMARY OF THE ARGUMENT

Both the Texas and United States Constitutions provide the right to a grand jury indictment before a suspect may be brought to trial for a criminal offense. Statutes determine bow that indictment is to be voted by the grand jury.

In this case, as detailed in the grounds for relief immediately above, Applicant was indicted on two theories of capital murder that were joined in the same indictment even though they described two different

offenses. The State did not present these as separate counts, but as separate paragraphs of the same charge. So the same error existed in the State's presentation of the indictment to the grand jury as later appeared in the indictment and the court's charge to the jury: it was possible for the grand jury to vote to indict with fewer than the required number of grand jurors convinced there was probable cause of Applicant's guilt of either particular theory.

This was the denial of a constitutional right. It was also structural error not subject to harm analysis.

ARGUMENT

The Fifth Amendment to the United States Constitution provides that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury..." U.S. CONST., Amend 5 (exceptions that do not apply here omitted). This right is made applicable to the states through the Fourteenth Amendment's due process clause.

The Texas Constitution provides the same protection. TEX. CONST., ART. I, Sec. 10. Texas statutes also determine how the grand jury shall be composed and how it will vote an indictment into effect. CODE OF CRIMINAL PROCEDURE, Art. 19, et seq. The grand jury shall be composed of not more than twelve jurors. Art. 19.26 *supra.* For an indictment to issue, at least nine of these grand jurors must vote to approve it. Art. 20.19.

Applicant was indicted on two theories of capital murder, the intentional killing of Ramiro Ayala in the course of robbery of three and the intentional killing of Ramiro Ayala and the intentional killing of Douglas Morgan in the same transaction. As argued under ground for relief number twelve, these were two separate

offenses requiring findings that Applicant committed two different criminal acts. Applicant incorporates those arguments herein.

But the same error infected this judicial proceeding long before these theories were presented to the jury. It was possible for a less than unanimous jury to find Applicant guilty of capital murder. It was also possible that fewer than nine grand jurors found probable cause to believe Applicant guilty of one theory of capital murder or the other. Six grand jurors could have believed one theory, three another, three remain unconvinced at all that there was plausible evidence of Applicant's guilt, yet the indictment would have issued in the form presented to the trial court.

This was a denial of Applicant's constitutional rights not to be brought to trial unless a quorum of a grand jury found proof that he had committed a criminal offense.

Applicant's trial attorneys should have objected to the indictment on this basis. When they did not, Applicant was deprived of the effective assistance of counsel. Applicant's attorneys on direct appeal should also have raised this error, as well as the denial of effective assistance of counsel in the trial court because the trial attorneys failed to object.

Applicant has already set out the standards of ineffective assistance of counsel more than once herein. and for the sake of economy relies on those same standards in this claim. However, the real issue here is whether those standards apply at all.

Harm

This was constitutional error, so reversal is required unless this Court finds the error to be harmless beyond a reasonable doubt. T.R.A.P 44.2(a). If it was statutory

error, a violation of the requirement that nine jurors vote to approve an indictment, then reversal is required if the error affected a substantial right of the defendant's. Rule 44.2(b), *supra.* The right to grand jury indictment is a constitutional right, designed as a check on the prosecution's power to bring charges against citizens. This was one of the first rights embodied in both the United States and Texas Constitutions, and is certainly a substantial right.

A harm analysis in this case would be impossible to perform since grand jury proceedings are secret by statute, and no records are kept of their deliberations. Presumably the grand jury prosecutor told the grand jurors something similar to what the trial prosecutor told the jurors: that they could issue an indictment as long as nine of them agreed that there was probable cause to believe one theory or the other.

But this error is not subject to harm analysis. It is a structural error, and requires reversal without such an analysis.

In *Johnson v. State,* 169 S.W.3d 223 (Tex.Crim.App. 2005), this Court analyzed in depth the difference between trial errors that require a harm analysis and structural errors that do not. The error in that case was held to be ineffective assistance of counsel to be judged under the *Strickland* standards of prejudice, *Id.* at 235, but the same analysis applies. This Court's conclusion was that "A structural error affects the framework within which the trial rather than simply [being] an error in the trial process itself." 169 S.W.3d at 237 (citation omitted; word insertion in original). This Court also illustrated the difference by comparing ineffective assistance of counsel (requiring harm analysis) to the deprivation of a trial or appeal (no harm showing required):

> The key to this different standard of prejudice is that the deprivation of a trial and the deprivation of an appeal are both structural defects. Comparing these deprivations to the denial of counsel at a critical stage, the Supreme Court has observed that these deprivations amounted to the "even more serious denial of the entire judicial proceeding itself" and "similarly demands a presumption of prejudice."

169 S.W.3d at 231, citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

This is such a structural defect as well. Applicant was deprived of the proper functioning of the grand jury, which affected everything that followed. Since this error occurred before trial even began, and affected the very basis on which Applicant was tri it was an error "that affects 'the entire conduct of the trial from beginning to end.'" *Id.* at 237. He was denied one essential component of the judicial process, one over which he had no control. Nor did the trial court.

Another way this Court in *Johnson* determined what kinds of error are structural was simply to refer to the Supreme Court's listing of such rights in *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed. 2d 718 (1997): "the total deprivation of counsel at trial, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the 'beyond a reasonable doubt' standard." 169 S.W.3d at 235.

One of these structural err declared so by the Supreme Court, concerns the right to a grand jury indictment. It is not the complete denial of a grand jury,

but an improper composition of such a grand jury. By analogy, allowing a grand jury to vote an indictment by fewer than a quorum of its members is also such a structural error. While not a complete denial of the right to a grand jury, it is a denial of the proper functioning of that grand jury, so that the right is diminished.

It is diminished in such a way that can't be reviewed for harm. This allowing the grand jury not to exercise its proper function in the judicial process was structural error. Reversal is required.

GROUND FOR RELIEF NINETEEN
THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AFTER THE PROSECUTION DELIBERATELY ELICITED TESTIMONY THAT APPLICANT HAD COMMITTED AN EXTRANEOUS OFFENSE.

GROUND FOR RELIEF EIGHTEEN
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE WHEN HIS ATTORNEYS FAILED TO MOVE FOR A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT.

GROUND FOR RELIEF TWENTY
APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS ATTORNEYS FAILED TO RAISE THE ISSUE OF PROSECUTORIAL MISCONDUCT IN HIS DIRECT APPEAL.

SUMMARY OF THE ARGUMENT

Applicant's attorneys had filed a motion in limine asking that the State be forbidden from eliciting testimony concerning extraneous offenses. That motion was gran and the State was instructed not to elicit such testimony without first approaching the court outside the

presence of the jury for a ruling on whether the evidence would be admitted.

However, during the prosecution's questioning of a police witness during the guilt-innocence phase of trial the prosecutor asked a question that could only have been designed to elicit such testimony. This was prosecutorial misconduct, the flouting of a court order to present inadmissible evidence to the jury.

The defense objected and moved for mistrial which should have been granted. The defense did not however, object on the basis of prosecutorial misconduct even though it clearly was.

So relief should be granted for the objection that was made and for the objection that wasn't. In either case, the result was that the jury heard evidence it should never have heard during the guilt-innocence phase of trial, evidence that was harmful to the defense.

ARGUMENT

This same error formed the basis of Applicant's point of error number three on direct appeal, though it was not as fully developed in that appeal.

Facts

Three of the five defense witnesses at the guilt-innocence phase of trial were police officers, called to demonstrate the suggestiveness of the identification procedures in this case. The first of these witnesses was Detective Roy Rodriguez. (RR32 3) After defense counsel examined him as to his showing photo spreads to witnesses including Paul Mata, the State cross-examined. The prosecutor asked:

> Q. And in fact. on July 2nd, after Paul positively identified Joseph Gamboa, this defendant, as the

actor or one of the actors, he became emotional, didn't he?

A. Yes, he did.

Q. And he began to cry, didn't he?

A. Yes, ma'am, he did.

Q. And he told you something about have seen this defendant didn't be?

A. Yes he did.

Q. What did he tell you?

A. He said he had seen this person in a Crime Stoppers on an unrelated shooting that occurred like the following weekend.

(RR32 37) At that point the defense objected, and after a brief bench conference the court excused the jury.

In the ensuing bearing outside the jury's presence, the prosecutor didn't claim this extraneous offense evidence had been elicited unintentionally. Instead she tried to justify the questions:

MS. HEWITT [prosecutor]: Judge, if I could point out that when Paul testified, he's already testified that he recognized him from an unrelated –

THE COURT: That was in a pretrial motion outside the presence of the jury.

MS. HEWITT: No, sir. It was not. It was when he was in front of the jury and they did not object.

MR. HANCOCK [defense counsel]: It's not the same thing. He testified that he saw him on Crime Stoppers.

MS. HEWITT: For an unrelated –

> MR. HANCOCK: No, he didn't say unrelated, or I would have been on my feet objecting.
>
> THE COURT: You know what, let's go back and look at it. He's object it's not admissible. It was in a motion in limine.
>
> MR. HANCOCK: And it's incurable with an instruction.
>
> MS. HEWITT: It is curable with an instruction, Judge. Just like –
>
> THE COURT: I mean surely this officer knew better.

(RR32 38-39) The court then instructed the State to "give me a little research on why I shouldn't declare a mistrial when a detective who prepared one of the photo lineups. testifies on your questions about an extraneous act." (RR32 39)

The court checked the reporter's record of Paul Mata's testimony during the State's case and decided it had not opened the door to evidence of an extraneous offense. (RR32 41) This was correct. In his earlier testimony Mata testified that he had seen Applicant on television as a suspect in a shooting, but not any unrelated shooting. (RR29 117-18) That testimony could have referred to the Taco Land shootings themselves.

