NO. AP-76, 051

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

MANUEL VELEZ, APPELLANT,

VS.

THE STATE OF TEXAS

Trial Court Cause Nos.
07-CR-721-G, 06-CR-83-D

Appeal from the 404th Judicial District
Cameron County, Texas

The Honorable ELIA LOPEZ, Judge,
and former Judge ABEL LIMAS, presiding

BRIEF FOR APPELLANT

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ORAL ARGUMENT
REQUESTED

Identity of Parties and Counsel

Pursuant to TEX. R. APP. P. 38.1(a) (2005), the parties to this suit are as follows: (1) MANUEL VELEZ, TDCJ # 999540, TDCJ Polunsky Unit, 3872 FM 30 South, Livingston, TX 77351, is the appellant and was the defendant in the trial court; 2)The STATE OF TEXAS, by and through the Cameron County District Attorney's Office, 964 E. Harrison Street, Brownsville, TX 78520, is the appellee, but prosecuted this case in the trial court through a special prosecutor, LUIS SAENZ.

The trial attorneys were as follows: (1) MANUEL VELEZ was represented by HECTOR J. VILLARREAL, 2202 West Schunior, Suite 2, Edinburg, TX 78541, and O. RENE FLORES, 1308 South Tenth Avenue, Edinburg, TX 78539; (2) The STATE OF TEXAS was represented by LUIS V. SAENZ, Special Prosecutor and Lead Counsel, 117 East Price Road, Brownsville, TX 78520, GABRIEL GARCIA, Special Prosecutor, 1135 East 12th Street, Brownsville, TX 78520, STEVE ECKERT, Assistant District Attorney, Cameron County District Attorney's Office, 974 E. Harrison Street, Brownsville, TX 78520.

The appellate attorneys are as follows: (1) MANUEL VELEZ is represented by BRIAN W. STULL and JOHN HOLDRIDGE of the American Civil Liberties Union, Capital Punishment Project, 201 W. Main Street, Suite 402, Durham, NC 27701. (2) The STATE OF TEXAS is represented by ARMANDO R. VILLALOBOS, District Attorney, and RENE B. GONZALEZ, Assistant District Attorney, 964 E. Harrison Street, Brownsville, TX 78520.

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STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant Manuel Velez hereby requests oral argument. This is a capital case. Among the issues presented are Points:

1 & 6 (a). The State corrupted the truth-seeking function of Velez's trial when it failed to correct the false and highly misleading testimony of its star witness at the guilt-innocence phase, requiring reversal (Point 1), and defense counsel provided constitutionally ineffective assistance in not correcting the record on this crucial issue (Point 6 (a)).

2. The trial court's denial of the defendant's motion to disqualify the special prosecutor violated Article 2.01 and the Due Process Clause of the United States Constitution, and requires reversal.

3. The court's failure to instruct on accomplice corroboration as required by articles 38.14 and 36.14 caused egregious harm and requires reversal.

4. The court's expansion of the intent charge beyond the result of Velez's actions to the "nature of his conduct" was reversible error.

5. By presenting false and highly misleading testimony on a crucial issue at the penalty phase, the State violated Velez's constitutional rights.

10. The trial judge lacked authority to issue findings of fact and conclusions of law under article 38.22 as she did not preside at the suppression hearing.

It is upon these issues that oral argument is particularly sought. Undersigned counsel is of the opinion that oral argument would serve to emphasize and clarify these issues.

INTRODUCTION

Manuel Velez was unjustly convicted of the capital murder of one-year-old Angel Moreno and sentenced to death. The evidence against him could not have been skimpier. No eyewitness accused him, no forensic evidence linked him, and he did not confess. His conviction was the result of the testimony of his girlfriend and the child's mother, Acela Rosalba Moreno, who implicitly accused him by claiming that on October 31, 2005, she went to a bedroom to nap and left the child "well" on a couch while Velez was present. Yet the evidence also showed that Moreno had been alone with the child immediately before *her* nap, as Velez was then napping with his own son. 16 RR 87.[1] Twenty minutes after she claimed to have left her child on a couch, Velez alerted Moreno that the child was struggling to breathe and initiated a 911 call, and the child later died from head injuries.