The prosecutor then changed her justification for her questions and said, "And also Judge, it was not my belief that the door had been opened. It was not my – I did not anticipate that that was going to be his – that he was going to go that far, or – or say that language." The court was obviously skeptical of this explanation: "I guess that goes with the territory of asking a detective who is on the stand, What did the witness say when he was making the identification. And that's your responsibility." (RR32 42)

The trial court expressed the view that "an instruction to disregard is in line. And that should cure all. I don't know if that makes me feel any better about how it transpired because although clearly Mr. Hancock has called the witness, he is a State's witness. He was involved in the – the investigation of the case. And it was not Mr. Hancock's question, it was the State's question that elicited that response." (RR32 41)

The defense pointed out what the court had already said, that this testimony not only gave evidence of an extraneous offense, but that asking the question violated the motion in limine. Then the defense again requested a mistrial, not only for this particular error but "We would ask that the Court reconsider under some cumulative aspect of the - of the things that have happened in this trial." (RR32 42)

The court denied the request for mistrial and gave the jury a belated instruction to disregard the question and answer. (RR.32 44, 47-48)

Law and Application

Evidence of other crimes is inadmissible to prove the character of the defendant in order to show conformity therewith. Tex.R.Evid. 404(b). Extraneous offenses are not admissible at the guilt-innocence phase of trial, as every competent trial lawyer knows. In this case that was even more obvious, because the trial court had granted a motion in limine regarding extraneous offenses, instructing the prosecutors to approach the court outside the presence of the jury to obtain a ruling prior to trying to introduce such evidence.

The prosecutor didn't do so. She asked questions that could on1y have been intended to elicit the fact that the witness had seen Applicant on television as a suspect in an

unrelated shooting. At first the prosecutor as good as admitted this intention, saying she thought the door had been opened to this kind of questioning. When the trial court ruled that the door had not been opened she changed her story, saying she hadn't thought the police detective would say as much as he had. But this claim was unbelievable (as the trial court seemed to feel). There was no other point to asking the question.[14] The prosecutor deliberately violated the motion in limine, as well as the defendant's right to be tried on proper evidence.

The trial court found the testimony inadmissible and gave an instruction to disregard, which should normally cure such error. It did not in this case for several reasons. The first is the length of time the court deliberated before giving that instruction. The general rule is that a prompt instruction to disregard will cure such error. *See, e.g., United States* v. *Wharton*, 320 F3d 526, 539 (5th Cir. 2005). In this case the instruction was anything but prompt. It came after the jury was removed from the courtroom and a lengthy discussion had, after which the trial court declared a fifteen- minute recess to give both sides time to do research. (RR32 39) After this interval an appellate prosecutor appeared to give an opinion as to the state of the law. (RR32 43-44) During this time the jury was isolated obviously realizing something untoward had happened, with ample opportunity to discuss what they'd heard. The fact that a witness had seen the defendant named as a suspect in an unrelated shooting had plenty of time to sink in. Even under normal circumstances it would be difficult for a jury to "un-hear" a piece of evidence. In

[14] If the prosecutor didn't deliberately elicit this inadmissible testimony. then the police detective deliberately injected it into the trial. As the trial court pointed out, this was a veteran detective who knew or should have known that such evidence was inadmissible. (RR32 41) "I mean this officer knew better." (RR32 39)

this case it would be impossible. *See, Fuller v. State,* 827 S.W.2d 919, 926 (Tex.Crim.App. 1992)(an instruction to disregard not promptly given doesn't in and of itself cure error).

In *Ex parte Wheeler,* 203 S.W 3d 317 (Tex.Crim.App. 2006), this Court found that the granting of a mistrial was proper because the harm of a prosecutorial question couldn't be undone. The question, which this court called a sentence with a question mark at the end, was whether the defendant's own insurance company had found her at fault. That question was so "manifestly improper" that a jury could not disregard it even if instructed to do so. *Id.* at 324.

Such is the case here. All the eyewitness identifications were called into question, and the fingerprint and DNA evidence were explainable by the fact that Applicant had been in the bar earlier in the evening. If the jury had any doubts, those would have been assuaged by knowing the defendant was also accused in another, similar offense – a shooting. Proof of an extraneous offense is inherently prejudicial. *Abdnor v. State,* 871 S.W.2d 726, 739 (Tex.Crim.App. 1994). In this case the sketchy detail the jury heard made this sound like a very similar offense, so the harm was amplified. It was amplified to the extent that the jurors could not ignore it.

The question and testimony so flagrantly violated the rule against admission of extraneous offenses that the jury could not have ignored them. *Wheeler, supra,* at 325.

Another factor is the flagrancy of the State's misconduct. This was a violation of a court order. If the prosecutor had thought she had a genuine basis for offering this evidence, she still should have approached the court to obtain a ruling. She did not. Her disavowal of

trying to elicit this evidence is unconvincing. What else could that question be expected to call forth as an answer?

So this was not just the injection of harmful extraneous offense evidence into the trial. It was prosecutorial misconduct. The mistrial should have been granted on that basis alone.

Preservation of Error or Ineffective Assistance of Counsel

As set out under the previous point of error (incorporated herein as if fully set out), this error was preserved by the defense's objection to the testimony and prompt request for a mistrial. Defense counsel did not use the words "prosecutorial misconduct," but the basis of that objection was clear to the trial court, especially as the trial court reprimanded the prosecutor for asking the question. *Lankston v. State,* 827 S.W.2d 90, 98 (Tex.Crim.App. 1992). As the basis for the objection was clear to the trial court, the error was preserved.

If this Court finds that the error regarding prosecutorial misconduct was not preserved, then Applicant received ineffective assistance of counsel both at trial and on direct appeal. He was harmed by that ineffective assistance because a properly-made objection for prosecutorial misconduct would have been sustained and a mistrial granted in the trial court, or the court's ruling would have been reversed on direct appeal. Either of these actions would have changed the outcome of the trial.

GROUND FOR RELIEF TWENTY-ONE

APPLICANT'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT A VOTE BY ONE

OF THEM WOULD RESULT IN A LIFE SENTENCE, DESPITE THE STATUTORY "10-12" DEATH SENTENCING SCHEME.

SUMMARY OF THE ARGUMENT

The current state of the law, which requires juries to be kept ignorant of the effect of their votes, denies Applicant his constitutional rights.

ARGUMENT

Applicant raised this issue in his tenth point of error on direct appeal. However, the Court of Criminal Appeals disposed of this issue in a manner that denies Applicant his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.[15]

1. *Article 37.071 § 2(a)*

Texas law requires that neither the court, the state, nor counsel for the defense may inform a juror or prospective juror of the effect of the jury's failure to agree on special issues at punishment. Tex. Code Crim. Proc. Ann. art. 37.071 § 2(a)(Vernon Supp. 1997). All parties in Petitioner's case acted in compliance with this statute.

2. *Article 37.071 §§ 2(d)(2) & 2(f)(2)*

Texas law requires that the capital sentencing jury be instructed that it may not answer the first special issue "yes" or the second special issue "no" unless 10 or more jurors agree. *See Tex. Code Crim. Proc. Ann. art. 37.071 §§ 2(d)(2) & 2(f)(2).* Mr. Bartee's jury was instructed pursuant to the statute. (CR— 307-10).

3. *The Law*

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[15] At the time of this writing, this is only an assumption on Applicant's part, since the Court of Criminal Appeals has not yet issued its opinion.

Mr. Bartee contends that the Court of Criminal Appeals, in rejecting variants of this argument during the last few years, has erred. Essentially, the claim contends that the "10-12 rule" contained in *Tex.Crim.Proc. art. 37.071* violates the constitutional principles discussed in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McCoy v. North Carolina*, 494 U.S. 294 (1990).

The "10-12 provision" in *Art. 37.071, § 2(d)(2) & § 2(f)(2),* violates the constitutional principles discussed in *Mills* and *McCoy* for the following reasons. The "10-12 provision" requires that, in order for the jury to return answers to the special issues that would result in a life sentence, (i) at least ten jurors must vote "no" in answering the first special issue, (ii) at least ten jurors must vote "no" in answering the second special issue, *or* (iii) at least ten jurors must vote "yes" in answering the third special issue. This "10-12 provision" violates the Eighth and Fourteenth Amendments because there is a reasonable possibility that, under the present Texas capital sentencing scheme, all twelve jurors in a capital case could believe that a life sentence would be appropriate under state law, but, because at least ten jurors could not collectively agree on their answer to any one of the special issues, the jury could not return a life sentence. Such a "majority rules" mentality could lead jurors to change their potential holdout votes for life to a vote for the death penalty.

As an illustration, consider the following hypothetical circumstance: at trial, four of the twelve jurors conclude that, as a consequence of a capital defendant's positive character traits, he would not pose a future threat to society; thus, those jurors individually vote to answer the

first special issue negatively.[16] Assume that those four jurors also believe, however, that the defendant possessed the requisite *mens rea* under the second special issue (the "parties" special issue) and that there is insufficient mitigating evidence as a whole to result in an affirmative answer to the third special issue (the "*Penry*" special issue).

Further suppose that four other jurors believe that the same capital defendant did not possess the requisite *mens rea* under the second special issue and, thus, those four jurors individually vote to answer the parties special issue negatively.[17] Assume, however, that those four jurors believe that the capital defendant does pose a future danger to society and that those four jurors also believe that the defendant's mitigating evidence, as a whole, is insufficient to result in a "no" vote to the statutory *"Penry"* special issue.

Finally, suppose that the four remaining members of the jury conclude, as a result of the capital defendant's mitigating evidence of a troubled childhood,[18] that the statutory *Penry* special issue should be answered affirmatively. However, for whatever reason, assume that those four jurors also believe that the capital defendant would pose a future threat to society and also that the

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[16] Of course, a "no" answer to the "future dangerousness" special issue – a finding that a capital defendant does not pose a future threat to society – is a constitutionally recognized mitigating factor. *See Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

[17] A capital defendant's lack of such a mens rea is, of course, a constitutionally relevant circumstance. *Cf Tison v. Arizona*, 481 U.S. 137 (1987).

[18] Of course, the third ("*Penry")* special issue also implicates a potentially limitless range of mitigating factors, including "troubled background" evidence. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

defendant possessed the requisite *mens rea* under the "parties" special issue. Thus, those four remaining jurors only vote in the defendant's favor on the third special issue.