A number of serious errors contributed to Velez's conviction. Critically, although Moreno had pled guilty before Velez's trial to injuring Angel Moreno on October 31, 2005 *by hitting his head* with her hand or an object or hitting his head against something, 1 SCR3 6-8, she told a different story at the trial: there, she swore that she had pled guilty merely for having failed to report Velez's alleged abuse of her child. In her direct examination, Moreno also recounted all of her actions that day, but never once admitted to striking her child's head. Despite a prosecutor's duty to seek truth and that "justice shall be done," *Berger v. United*

[1] For convenience, the reporter's record is cited by reference to its volume number, followed by "RR," followed by the page number. Citations to the clerk's record – CR – follow this same format. The record contains several supplemental volumes of clerk's and reporter's records; the citation formats for them are set forth in Appendix A to this brief.

States, 295 U.S. 78, 88 (1935), the special prosecutor in this case – who had consulted with Velez's sister about representing Velez before signing on to prosecute him – did not correct Moreno's false, highly misleading, and extremely damaging testimony. *See* Points 1, 2, *infra*.

Further, two serious charge errors ensured that the jury lacked the legal guidance it needed to decide Velez's guilt or innocence in accordance with Texas law. First, although Moreno was legally an accomplice by virtue of her status as a codefendant charged with capital murder as well as her plea to the lesser-included offense of injury to a child, the trial court did not charge the jury on the statutory requirement of accomplice corroboration. *See* Art. 38.14;[2] Point 3, *infra*. Second, in defining the intent or knowledge the State was required to prove for capital murder, the trial court failed to heed this Court's clear precedents and erroneously charged the jury to consider whether Velez acted "intentionally or with intent with respect to the nature of his conduct" or "act[ed] knowingly or with knowledge with respect to the nature of his conduct" – rather than limiting the jury's consideration to whether Velez intentionally or knowingly caused the child's death. 18 RR 83. *See* Point 4, *infra*. Assuming for the purpose of argument that Velez caused the child's death, the dearth of evidence in this case left his intent in serious question and, therefore, this error denied him a fair trial.

At sentencing, the jury received further false information. Repeating the constitutional error this Court recognized in *Estrada v. State*, 313 S.W.3d 274,

[2] Unless otherwise indicated, "Art." refers to the articles of the Texas Code of Criminal Procedure.

287-88 (Tex.Crim.App. 2010), State's expert A.P. Merillat inaccurately told the jury that, if sentenced to life without parole instead of death, Velez could earn a less restrictive custody than G-3, thereby increasing his opportunities to commit acts of future danger. Because the State's proof of future danger in this case was thin at best, the State cannot prove that this error did not contribute to the jury's death verdict. Based on these errors and those set forth more fully below, this Court should reverse Velez's conviction and death sentence.

STATEMENT OF FACTS

On October 31, 2005, a one-year-old boy named Angel Moreno was taken to a Brownsville hospital, unconscious and unable to breathe. 15 RR 47. He had suffered serious head injuries, bruises, apparent bite marks, and cigarette and lighter burns. 14 RR 105-06, 14 RR 121-25, 140-42, 15 RR 17, 16 RR 27-28. On November 2, 2005, he died from a head injury sustained on that Halloween day combined with an earlier head injury, according to the state's medical experts. 15 RR 20-25; 17 RR 137-38.[3]

The State brought capital murder charges against the only two adults who had been with Angel Moreno when the police responded to a 911 call – his mother, Acela Moreno, and her boyfriend, Manuel Velez, who had initiated the 911 call. *See* 1 SCR3 6-8 (Indictment). In exchange for testimony against Velez, Moreno

[3] The medical examiner, Dr. Norma Jean Farley, and a State's medical expert, Dr. Vincent DiMaio, both found fresh bleeding around the child's brain. 17 RR 26, 135. Dr. DiMaio testified that this bleeding "indicate[d] there has been [an] incident of severe trauma within minutes or a few hours of the child being found unconscious . . . on that October the 31st, Halloween." 17 RR 135. *See also* 17 RR 34 (Dr. Farley stating a person sustaining this kind of injury could become immediately sleepy or immediately unconscious).