Such a breakdown can be graphically illustrated:

	1st SPECIAL ISSUE	*2nd SPECIAL ISSUE*	*3rd SPECIAL ISSUE*
Juror 1:	**NO (life)**	YES (death)	NO (death)
Juror 2:	**NO (life)**	YES (death)	NO (death)
Juror 3:	**NO (life)**	YES (death)	NO (death)
Juror 4:	**NO (life)**	YES (death)	NO (death)
Juror 5:	YES (death)	**NO (life)**	NO (death)
Juror 6:	YES (death)	**NO (life)**	NO (death)
Juror 7:	YES (death)	**NO (life)**	NO (death)
Juror 8:	YES (death)	**NO (life)**	NO (death)
Juror 9:	YES (death)	YES (death)	**YES (life)**
Juror 10:	YES (death)	YES (death)	**YES (life)**
Juror 11:	YES (death)	YES (death)	**YES (life)**
Juror 12:	YES (death)	YES (death)	**YES (life)**

Hypothetically speaking, all twelve members of the jury in such a case individually agree that *one of the three*

statutory mitigating factors has been established and that, under state law, a life sentence is appropriate. That is, all twelve jurors could have believed that a mitigating factor exists which, under state law, should have caused the capital defendant to be sentenced to life. However, jurors are given the impression that Texas law forbids the imposition of a death sentence *only if* ten members of a capital sentencing jury agree collectively as to *which* statutory mitigating factor has been established; because such jurors could disagree about which of the three factors has been established, however, they are left without guidance as to how to proceed. In the absence of such guidance, there is a constitutionally unacceptable risk that Texas capital sentencing juries may feel coerced by a "majority rules" mentality into returning answers to the special issues that would result in a death sentence. A death sentence imposed by a jury so instructed is too likely a product of arbitrary decision-making for the Constitution to tolerate. *See McKoy v. North Carolina, supra; Mills v. Maryland, supra.*

GROUND FOR RELIEF TWENTY-TWO

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO INSTRUCT THE JURY THAT THERE IS NO PRESUMPTION IN FAVOR OF DEATH, EVEN IF THEY FOUND APPLICANT TO BE A FUTURE DANGER IN ANSWER TO SPECIAL ISSUE NUMBER ONE, AND THAT SPECIAL ISSUE NUMBER THREE, REGARDING MITIGATING CIRCUMSTANCES, IS TO BE TAKEN UP AND CONSIDERED INDEPENDENTLY, WITHOUT REGARD TO THE JURY'S FINDING ON SPECIAL ISSUE NUMBER ONE.

SUMMARY OF THE ARGUMENT

The trial court's refusal to instruct the jury that there is no presumption in favor of a death sentence, even after they have found Applicant to be a future danger to society, deprived Applicant of his rights under the Eighth and Fourteenth Amendments to the Constitution to be free of cruel and unusual punishment and to due process of law.

ARGUMENT

This argument was made to the court in a pretrial motion and was overruled (RR9 4-6) It was also Applicants eleventh point of error on direct appeal, but the Court of Criminal Appeals' resolution of the issue conflicts with well-established federal law.[19]

The jury was asked to answer the three standard questions in the sentencing phase of trial, which may be summarized as: (1) future danger to society; (2) actually caused the death: and (3) mitigating circumstances. Under the instructions, the jury would have to find first that Applicant was likely to commit future acts of criminal violence before they could proceed further. A "no" answer to that question would mean a life sentence, as would a "no" answer to the second question, or a "yes" answer to the third question. Failure to reach agreement at all would also, of course, result in a sentence of life imprisonment (though the jury was not instructed to that effect). These questions come from Tex.Code of Crim. Pro. Art. 37.071 §2(b)(1) and §2(e)(1).

A court is to interpret this or any statute by first looking to its literal text and the plain meaning of the words. *Muniz v. State,* 85l S.W.2d 238, 244 (Tex.Crim.App. 1993). From such a reading, it appears that a life sentence is given preference over a death sentence. A jury has to give the deadly answers three

[19] See footnote 4, above.

times, unanimously, before a death sentence may be imposed. If they answer differently at any question along this route, or if they fail to agree at all, the sentence of life is automatically imposed.

Applicant's motion asked only that the court instruct the jury as to this preference for a life sentence. The trial court should also have instructed the jury that the third, "mitigation," special issue should be decided independently from the first special issue, and not starting from the premise that Applicant would be a future danger to society. The failure to instruct the jury in this fashion in effect placed the burden of proof on Applicant as to the third special issue.

The Eighth Amendment to the United States Constitution requires a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell v. Mississippi,* 472 U.S. 320, 323 (1985). Because the jury was not instructed in accordance with Applicant's pretrial motion, his sentence of death does not have the required heightened reliability.

The failure to instruct the jury in accordance with the law also denied Applicant his rights to due course of law and due process of law, by failing to inform the jury of the relevant laws concerning burden of proof and degree of proof, under the Texas Constitution, Art. I, §l0, and the United States Constitution, Amendment 14, respectively.

GROUND FOR RELIEF NUMBER TWENTY-THREE

THE TRIAL COURT VIOLATED THE FIRST, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO DEFINE THE WORD "MILITATES" SO AS TO PRECLUDE CONSIDERATION OF

APPLICANT'S AGE, RACE, SEX, NATIONAL ORIGIN, RELIGION, POLITICAL VIEWS OR SEXUAL ORIENTATION AS A FACTOR SUPPORTING A DEATH SENTENCE.

SUMMARY OF THE ARGUMENT

In deciding the third special issue, jurors were instructed to consider the evidence that "militates" in favor of a death sentence or mitigates in favor of life. But the crucial word "militates" was not defined in the court's instructions. The defense requested such an instruction and that request was denied.

Without such a definition, jurors were free to include in their considerations factors which it would be unconstitutional for them to consider, such as race or ethnicity of the defendant. A simple definition saying that "militates" does not allow such factors to be used would have prevented this possibility.

Applicant suffered harm from this lack of definition because it left the jury free to consider unconstitutional factors.

ARGUMENT

The trial court instructed the jury that "you shall consider all evidence submitted at the guilt-innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty." (CR 301) The statute does not define "militates." In a pretrial motion the defense asked the court to define "militates" to exclude factors that would be contrary to law for the jury to consider. For example, by statute jurors may not consider race or ethnicity as factors making it more likely the defendant will engage in future

criminal conduct. CodeCrim.Pro. Art. 37.071 §2(2). The court denied this motion. (RR9 4-6)

By allowing jurors to consider such illegal factors, the trial court violated Applicant's rights under the First, Eighth, Fourteenth Amendments to the United States Constitution. Under the First Amendment a person has a right to the free exercise of religion and of assembly, but by not defining "militates" to exclude such considerations, the trial court allowed the jury to consider unconstitutional factors. Because this instruction allowed for the possibility of unconstitutional or illegal factors to tip the jury's decision in favor of death, the Eighth Amendment's requirement of heightened certainty in death penalty cases was denied to Applicant. Finally, the Fourteenth Amendment's right to due course of law was violated when Applicant's jury was allowed to consider factors that the law would otherwise not allow.

This issue was presented as Applicant's point of error number twelve in his direct appeal. The Court of Criminal Appeals failed to follow well-established federal law in overruling this point.[20]

As so often happens, the Texas legislature in trying to solve a problem created another. After the Supreme Court ruled that juries must be instructed to consider mitigating factors in reaching a death sentence, the legislature passed the third special issue, which does include an order to juries to consider such factors, but also instructs juries to consider <u>all</u> evidence from the guilt-innocence and punishment phases of trial that militates in favor of a death sentence. "Militates" is an unusual word, and the statute does not define it. Webster's New World Dictionary of the American Language defines it as "to

[20] See, again, footnote 4.

serve as a soldier," or, as used in this statute, "to be directed (against); operate or work (against or, more rarely, for): said of facts, evidence, actions, etc."

Most people would take the word to mean something to do with the military. As one judge of this Court has observed, "If one were to ask the average juror what [militates] means, the smart money says he will not get even close." *Middleton v. State,* 125 S.W.3d 450, 457 (Tex.Crim.App. 2003)(Price, J., dissenting)

The majority holding in *Middleton* is that terms with a technical legal meaning may need to be defined by trial courts even if there is no statutory definition: "This is particularly true when there is a risk that the jurors may arbitrarily apply their own personal definitions of the term or where a definition of the term is required to assure a fair understanding of the evidence." *Id*. at 454.

Such is the case here. The lack of definition allowed jurors to "arbitrarily apply their own personal definitions" of militates to include everything they heard during the two phases of trial, including Applicant's ethnicity, youth, national origin or other factors that should not be considered.

The trial court's error in failing to give this charge was a violation of Applicant's constitutional rights, so this Court must reverse unless it finds beyond a reasonable doubt that the error did not contribute to Applicant's death sentence. Tex.R.App.Pro. 44.2(a). This is not possible, given the secrecy of jury deliberations and of individual juror's thought processes. Because of the possibility that jurors considered unconstitutional and otherwise illegal factors in reaching their decision on special issue number three, this error calls for reversal.

GROUND FOR RELIEF NUMBER TWENTY-FOUR

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE THE WORD "PROBABILITY" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL.

GROUND FOR RELIEF NUMBER TWENTY-FIVE

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE "CRIMINAL ACTS OF VIOLENCE" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL

GROUND FOR RELIEF NUMBER TWENTY-SIX

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FAILED TO DEFINE"CONTINUING THREAT TO SOCIETY" FOR THE JURY DURING THE SENTENCING PHASE OF TRIAL

SUMMARY OF THE ARGUMENT

By failing to define crucial terms in the first special issue, the trial court allowed the jury unfettered discretion to impose the death penalty or not, based on their own personal definitions of those terms. The Eighth and Fourteenth Amendments to the United States Constitution prohibit such unguided freedom to impose a death sentence.

ARGUMENT

These three points of error will be argued together in the interest of judicial economy, because they are similar and rely on the same legal precedents.

Facts

At the punishment phase of trial the trial court gave the standard Texas instruction to the jury:

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Joseph Gamboa, would commit criminal acts of violence that would constitute a continuing threat to society?

(CR3)

The terms "probability," "criminal acts of violence," and "society" were not defined for the jury. Applicant's attorneys objected to the lack of these definitions in a pretrial motion (CR 171), which the trial court denied. (RR9 4-6)

This failure to define the terms, which follows the Texas statute and caselaw, makes the Texas capital sentencing scheme unconstitutionally vague, violating Applicant's right against cruel and unusual punishment. In this case, that means capricious punishment, punishment given by a jury that has not been properly guided as to how to consider the evidence.

Evidence

The defense presented a great deal of evidence in the punishment phase of trial, as set out in the statement of facts, above. There was evidence that applied to all three special issues. As to future dangerousness, the defense's mental health expert testified that Applicant did very well in prison and based on her psychological tests would not be dangerous to anyone, under the rules of the prison system. As to special issue number two, Dr. Milam testified that Applicant was more likely than most people to be guided by someone else, as the shooter was guided, and instructed, in this robbery. So there was evidence that

Applicant did not intend to cause the deaths of the victims; be was only following orders to get them out of the way.

Finally, as to the mitigation special issue, there was certainly evidence that Applicant might be a continuing threat to society, given the evidence of extraneous offenses the State introduced. But there was also a great deal of mitigating evidence, particularly of Applicant's miserable childhood, lack of good parental figures, and poorly functioning intelligence. But with the essential terms of the statute undefined, the jury could not apply all that evidence.

Law and Application

The Supreme Court struck down the death penalty in Texas and other states in 1972 because the capital murder statutes allowed the arbitrary and capricious infliction of the death penalty. *See, Furman v. Georgia,* 408 U.S. 238 (1972). Texas passed a new death penalty scheme which the Supreme Court held facially constitutional *Jurek v. Texas,* 428 U.S. 262 (1976). However, in this case the scheme has allowed, in fact forced the jury to sentence Applicant to death in an arbitrary and capricious manner.

The Supreme Court has held that a death penalty scheme is constitutional if it defines aggravating and mitigating factors and requires a jury to consider them all. In Texas, both the elements of capital murder and the fact that a defendant is found to be a continuing threat to society are aggravating factors. *McFarland v. State,* 928 S.W.2d 482, 520 (Tex.Crim.App. 1996).

As such, this aggravating factor must be clearly defined. The Supreme Court has held that "a vague aggravating factor employed for the purposes of determining whether a defendant is eligible for the death

penalty fails to channel the sentencer's discretion." *Stringer v. Black,* 503 U.S. 222, 235 (1992).

In *Argave v. Creech,* 113 S.Ct. 1534 (1993), the Court considered the constitutionality of an Idaho aggravating factor which asked whether the defendant "exhibited utter disregard for human life." The Court found that this phrase did properly guide the sentencer's decision-making, because the Idaho courts had defined this phrase as the act of a "cold blooded, pitiless slayer." These are closely enough defined terms that they describe a particular state of mind which can be determined in particular cases. 113 S.Ct. at 1542.

In Texas, though, the crucial terms have not been defined either in the statute or by the Court of Criminal Appeals. *See. e.g., Patrick v. State* 906 S.W.2d 481, 494 (Tex.Crim.App. 1995). Texas juries must therefore guess at the meaning of the terms. If they guess wrong, they fail to meet constitutional standards.

This is why the Texas death penalty scheme is unconstitutional. It allows different juries to apply different definitions to the crucial terms. One jury might believe that "society" means the society of the free world. Another might define society more broadly to include prison society as well. Because different definitions can be applied by different juries, the system is arbitrary and capricious. This amounts to cruel and unusual punishment, forbidden by the Eighth Amendment to the United States Constitution.

The statute is not just facially unconstitutional. It failed properly to guide the sentencer in Applicant's particular case. His evidence showed that he was a model prisoner when incarcerated, one who adjusted well to the structured environment of prison. He was even chosen by

the prison officials themselves to represent the prison to the outside world.

The jury also heard that this 23-year-old defendant (RR23 72) would not be eligible for parole for forty years if he were given a life sentence. (CRIII 281) He would in effect spend the rest of his life in prison. If "society" had been defined as the society in which Applicant would actually be living for the rest of his life, prison society, the jury would have been allowed to give effect to his mitigating evidence and find that he was not a continuing threat to commit criminal acts of violence that constituted a threat to society. Indeed, they would have been required to do so, since the state presented no controverting evidence that Applicant had ever done anything wrong in prison, and the state has the burden of proof of beyond a reasonable doubt on the first special issue.

The Texas aggravating factor is vague and undefined. It allows a death sentence to be given capriciously and arbitrarily, as was done in this case. Applicant's death sentence violates the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. It must be vacated and set aside.

GROUND FOR RELIEF NUMBER TWENTY-SEVEN

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION TO PRECLUDE THE DEATH PENALTY AS A SENTENCING OPTION DUE TO EQUAL PROTECTION VIOLATIONS.

SUMMARY OF THE ARGUMENT

The death penalty is administered so wantonly, without any guiding standards, that defendants accused of similar crimes but in different locations are treated unequally. As a result, Applicant was denied equal

protection of the law under the U.S. Constitution. The death penalty is sought and obtained so freakishly that its use also violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT

This issue was raised as the appellant's sixteenth point of error in his direct appeal. It was denied by the Court of Criminal Appeals, a denial that is not in accord with federal law.[21] This Court has previously rejected this argument. *Threadgill v. State,* 146 S.W.3d 654, 671-72 (Tex.Crim.App. 2004).

The defense filed a pretrial motion titled similarly to this ground for review, claiming that there are no uniform, statewide standards to guide Texas prosecutors in deciding when they should seek a death sentence. (CR 219) The trial court denied the motion. (CR 249). That motion relied on the equal protection clause of the United States Constitution.

In *Bush v. Gore,* 531 U.S. 98 (2000), the United States Supreme Court held that when fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people. *Id.* at 102.

What was true of voting rights in *Bush v. Gore* is certainly true of the right to life in death penalty cases. States must establish guidelines to ensure that the lives of all their citizens are treated equally. The Constitution guarantees the right to life and to the equal protection of the laws, and a State may not, through arbitrary use of

[21] See footnote 4.

the death penalty, treat one person's life differently from another's.

Applicant asks that the Court take note of legal articles applying the principles of *Bush* to the wanton imposition of the death penalty: Laurence Benner, et al, *Criminal Justice in the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions* (October 2, 2000 - September 30, 2001); 38 Cal. W. L. Rev. 87, 91 (200l)("Certainly the *Bush v. Gore* equal protection principle ought to be no less applicable when a state permits 'disparate treatment' of death eligible defendants"); Michael P. Seng, *Commentary: Reflections on when "We, the People" Kill,* 34 J. Marshall L. Rev. 713, 717 (2001); Cass R. Sunstein, Symposium: *Bush v. Gore: Order Without Law,* 68 U.Chi.L.Rev. 737, 758 (2001)(*Bush* may require that "methods be in place to ensure against the differential treatment of those subject to capital punishment").

Texas' lack of standards to ensure non-arbitrary treatment with regard to the right to life is enough in itself to establish an equal protection violation; a showing of intentional discrimination against a protected class is not required. *Bush,* 531 U.S. at 106. Such claims are not based on an individual act of discrimination, but rather challenge a system in which unchecked official discretion makes arbitrary and unequal treatment inevitable. *Cf. McCleskey v. Kemp,* 481 U.S. 279 (1987)(holding superseded in part by statute).

While *Bush v. Gore* declares "consideration is limited to the present circumstances," *Id.* at 109, surely no one would suggest that the right to vote is protected by the equal protection clause of the Fourteenth Amendment while the right to life is not. Non-arbitrariness is a necessity for equal protection. Written standards are

used in other jurisdictions to guide prosecutors in the decision as to when the death penalty should be sought. *See, e.g.,* United States Attorneys' Manual §9-10.010 et. seq. (1995)(laying out "federal protocol" for capital cases); U.S. Department of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review (2001).

The fact that written standards are in place in some jurisdictions but not in this one supports Applicant's claim that he has been denied equal protection of the laws by his death sentence.

The Right to Life is Fundamental

The U.S. Constitution safeguards the equal treatment of all persons in the context of death penalty prosecutions. The right to vote is conferred by historical trends and legislative decisions, while the right to life is contained in the text of the Constitution (as well as the Declaration of Independence.) The Fifth and Fourteenth Amendments provide that neither the federal government nor the states shall deprive any person of "life, liberty, or property" without due process of law. *Contrast, Bush v. Gore* at 104 ("the individual citizen has no federal constitutional right to vote for electors for the President of the United States.")

Arbitrary and Disparate Treatment of Similarly Situated Texas Defendants

The lack of standards to guide local prosecutors as to whether to seek the death penalty inevitably leads to the arbitrary and disparate treatment of similarly situated defendants. Prosecutors in each of Texas' 254 counties make such decisions on their own, according to unwritten and widely varying standards. Whether a person charged with a capital crime will face the death penalty depends largely on arbitrary factors such as the location, personal

opinions of the local prosecutor, differences in public opinion, and even prosecutorial and judicial budgets. More disturbingly, these decisions may tum on the race of the accused and the victim. While under the *Bush* standard it is not necessary to show that a standardless system has, or will have, a disparate or discriminatory impact, the evidence of such an impact in Texas underlines the arbitrariness inherent in such a system. Statewide standards would remedy this blatant violation of the equal protection clause.

A review of the various counties in Texas reveals that some have never prosecuted a case as a capital murder, while others are on the cutting edge of the death penalty, trying out new theories of ways to achieve more death sentences. Applicant refers to and incorporates herein the statistics kept by the Texas prison system itself.[22] Harris County leads the nation both in defendants sent to death row and to executed defendants. In this case, Applicant was sentenced to death on a novel theory that the State could incorporate two possible capital murders into one. See Ground for Relief Number Ten.

"[T]he willingness of the local prosecutor to seek the death penalty seems to play by far the most significant role in determining who will eventually be sentenced to death." Richard Willing and Gary Fields, "Geography of the Death Penalty," *USA Today,* December 20, 1999, at 1A. Harris County again provides the primary example of this, where possible death penalty cases are prosecuted not based on their individual components but on whether prosecutors think there is a "better than average chance" of a jury's returning a death sentence. Mike Tolson and Steve Brewer, "Harris County is a Pipeline to Death Row," Houston Chronicle, February 2, 2001. As state

[22] www.tdcj.state.tx.us/stat/drowfacts.htm

district judge Doug Shaver said in regard to Harris County, "It seems to me that there are cases going through that are not necessarily death cases. It is no longer reserved for the special cases it ought to be reserved for." *Id.*

Even more disturbing are the racial disparities. Researchers have concluded that all other things being equal, a Texan who murders a white person is twice as likely to be charged with capital murder than one who murders a Hispanic person, and almost five times more likely to be charged with capital murder than one who murders an African-American. Jonathan R. Sorensen and James W. Marquart, "Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases," 18 N.Y.U. Rev. L. and Soc. Change 743, 765 (1990/91).[23] That the victim is white increases an offender's chance of being charged with capital murder more than if he is charged with multiple killings. *Id.*[24]

Although the *Bush v. Gore* opinion says that its ruling applies only to that case's particular circumstances, it relies on the equal protection clause, which certainly provides protection to all Americans (hence its title), not just to Presidential candidates.