would later plead guilty to causing head injury to the child on or about October 31, 2005, and receive a sentence of ten years imprisonment. 16 RR 104. At Velez's trial, Moreno implicitly accused him by claiming that on October 31, 2005, she went to a bedroom to nap and left the child "well" on a couch, but twenty minutes later Velez alerted her that the child was struggling to breathe. State's Ex. 49A at 20, 29-30; 16 RR 95. Although she disclosed to the jury that she was the only adult with the child when she left him on the couch supposedly "well" (as Velez was then napping), 16 RR 87, she failed to disclose that *she* had hit the child's head that day. Rather, she claimed that she had pled guilty for having failed to report Velez's alleged abuse of her child. 16 RR 84-92. Based on Moreno's testimony, Velez was convicted of capital murder and sentenced to death.

Velez's attempt to hire the attorney who later prosecuted him: After Velez's arrest and incarceration in the Cameron County jail, his sister, Marisol Velez, sought legal representation for him from attorney Luis Saenz at his law office. 7 SRR1 Def. Ex. 1.[4] *See also* Point 2, *infra* (setting out facts in detail). Saenz asked Marisol Velez about the case. 7 SRR1 21-23, Def. Ex. 1. She told him that her brother had returned from being out of town only two to three weeks before the child's death and that Moreno was a "very irresponsible mother." 7 SRR1 Def. Ex. 1. Saenz quoted a fee of $30,000, which the Velez family neither accepted nor rejected. 7 SRR1 22. At some point after this conversation, having not received

[4] Saenz, a former prosecutor, worked as a defense lawyer and sometimes as a special prosecutor. 7 SRR1 21-22, Def. Ex. 1.

his requested fee from Velez or his family, Saenz was retained by the State as a special prosecutor in this case. 3 SRR1 2. He prosecuted both Velez and Moreno.

The guilt of Acela Moreno: The information Saenz received from Velez's sister – that Moreno was a very irresponsible mother – turned out to be a vast understatement. Detectives videotaped an interrogation of Moreno on November 1, 2005. 16 RR 35. In it, Moreno confessed that on some unspecified date she had accidently burned Angel Moreno "perhaps" with a cigarette, when "holding him . . . [p]erhaps, maybe as he was crawling." State's Ex. 49A at 13-14.[5] She claimed that because the burns on his feet appeared to be "blisters," she did not have him treated by a doctor. *Id.* at 41-42, 45. Moreno had by then previously admitted to her sister – Magnolia Medrano, later a State's witness at trial – that she had bitten the child, injuring his face (again, no date was given for this abuse). 14 RR 47-8. Similarly, Velez reported to the police that Moreno abused "her kids, she has hit her kids pretty bad including the baby (Angel Moreno)," and, on one occasion, she "grabbed and pushed her little girl [Emily] against a ceramic statue of a panther and split her head open a little." State's Ex. 64.

At her guilty plea on May 3, 2007, Moreno and the State revealed further evidence of her abuse of Angel Moreno. Moreno pleaded guilty to "intentionally or knowingly causing bodily injury to Angel Moreno on October 31, 2005, by striking Angel Moreno on or about the victim's head with the defendant's hand, or striking the victim's head against a hard surface unknown to the Grand Jury, or by

[5] The trial exhibits appear consecutively in the 21st through 23d volumes of the reporter's record.

striking victim's head with an object unknown to the Grand Jury." 1 SRR2 State's Ex. 1 at 4 (plea papers); 6 SRR1 6 (plea transcript); 1 SCR3 6-8 (Indictment). The judge asked Moreno if she was pleading guilty because she was "guilty," and she responded, "Yes." 6 SRR1 8.

Consistent medical testimony: The testimony of medical examiner, Dr. Norma Jean Farley, and a State's medical expert, Dr. Vincent DiMaio, was consistent with Moreno having killed her child when she injured his head on October 31, 2005. Dr. Farley stated that the first head injury possibly occurred seven to fourteen days before the autopsy of November 3, 2005, 17 RR 28-30, but she did not know the date with certainty because it was based on microscope dating using data related only to "older people." 17 RR 30. In that first injury, the child sustained two skull fractures. *Id.*

Dr. Farley explicitly testified that the child's fatal injuries were consistent with his being "[s]truck, thrown against a surface or beat about the head … with hands or feet" … or "against a surface unknown." 17 RR 42-43. The injuries, moreover, were consistent with a person having admitted to "beating," "slamming," swinging, "throw[ing]" the child, or "drumming" him against a hard surface. 17 RR 42-45. Dr. DiMaio agreed that these acts were consistent with the child's injuries. 17 RR 138. As pertinent to the police interrogations of Velez and Moreno discussed below, however, Dr. DiMaio found that "the child was not shaken violently." 17 RR 142.