Invoking Prosecutorial Discretion Does not Excuse an Unconstitutional Statute

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[23] This study compared death-eligible arrestees to defendants charged with capital murder, excluding acquittals, from 1980 to 1988, in order to measure prosecutorial discretion. Thus, the defendants referred to as being charged with capital murder were also convicted.

[24] A defendant in a white-victim crime is 4.6 times as likely to be charged with capital murder as a defendant in a black-victim crime; a defendant in a multiple-victim crime is 2.86 times as likely to be charged as one in a single-victim crime. *See, supra* at notes 4 and 5.

The need for non-arbitrary standards in the application of the death penalty outweighs any benefits of unbounded prosecutorial discretion. Because the right to life is fundamental, if Texas is to maintain a death penalty system, its justification for that system would have to pass strict scrutiny. *Skinner v. Oklahoma* 316 U.S. 535, 541 (1942) (reversing an order to sterilize a felon because the law did not pass strict scrutiny, as it treated larceny and embezzlement differently despite their being essentially the same crime). The separation of powers doctrine does not bar courts from requiring some restraint on prosecutorial discretion. *See, e.g., United States v. Armstrong,* 517 U.S. 456 (1996)(acknowledging that discovery would be allowed if pretitioner showed that the Government declined to prosecute similarly situated persons of other races); *United, States v. Batchelder,* 442 U.S. 114, 125 (1979)(prosecutorial discretion is "subject to constitutional constraints"); *Bordenkircher v. Hayes,* 434 U.S. 357, 365 (1978)(same); *Oyler v. Boles,* 368 U.S. 448 (1962)(same). In selective-prosecution and vindictive prosecution cases, courts require "clear evidence" to rebut the presumption that prosecutors have acted legally. *Armstrong,* 517 U.S. at 464 (quoting *United States v. Chemical Foundation, Inc.,* 272 U.S. I, 14-15 (1926)). Because of separation of powers concerns, courts refuse to force district attorneys and U.S. Attorneys to prosecute particular offenders, as doing so would "encroach on the prerogatives of another department of the Government." *United States v. Shaw*, 226 A.2d 366, 368 (D.C. 1967). However, "there is an enormous difference between, on the one hand, forcing a prosecutor to charge or stripping him of authority to charge and, on the other, regulating that authority..." James Vorenberg, *Decent Restraint of Prosecutorial Power,* 94 Harv. L. Rev. 1521, 1546 (1981). This analysis is not attacking a

particular decision of an individual prosecutor. Rather, it alleges that Texas violates the Equal Protection Clause by failing to establish standards by which prosecutors are to decide whether to seek the death penalty.

The frequently cited reasons for allowing prosecutors broad discretion cannot justify a system which allows some defendants' lives to be arbitrarily valued less than others. The primary justification for judicial noninterference with prosecutorial decision-making is that review of individual prosecutorial decisions would be difficult or inefficient. If coherent standards were in place, judicial review would be much more feasible arid concurrently, arbitrary and willful prosecutions seeking death would be less likely. Statewide standards would simply provide "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Bush*, 531 U.S. at 109. Allowing the decision to seek the death penalty to be made based on the unfettered discretion of an individual prosecutor allows an unconstitutional degree of arbitrariness, inconsistency and unpredictability.

A Statewide Standard is Required by the Eighth Amendment

Requiring standards to ensure that prosecutors do not arbitrarily value some people's lives more than others' would further the Eighth Amendment's mandate of reliability and consistency in the imposition of the death penalty. In 1972, the Supreme Court invalidated the death penalty in part on the grounds that the standardless death penalty statutes then in effect allowed the ultimate punishment to be applied "wantonly and... freakishly." *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(Stewart, J., concurring). Four years later, when the court approved revised death penalty statutes, it held that state legislatures confronted these problems by drafting

statutes that narrowed the sentencer's discretion to impose the death penalty and provided guidelines. *Jurek v. Texas,* 428 U.S. 262, 270 (1976). If imposing the death penalty on a freakishly and randomly selected subset of those who commit murder violated the Eighth Amendment, *see Furman, supra,* then surely allowing prosecutors to choose, without any standards whatsoever, what subset of those accused of capital murder will face the death penalty is equally unconstitutional.

In light of the Equal Protection analysis of *Bush v. Gore,* the Supreme Court's previous approval of Texas' system for selecting which defendants should face the death penalty must be revisited. Texas' standardless system allows for the arbitrary and inconsistent treatment of similarly situated defendants and is thus unconstitutional because it violates the Equal Protection Clause. Consequently the trial court's denial of Mr. Gamboa's motion was in error, and his conviction should be reversed.

GROUND FOR REVIEW TWENTY-EIGHT

THE TRIAL COURT ERRED WHEN IT REFUSED TO HOLD THAT ARTICLE 37.071 IS UNCONSTITUTIONAL BECAUSE A GRAND JURY HAD NOT CONSIDERED AND ALLEGED IN AN INDICTMENT THE FACTS LEGALLY ESSENTIAL TO APPLICANT'S RECEIVING A SENTENCE OF DEATH.

SUMMARY OF THE ARGUMENT

The state must not only prove but plead every element of an offense. A defendant is entitled to have a grand jury determine that there is probable cause to believe he committed every element of the offense. In this case the facts that would allow a death sentence are elements of the offense, or at least of the punishment. A

death sentence cannot be given unless other facts are found after the guilty verdict. Therefore those facts are elements of the offense of capital murder – death, and should have to be pled in the indictment.

The defendant is not only entitled to a grand jury determination of the facts that make his case death-worthy. Such determinations would make the plea-bargaining process more fair. A defendant who knows that a grand jury has found probable cause to believe him death-worthy would be better able to evaluate his case.

The Constitution requires that a grand jury pass on the allegations that make a death sentence possible.

ARGUMENT

Applicant filed a "Motion to Preclude the Death Penalty as a Sentencing Option due to Equal Protection Violations." (CR 219-222) The motion argued that Applicant "has the constitutional right to be accused of Capital Murder only on an indictment of a grand jury," and went on to argue that he had the right to be informed of the specific accusation against him; that is, the accusations that would give rise to a death sentence.

The trial court heard this motion before trial and denied it. (RR9 4-6)

Applicant acknowledges that this Court has rejected these arguments. *Threadgill v. State,* 146 S.W.3d 654, 671-72 (Tex.Crim.App. 2004). However, Applicant believes his constitutional arguments invoking the equal protection clause of the United States Constitution are still sound.

Several United States Supreme Court opinions give rise to this argument. *Jones v. United States,* 526 U.S. 227, 243, 119 S.Ct. 1215, 1219, 143 L.Ed.2d 311 (1999), held that "any fact, other than a prior conviction, that increases

the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt.'" *Apprendi v. New Jersey,* 530 U.S. 466, 475, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), extended this constitutional requirement to the states.

In *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court applied these standards to the Arizona death penalty scheme, finding it unconstitutional because it allowed a judge to find additional facts, after the jury verdict, which would allow the imposition of a death penalty. The aggravating factors, said the Court, were the functional equivalent of an element of the offense of capital murder - death, so that they must be found by a jury.

Most recently, the Supreme Court has again addressed these issues in *Blakely v. Washington,* 542 U.S. _____, 124 S.Ct 2537 (2004). Blakely pled guilty to kidnapping, which would have carried a sentence under Washington state's sentencing guidelines of 49 to 53 months' imprisonment. However, after the plea the trial judge made further inquiry, found "deliberate cruelty," and sentenced Blakely to 90 months in prison.

The Supreme Court, in an opinion by Justice Scalia, found this sentence unconstitutional because the facts that allowed the higher sentence were found by a judge, not either found beyond a reasonable doubt by a jury or pled to by the defendant. Slip op. at 7 and throughout.

These cases primarily concern the right to a jury finding of any fact which will increase the possible punishment. However, they also declare that such facts must be pled in an indictment.

I.

The first question is, do the logic and the constitutional holdings of these cases apply to the Texas scheme for sentencing a defendant to death? Yes. The *Blakely* opinion makes clear that its holding applies wherever an additional fact-finding is required, after a verdict, to impose a greater sentence than could be imposed without that fact-finding. This is applied to the death penalty scheme in *Ring,* as well. Slip op. at 6-7.

In fact, the prosecution tried to defend the sentence in *Blakely* by saying the judge's punishment still fell within the statutory maximum punishment, citing examples which the Supreme Court had previously held constitutional. *Id.* at 7-8. However, the Court distinguished those cases because their sentences did not require additional fact-findings after the verdict, saying, "neither case involved a sentence greater than what state law authorized on the basis of the verdict alone." *Id.* at 8.

Thus the court's holding applies here, as well. A death sentence is different from every other punishment not only because its nature is fundamentally different, but because of how it is assessed. Additional facts must be proven at the punishment phase to allow its imposition. This sets it apart from every other crime in the Texas Penal Code. If, for example, a defendant is convicted of murder, he may be sentenced to the maximum punishment, life in prison, based solely on that verdict.

A death sentence, though, requires additional findings. If trial ended immediately after the jury's verdict, the sentence would automatically be life in prison. If the state seeks the much harsher penally of death, it must prove additional facts to the jury's satisfaction: that the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society, and that there is no mitigating factor which

warrants a sentence of life imprisonment rather than death. Art. 37.071, Sec. 2(b)(l), and (e)(l), V.A.C.C.P. In fact, the state must prove the first of these issues beyond a reasonable doubt. *Id.,* Sec. 2(c).

The Court of Criminal Appeals has addressed *Apprendi* in another context, where a defendant argued that punishment must be assessed by the same jury that heard the guilt-innocence portion of trial. *Smith v. State,* 74 S.W.3d 868 (Tex.Crim.App. 2002). The Court quoted the language from *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt," but not language also holding that such facts must also be included in the indictment. *Smith, supra,* at 873. The Court went on to hold that the "deliberateness" special issue (and presumably the future dangerousness special issue as well) may not be such an element, and if it is the Texas death penalty scheme complies by requiring it to be proven beyond a reasonable doubt.

The Court did say, "If anything, the quoted language in *Powell [v. State,* 897 S.W.2d 307, 318 (Tex.Crim.App. 1994)] should be read to mean that the "deliberateness" special issue is an element of the death penalty, not of capital murder." 74 S.W.3d at 874 (emphasis added).

This is exactly the ruling that Applicant asked for in his motion. He did not argue that the capital murder indictment should be dismissed, but that the death penalty should be precluded as a sentencing option, because the indictment did not plead the additional claims that would allow a jury to find facts that would allow the imposition of the death penalty. As the Court of Criminal Appeals said, the special issues are elements of the death penalty. Those elements were not pled in this case, could

not therefore be proven, and Applicant's motion to preclude the death penalty should have been granted.

The Court of Criminal Appeals has also addressed *Apprendi* in *Resendiz v. State,* 112 S.W.3d 541, 550 (Tex.Crim.App. 2003), again on a burden of proof issue. The Court held that the mitigation special issue did not allow a sentence greater than the statutory maximum. "Under Article 37.071, the statutory maximum is fixed at death." After *Blakely's* strong language that the maximum punishment is that which can be imposed without any additional post-guilty-verdict fact-finding, this holding of the Court of Criminal Appeals' is seriously called into question.[25] The death sentence is not the statutory maximum punishment for capital murder, any more than it was in *Ring, supra,* without an additional fact-finding.

Both these Court of Criminal Appeals cases predate *Blakely*. Their language does not address Applicant's argument herein.

Just as in *Blakely, Ring,* and *Apprendi,* the verdict of guilt alone is not enough to impose the death sentence in Texas. The additional fact-findings required means that

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[25] The prosecution made a similar argument in *Blakely,* that the statutory maximum punishment was ten years, rather than the 49 to 53 months under the guidelines, but Justice Scalia dismissed this argument: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*…. The 'maximum sentence' is no more 10 years here than it was 20 years *in Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." *Blakely, slip op.* at 7 and 8 (italics in original). By the same token, death is not the statutory maximum in Texas, until additional fact-findings have been made.

the holdings of these Supreme Court cases apply in this context.

II.

A defendant not only has the right to have a jury find these additional facts, he has a right to notice in the indictment that the state will seek such findings. *Jones* had already held that such "elements" must be charged in the indictment. *Blakely* makes this holding even clearer.

Blakely criticizes pre-*Apprendi* sentencing regimes, "in which a defendant, with no warning in either his indictment or plea, would routinely see" his maximum possible punishment increased at the punishment phase. *Blakely, slip op.* at 15.

The opinion at page 5, and the accompanying footnote, make clear the requirement that these facts which give rise to a greater punishment must be pled in the indictment. Quoting an 1872 commentary, Justice Scalia says that "an accusation which lacks any particular fact which the law makes essential to the punishment is... no accusation within the requirements of the common law, and it is no accusation in reason." *Id.,* slip op. at 5 (ellision in original). The opinion expands on this commentary at footnote 5, quoting again, "'every fact which is legally essential to the punishment' must be charged in the indictment..." *Id.*, citing 1 J. Bishop, Criminal Procedure, ch. 6, pp. 50-56 (2d ed. 1872).

This is very clear and very basic. If the prosecution must prove a certain fact in order to obtain the sentence it seeks, it must also plead that fact, and convince a grand jury that it is at least probably true. *Cook v. State,* 902 S.W.2d 471, 475 (Tex.Crim.App. 1995). The indictment not only places the grand jury between the prosecuting authority and the accused. It also gives notice to the

defendant of exactly what he must be prepared to defend against. *Riney v. State,* 28 S.W.3d 561, 565 (Tex.Crim.App. 2000). This is what Applicant here asked for (CR 89), and was denied by the trial court's ruling.

III.

The final question is harm, and there is plenty of that. *Blakely* and the other Supreme Court precedents are based on the Sixth Amendment to the Constitution. Applicant's motion also relied on the right to indictment by a grand jury found in Article I, Section 10 of the Texas Constitution. Therefore the rights he was denied are of constitutional dimension, so the harm standard found in Rule 44.2(a) of the Rules of Appellate Procedure applies. That is, the Court must reverse unless it can determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

Such speculation would not be sufficient for this Court to find that the court's error in denying the motion was harmless beyond a reasonable doubt.

Furthermore, even if Applicant had been indicted under a proper death penalty indictment, he would have known where he stood. He would realize that twelve citizens had found at least probable cause to believe that he would be a continuing threat to society and no factors mitigated in favor of a life sentence for him rather than death. He would have been better able to assess his chances in trial, and made a more informed decision as to whether to accept a plea bargain offer. His rights to due process of law, including a grand jury indictment, would have been protected.

Instead all he knew was that prosecutors said they would seek a death sentence, and that they had some evidence. This is how the enormous threat of the death

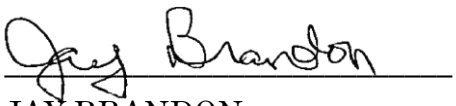
penalty – different from all other punishments – is sometimes used. A case that is fairly weak in evidence is indicted for capital murder. The state announces that it will seek the death penalty. This threat coerces a defendant into foregoing his right to have a jury determine his guilt or innocence. This is what happened to Applicant while proclaiming his innocence, he accepted a long prison sentence. The threat of the death sentence, which prosecutors might have thought they could never obtain anyway, was used to deny Applicant his constitutional right to a jury trial.

Applicant was entitled to have his death penalty case indicted by a grand jury. He was denied that right, and harmed. This Court should reverse his conviction and remand to the trial court for trial in which the death sentence is not an option, based on Applicant's motion and the indictment in his case.

PRAYER FOR RELIEF

Applicant prays that this Court ordered this case filed and set for submission. After oral argument and further briefing if necessary, Applicant prays that this Court will set aside his judgment of conviction and sentence of death and remand to the trial court for new trial.

Respectfully submitted,



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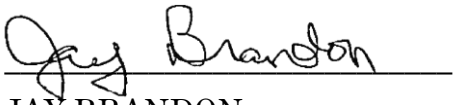
Appointed on 11.071 writ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Appellant's brief was delivered to counsel for the State by placing a copy in the drop box provided for that purpose in the Court of Appeals on this 24th day of November, 2008.



JAY BRANDON

APPENDIX P

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-75,635

JOSEPH GAMBOA Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 2005-CR 7168A IN THE 379TH
DISTRICT COURT BEXAR COUNTY

KELLER, P. J. ,delivered the opinion of the Court in which MEYERS, PRICE, KEASLER, HERVEY, and HOLCOMB, JJ., joined. COCHRAN, J., concurred in point of error seven and otherwise joined. WOMACK and JOHNSON, JJ., concurred.

In March 2007, appellant was convicted of capital murder and sentenced to death.[1] Direct appeal to this Court is automatic.[2] Appellant raises eighteen points of error. Finding no reversible error, we affirm the conviction and sentence.

I. BACKGROUND

A. The Crime

On the night of June 23, 2005, Ramiro "Ram" Ayala, the owner of a San Antonio bar named Taco Land, was working alongside employees Denise Koger and Douglas Morgan. Shortly after the bar opened, between 10:00 and 11:00 in the evening, appellant and Jose Najera entered the bar. Neither man was known to the employer or his staff. Patrons Paul Mata and Ashley Casas arrived at around 11:30 p.m. They purchased a couple of beers and began a game of pool. Shortly afterwards, appellant approached Paul, introduced himself as "Rick," and asked to play pool. After Paul and Ashley finished their game, appellant and Paul began to play. Another patron, Anita Exon, left around midnight and remembered seeing two Hispanic males who remained at the bar.

At some point during the pool game, appellant approached Ram and began to argue. Appellant then put a gun to Ram's stomach and shot him. Paul and Ashley hid in a nearby closet. Douglas and Denise hid behind the bar, only to be confronted later by appellant. Appellant told Douglas to open the cash register, but he was unable to do so. Appellant then shot him and had Denise open the cash

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[1] TEX. PEN. CODE §19.03(a); TEX. CODE CRIM. PROC. art. 37.071. Unless otherwise indicated, all future references to articles refer to the Code of Criminal Procedure.

[2] Art. 37.071, §2(h).

register. After she retrieved the money, appellant demanded any money that was not kept in the register. While Denise was complying, appellant shot her in the back and commenced kicking her in the head. He then picked up Douglas and shot him again.

Shortly afterwards, appellant and Najera left the bar. Denise was able to telephone 911 for help while Paul attempted to render aid to Ram and assist Denise with the phone call. Ram died that same night; Douglas lived for three more weeks before succumbing to his injuries.

B. Investigation and Evidence

Officer Michael Wesner arrived first on the scene at approximately 1:15 a.m. Investigators took statements from the three witnesses and collected various items such as pool cues and a beer can thought to have been handled by appellant, as well as spent bullets and samples of blood. Later, he attended a memorial service for Ram where he interviewed several people. The leads he received at the service did not pan out under further investigation.

At some point, Anita Exon told Detective John Slaughter that, based on her belief that Denise had owed a person called "Tiny" money for drugs, "Tiny" might have been involved in this offense. Other leads included a June 25th Crime Stoppers tip regarding a person named Sean Waggoner.

Detective Slaughter testified that he had no reason to think of or discount "Tiny" as a suspect. The only reason he was considered by Detective Slaughter was that Anita mentioned him. Nothing in Denise's account of what happened referred to "Tiny," nor did anything else that came up in the investigation. Sean Waggoner matched the description of one of the assailants, and once he heard that the police where looking for him, he contacted Detective

Slaughter. Detective Slaughter then met with Sean, who was cooperative. Sean gave a DNA sample and an alibi for his whereabouts on the night in question. His DNA did not match the DNA taken from the beer can believed to have been used by appellant and his accomplice, and further investigation substantiated his alibi.

On July 2, 2005, Detective Slaughter received a tip from Crime Stoppers regarding the identities of the two assailants, Najera and appellant. Detective Slaughter returned to the hospital that day to show Denise a photo line-up with a picture of appellant. She was not able to identify him as her assailant, but she did point to his picture and that of another person and said that they looked familiar to her. Detective Slaughter showed her another photo array that included Najera, and she was able to identify him as one of the assailants. Detective Slaughter was never able to communicate in any significant way with the other victim, Douglas, before his death.

On the same day, Detective Roy Rodriguez showed Paul a black and white photo array consisting of pictures of appellant and five other men. Paul was able to identify appellant as one of the two men involved in the crime. Three days later, due to a miscommunication between Detectives Slaughter and Rodriguez, the same photo array, but this time in color, was shown to Paul. Once again he identified appellant. Paul was also shown another array, which included Najera's photo, but he was unable to identify him as one of the two offenders.

On July 6, 2005, Detective Slaughter received fingerprint results from the pool cues and beer cans. A fingerprint examiner for the San Antonio Police Department found that the prints from one of the pool cues matched those of appellant.

On June 7, 2006, Detective Slaughter executed a search warrant to obtain a DNA sample from appellant. The next day, appellant's and Najera's DNA were compared to samples from the beer can found at the Taco Land Bar. The results excluded Najera, but did not exclude appellant.

II. GUILT

A. Factual Sufficiency of the Evidence

In point of error nine, appellant contends that the evidence at trial, including DNA, eyewitness identification, and fingerprints, was factually insufficient to justify the jury's verdict. Appellant argues that the three witnesses who testified to seeing appellant shoot Ram never positively identified appellant before trial and therefore their in-court identifications are suspect. Appellant also argues that Anita testified that appellant and Najera left the bar before she did, so the DNA and fingerprint evidence collected were not dispositive of guilt. Finally, appellant suggests that Detective Slaughter purposefully ignored other suspects, such as "Tiny" and Sean Waggoner.

DNA evidence from beer cans was consistent with appellant's DNA. Bexar County's forensic scientist testified that the chance of finding another person with the same DNA profile as appellant's is 1 in 5.95 quadrillion. Also, appellant's fingerprints were recovered from the crime scene, and multiple eyewitnesses identified him as the perpetrator of the crime. During Paul's testimony, there was some confusion as to when he became positive of his identification. Nevertheless, the record indicates that Paul positively identified appellant at the time he reviewed the photo array. The photo array, with his signature behind appellant's photograph, was admitted into evidence as well. Denise testified that once

she was out of the hospital and no longer under the influence of medication, she was also able to positively identify appellant.

Appellant also contends that Anita stated that appellant and Najera left before she did. But appellant seems to be referring to what Detective Slaughter testified regarding what Anita had told him, as opposed to her own testimony. Anita testified that she never told him anything of the sort and the two men she saw were still at the bar when she left. The record shows that Detective Slaughter investigated both Sean and Tiny and was able to eliminate them as suspects.

In reviewing a factual sufficiency challenge, we consider all of the evidence in a neutral light and ask whether the evidence introduced to support the verdict, though legally sufficient, is nevertheless so weak or so against the great weight and preponderance of conflicting evidence as to render the jury's verdict clearly wrong and manifestly unjust.[3] Viewing the evidence in a neutral light, we find the evidence factually sufficient to sustain the verdict. Point of error nine is overruled.

B. Jury Selection

In point of error one, appellant complains that the trial judge erred in dismissing a juror sua sponte when he was not disqualified as a matter of law. Appellant argues that the trial judge erroneously relied upon *Brooks v. Dretke* in dismissing the juror.[4] In addition, appellant argues that the harmless error doctrine does not apply

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[3] *Watson v. State*, 204 S.W.3d 404, 414-15 (Tex. Crim. App. 2006).

[4] *Brooks v. Dretke*, 444 F.3d 328 (5th Circuit 2006) .

due to the Supreme Court's ruling in *Gray v. Mississippi*.[5]

During voir dire, Juror Aulds was arrested for driving while intoxicated. The arrest occurred after the jury was selected, but before it was sworn, and a couple of days before the trial was to commence. Neither the State nor appellant objected to Juror Aulds serving on the jury. But the trial judge believed that because of the Fifth Circuit's ruling in *Brooks v. Dretke*, Juror Aulds should be disqualified or else his inclusion would lead to an eventual overturning of a verdict on appeal. The trial judge believed that the power the District Attorney's office would have over Juror Aulds would influence his ability to be impartial. Appellant objected to the sua sponte dismissal of Juror Aulds. After the dismissal, the trial judge decided to place the already-selected alternate in Juror Aulds' position and continue voir dire with the remaining potential jurors to fill the alternate's spot.

Appellant relies on *Gray v. Mississippi* to support his position.[6] But the Supreme Court has explained that the broad language in *Gray* was too sweeping to be applied literally and should not be extended beyond the context of the "erroneous *Witherspoon* exclusion" of a qualified juror in a capital case."[7] This Court has also held that, when *Witherspoon* error is not at issue, the erroneous excusal of a veniremember will call for reversal "only if the record shows that the error deprived the defendant of a lawfully constituted jury."[8] Under *Jones*, the question is

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[5] *Gray v. Mississippi*, 481 U.S. 648 (1987).

[6] *Gray*, 481 U.S. at 665, 668 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521).

[7] *Ross v. Mississippi*, 487 U.S. 81, 87 (1988).

[8] *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998).

whether or not the jurors who actually sat were impartial.[9]

In the instant case there is nothing to indicate that the jurors were anything but impartial. Appellant's only complaint regarding the jury is that, because of the erroneous excusal, his ability to have a compatible jury was negated. This is insufficient to show that he was deprived of a lawfully constituted jury. For these reasons, we need not decide whether the trial judge erred in dismissing Juror Aulds. Appellant's first point of error is overruled.

C. Outburst during trial

In point of error four, appellant alleges that the trial court erred when it denied his motion for mistrial after an outburst by one of the victim's relatives.

During the testimony of a witness for the State, a family member of the victim shouted, "You did this for 200 dollars?" Appellant moved for a mistrial, and the trial court denied his motion. Instead, the court directed the jury that the outburst was made by someone who was not a witness and not under oath. The trial judge further instructed the jury to completely disregard what was said.

The denial of a motion for mistrial is reviewed under an abuse of discretion standard.[10] This Court has long held that conduct by a bystander "which interferes with the normal proceedings of a trial will not result in reversible error unless the defendant shows a reasonable probability that the conduct interfered with the jury's verdict."[11]

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[9] *Id*. at 391.

[10] *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

[11] *Landry v. State*, 706 S.W.2d 105, 112 (11 Tex.Crim.App. 1985); *Ashley v. State*, 362 S.W.2d 847 (Tex.Cr.App. 1963); *Guse v. State*, 97 Tex.Cr.R. 212, 260 S.W. 852 (1924).

Instructions to the jury are generally considered sufficient to cure improprieties that occur during trial.[12] And we generally presume that a jury will follow the judge's instructions.[13]

Nothing in the record suggests that the outburst was of such a nature that the jury could not ignore it and fairly examine the evidence in arriving at a verdict. Point of error four is overruled.

D . Extraneous Offense

In point of error three, appellant argues that the trial court erred when it denied his motion for mistrial after extraneous offense evidence was elicited during the guilt phase of trial. The complained-of evidence was elicited in the following colloquy between the prosecutor and the witness, Detective Rodriguez:

> Q: And in fact, on July 2nd after Paul positively identified Joseph Gamboa, this defendant, as the actor or one of the actors, he became emotional, didn't he?
>
> A: Yes, he did.
>
> Q: And he began to cry didn't he?
>
> A: Yes he did.
>
> Q: What did he tell you?

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[12] *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (jury presumed to disregard parole during deliberation when so instructed); *Waldo v. State*, 746 S.W.2d 750 (Tex. Crim. App. 1988) (jury presumed to follow instruction to disregard testimony regarding defendant's post-Miranda silence); *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987) (jury presumed to follow instruction after accomplice witness alluded to defendant's previous incarceration).

[13] *Colburn*, 966 S.W.2d at 520.

> A: He said he had seen this person in a Crime Stoppers on an unrelated shooting that occurred like the following weekend.

Appellant objected to the testimony and argued that an instruction to disregard would be ineffective. The trial court sustained appellant's objection and gave the jury the following instruction: "As for the last question and answer, if you recall what it was, I'm instructing you to completely disregard it. It has nothing to do with this case or any of your deliberations whatsoever. So just disregard it."

Appellant argues that evidence violated Texas Rule of Evidence 404(b), which states: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Assuming that the testimony was improper, the trial judge quickly instructed the jury to disregard the statement and the question. Nothing in the record suggests that the jury was unable to follow the instruction. Point of error three is overruled.

E. In-Court Identification

In point of error seven, appellant contends that the trial court erred in failing to suppress Paul's in-court identification of appellant. Appellant argues that Paul's in-court identification was influenced by a highly suspect photo array shown to him by police officers during their investigation. Appellant argues that Paul never positively identified appellant as the shooter until a pre-trial hearing where appellant was present in an orange jumpsuit.

Paul was shown three photo arrays during the police investigation. The first, shown on June 28, 2005, consisted of photographs of Sean Waggoner and five random individuals. Paul was unable to identify anyone from that

array. The second, shown on July 2, 2005, was a black and white array that included a photo of appellant. After Paul was able to narrow the array down to two individuals, Detective Rodriguez asked Paul to choose the one who most resembled the shooter. Paul was able to single out and identify the appellant, and he signed his name behind that picture. Due to a miscommunication, three days later, another detective went to Paul with a third photo array, which was identical to the second except that it was in color. Again, Paul identified appellant. In a pre-trial hearing Paul identified appellant as the man who shot and killed Ram. Finally, Paul again identified appellant at trial. The trial court suppressed only the third photo array.

We review de novo a trial court's ruling on how the suggestiveness of a pre-trial photo array may have influenced an in-court identification[14] "An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification."[15] We consider the totality of the circumstances in order to determine whether "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[16] Factors to be considered when making a de novo review are: 1) the witness's opportunity to view appellant at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the witness's level of certainty at the time of

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[14] *Loserth v. State*, 963 S.W.2d 770, 771-772 (Tex. Crim. App. 1998).

[15] *Id.* at 772.

[16] *Id.* quoting *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). *See also Madden v. State*, 799 S.W.2d 683, 695 (Tex. Crim. App. 1990).

confrontation; and 5) the length of time between the offense and the confrontation.[17]

Even though Paul testified that he hesitated when identifying appellant, there was other testimony to support the contention that Paul gave multiple positive identifications. Police officers who conducted the array testified to Paul's positive identification of appellant. A few days after the shooting, Paul was watching television and recognized appellant from an unrelated Crime Stoppers commercial regarding another robbery. Paul called the Crime Stoppers hotline when he saw the number come up on the commercial. Also, Paul testified that he played pool with appellant for approximately ten minutes. Paul testified that he based his in-court identification of appellant on his memory of the events that transpired at Taco Land and of Ram's murder. This evidence is sufficient to remove any possible taint from the excluded third photo array. The trial court did not err in admitting evidence of Paul's in-court identification of appellant. Point of error seven is overruled.

F. Jury Unanimity

In point of error two, appellant contends that he was denied his right to a unanimous jury verdict. He claims that the jury was allowed to convict him based upon two distinct and separate theories within the capital murder statute without having to unanimously agree which one was applicable. He acknowledges prior cases that permit the disjunctive charging of alternate methods of committing capital murder, but he argues that those cases are distinguishable because the different means of committing capital murder in those cases were contained within the same subsection of the statute, while the

[17] *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

different legal theories of capital murder in his case are found in different subsections.

Appellant was charged in a two-paragraph indictment. The first paragraph alleged that appellant caused the death Ram by shooting him with a firearm while committing or attempting to commit the offense of robbery of Ram, Douglas, and Denise. The second paragraph alleged that appellant caused the death of Ram and murdered Douglas during the same criminal transaction..

In *Kitchens v. State*, we held that the disjunctive submission of two theories of capital murder with two different aggravating elements (the underlying offenses of robbery and aggravated sexual assault) did not violate the right to a unanimous verdict because the different theories were simply alternate methods of committing the same offense.[18] It is true that the alternate theories of capital murder in *Kitchens* involved aggravating elements that were listed within a single subsection of the capital murder statute.[19] Nevertheless, in *Kitchens*, we explained generally that alternate theories of committing the same offense may be submitted disjunctively in the jury charge without violating the right to jury unanimity.[20] In

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[18] 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *see also Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004).

[19] *See* TEX. PENAL CODE §19.03(a)(2)("A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and . . . the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6).").

[20] 823 S.W.2d at 258; *see also Martinez*, 129 S.W.3d at 103 (question is whether the disjunctive submission involves "alternative theories of committing the same offense, in contrast to instructing the jury on two separate offenses involving separate incidents").

answering a claim that the State should have elected between different theories of capital murder that did involve aggravating elements that were contained in different subsections (murder in the course of robbery and burglary and murder for hire),[21] we held in *Hathorn v. State* that no election was required because the indictment charged only one offense.[22] For this reason, we rejected the defendant's reliance upon the severance statute because that statute applied only when two or more offenses have been consolidated or joined for prosecution.[23]

In *Graham v. State*, we addressed a complaint that the trial court erred in denying a motion to sever where the defendant's claim was that different theories of capital murder (where the aggravating elements were in fact codified in different subsections) were different offenses.[24] Three different theories were at issue: (1) the murder of Hurtado in the course of robbing him, (2) the murder of Hurtado during the same transaction in which the defendant also murdered Giraldo, and (3) the murder of Garcia-Castro in the course of robbing him.[25] The Court held that the first two theories, which involved Hurtado as the victim of the predicate murder, were the same offense, but the third theory, involving a different victim for the predicate murder, was a different offense that

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[21] *See* TEX. PENAL CODE §19.03(a)(2)(robbery and burglary), (3)("the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration").

[22] 848 S.W.2d 101, 113 (Tex. Crim. App. 1992).

[23] *Id.*

[24] 19 S.W.3d at 851, 852 (Tex. Crim. App. 2000).

[25] *Id.* at 854.

should have been severed.[26] Here, we face the same factual situation presented by Graham's first two theories of capital murder: the victim of the predicate murder is the same (Ram), and the predicate murder is aggravated by the elements of robbery and an additional murder.

We explained in *Huffman v. State* that two "closely intertwined strands of our jurisprudence" – jury unanimity and double jeopardy – "address the same basic question": whether "different legal theories of criminal liability comprise different offenses" or "alternate methods of committing the same offense."[27] Comparing the jury unanimity case of *Kitchens* to the double jeopardy case of *Ex parte Ervin*,[28] we observed that the rule for homicide offenses appeared to be that "different legal theories involving the same victim are simply alternate methods of committing the same offense."[29] In *Ervin*, we included in our discussion of "murder variations" the occurrence of different legal theories in the capital murder context, and we observed that the prevailing view was "that a trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed."[30]

We conclude that our holding in *Kitchens* applies equally to all alternate theories of capital murder contained within §19.03, whether they are found in the same or different subsections, so long as the same victim is alleged for the predicate murder, as was the case here. Point of error two is overruled.

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[26] *Id.*

[27] 267 S.W.3d 902, 905 (Tex. Crim. App. 2008).

[28] 991 S.W.2d 804 (Tex. Crim. App. 1999).

[29] Id. at 807.

[30] *Id.*; *see also id.* at 807-11 (citing and discussing cases).

III. PUNISHMENT

A. Outside Influence Upon Jurors

1. Juror Harcek

In point of error five, appellant claims that Juror Harcek was exposed to improper influence when he overheard a conversation between Police Officer Breen and a prosecutor who was not involved in the case.

Juror Harcek was in the courthouse elevator when Officer Breen entered and the prosecutor asked where he was headed. Officer Breen responded, and asked if the jury took all of forty-five minutes to come back with a verdict. The prosecutor then told him it took four hours, after which Juror Harcek asked them to be quiet. Officer Breen saw Juror Harcek's juror badge and apologized, riding the rest of the way up the elevator with no further discussion regarding the case. Juror Harcek testified that all he heard was someone mention the Taco Land case, at which point he asked them to be quiet and they did. He did not hear anything relating to evidence in the case or deliberations. He further testified that he would still be able to be an impartial juror. The judge then admonished Juror Harcek not to discuss what happened with any of the other jurors, to disregard the comment when deliberating, and he asked, multiple times, if the comment would affect his ability to be impartial, to which Juror Harcek said it would not.

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion.[31] When a juror has a conversation with an unauthorized person about the case on which he is serving, there is a rebuttable presumption that injury has occurred and a new trial may be

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[31] *Ladd*, 3 S.W.3d at 567.

necessary.[32] An appellate court should defer to the trial court's findings of facts regarding the credibility and demeanor of the witnesses, viewing the evidence in the light most favorable to the trial judge's rulings.[33] In this case the juror was not even involved in the conversation; he merely overheard it. Given Juror Harcek's testimony, we hold that the trial court did not abuse its discretion in denying the request for a mistrial. Point of error five is overruled.

2. Juror Lincoln

In point of error six, appellant claims that the trial court erred when it denied his motion for mistrial after it was discovered that Juror Lincoln's seventeen-year-old son was arrested while she was serving on the jury. Because Juror Lincoln's son was arrested in Bexar County and the same District Attorney's office that was prosecuting the case at hand would also be prosecuting her son's case, appellant claims that her son's arrest would unduly influence her ability to be fair and impartial.

After the guilt phase of the trial but before the punishment phase, Juror Lincoln informed the court that over the weekend her son had been arrested for interfering with the duties of a public servant, evading arrest, and failure to identify. The trial judge asked Juror Lincoln whether or not her son's arrest would affect her ability to pay attention to the evidence and if she could set aside what happened to her son. She responded that it would not affect her ability to pay attention, nor would it prevent her from being impartial. The judge also asked her if she could set aside what happened, to which she responded that she could. Juror Lincoln also informed the

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[32] *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997).

[33] *Id.* at 402.

judge that her son was being "stupid" and she had let him stay in jail because he needed to "learn a lesson." Juror Lincoln repeatedly testified that she would have no trouble being fair and that her son's arrest would not affect her in any way for the remainder of the trial. She testified that she knew that her son was running with a bad crowd and it was her choice to leave her son in jail to teach him a lesson.

Viewed in the light most favorable to the trial court's ruling, we find that the evidence supports the trial court's denial of appellant's motion for mistrial. Point of error six is overruled.

B. Cumulative impact of first seven errors

In appellant's eighth point of error he contends that, cumulatively, errors one through seven were so great that they demand a reversal. Though it is possible for a number of errors to cumulatively rise to the point where they become harmful,[34] we have never found that "non-errors may in their cumulative effect cause error."[35] Point of error eight is overruled.

C. Multiple Challenges to the Death Penalty Scheme

In points of error ten through seventeen, appellant raises challenges to the Texas death penalty scheme that we have already rejected. In point of error ten, appellant contends that the trial court violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to instruct the jury that a vote by one juror would result in a life sentence despite the statuory requirement of ten votes for a "No" answer to the question of future dangerousness, or for a "Yes" vote

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[34] *See Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988).

[35] *Chamberlain v. State*, 998 S.W.2d, 230, 238 (Tex. Crim. App. 1999).

to a finding of mitigating circumstances. In point of error eleven, appellant argues that the court violated the Eighth Amendment by failing to instruct the jury that there is no presumption in favor of death, even if they were to find appellant to be a "future danger" in answer to special issue number one, and that special issue number three, regarding mitigating circumstances, is to be taken up and considered independently, without regard to the jury's finding on issue one. In points of error twelve through fifteen, appellant argues that the jury should have been instructed on the definitions of particular words and phrases in the jury charge and, in not doing so, the trial court violated the United States Constitution. In point of error sixteen, appellant argues that the trial court erred when it denied his motion to preclude the death penalty as a sentencing option due to equal protection violations. In point of error seventeen, appellant alleges that the trial court erred when it refused to hold Article 37.071 unconstitutional because a grand jury had not considered, and alleged in an indictment, the facts legally essential to appellant's conviction and death sentence.

All of these claims have been rejected in the past.[36] It is sufficient to dispose of such claims "by recognizing that the trial court submitted a charge consistent with applicable state statutes, which have withstood numerous constitutional challenges."[37] Points of error ten through seventeen are overruled.

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[36] *Saldano v. State*, 232 S.W.3d 77, 104-09 (Tex. Crim. App. 2007), cert. denied, 128 S. Ct. 1446 (2008); *Threadgill v. State*, 146 S.W.3d 654, 672 (Tex. Crim. App. 2004); *Blue v. State*, 125 S.W.3d 491, 504-05 (Tex. Crim. App. 2003); *Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996); *see also Gallo v. State*, 239 S.W.3d 757, 779-780 (Tex. Crim. App. 2007); *Perry v. State*, 158 S.W.3d 438 (Tex. Crim. App. 2004); *Woods v. State*, 152 S.W.3d 105, 121 (Tex. Crim. App. 2004).

[37] *Saldano*, 232 S.W.3d at 107.

D. Lethal injection cruel and unusual

In point of error eighteen appellant argues that the procedure used by the State of Texas in which lethal injections are employed in administering the death penalty violates the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Since appellant's execution is not imminent his argument is not ripe for review.[38] Point of error eighteen is overruled.

We affirm the judgement of the trial court.

DELIVERED: April 8, 2009

PUBLISH

[38] *Segundo v. State*, 270 S.W.3d 79, 104 (Tex. Crim. App. 2008).