Saenz's use of Moreno at Velez's trial: Velez's jury never learned that Moreno had admitted that on the day Angel Moreno sustained his fatal injures, she had struck his head with her hand or with an object, or against a hard surface. 1 SCR3 6-8. Rather, special prosecutor Saenz traded the facts of Moreno's active abuse of her child for a portrayal of her as a grieving, albeit negligent mother who was belatedly admitting that she had failed to protect her child from Velez. Answering a question on direct from Saenz about her "understanding" of the plea, Moreno swore she was serving a ten year sentence "[b]ecause I am guilty of not having reported to the police that Manuel was hurting my child." 16 RR 95. In Saenz's summation at the close of the culpability phase of the trial, he emphasized Moreno's false testimony, claiming that Moreno's only failure "was not [to] advise people, not [to] call the police and for that you get 10 years maximum and that's what she got." 18 RR 148-49. *See also* 18 RR 112 (similar).

Saenz's case against Velez was built upon Moreno's testimony and the admission of her videotaped statement. State's Ex. 49. But, again, Saenz never revealed to the jury that Moreno had struck Angel Moreno's head with her hand or object, or against something on October 31, 2005. In fact, while Saenz's direct examination of Moreno led her through all of the events of that day, she never mentioned having struck her child's head in any fashion. 16 RR 84-92. Saenz's conspicuous silence proved pivotal to Velez's conviction.

Moreno's recorded statement: In her recorded statement, Moreno said that, on October 31, 2005, Angel Moreno lay crying in an arm chair. State's Ex. 49A at

26. Velez picked him up and began playing with him, including shaking him gently. *Id.* at 26-27. The child then ate breakfast, and Velez put him to bed for a nap. *Id.* at 28. Asked by the police if Velez put the child to bed by throwing him, Moreno answered that Velez put him to bed "well." *Id.*

According to Moreno, the child awoke "well" and he was okay when she placed him on the sofa with her daughter. *Id.* at 20, 29-30. At this time, Moreno was the *only* adult with Angel Moreno because Velez was napping in the bedroom. *Id.* at 20-22. Moreno claimed that, having left Angel Moreno on the sofa, she went to nap with her other son in the bedroom. *Id.* at 20-22, 37. When Moreno came into the bedroom, Velez got up with his young son, Ismael,[6] and left the room. *Id.* at 22; 16 RR 87. He did not get up "moody" or complaining about anything. State's Ex. 49A at 22. Moreno was in the bedroom for twenty minutes, never fell asleep and heard nothing in the "small" home; she did not hear a hit or the child crying. *Id.* at 22, 30, 31; 16 RR 100; State's Exs. 47 & 48 (showing tiny size of home). Just as she was about to come out of the bedroom, Moreno claimed, she heard someone blowing two or three times, as though giving mouth to mouth resuscitation, and heard water running.[7] State's Ex. 49A at 34-35. Velez then appeared, looking "frightened," and urged her to come to see Angel Moreno because he was not breathing. *Id.* at 31, 22; 16 RR 89. When Moreno moved the child, "he was like choking[, l]ike, he was about to pass out." State's Ex. 49A at

[6] Ismael was then approximately two and one-half years old. 18 RR 21.

[7] The State introduced a statement by Velez that he was taking a shower and using the toilet during this time period, State's Ex. 64 at 1, 3, evidence both consistent with Moreno hearing water and providing an innocent explanation.

24. He took his "last breath." 16 RR 91. Velez and Moreno then took the child to the neighbor to seek aid. State's Ex. 49A at 24.[8]

Interrogating Moreno, the police dug hard for allegations that Velez intentionally harmed the child. *See* State's Ex. 49A (English transcript of interrogation). The effort failed. Moreno knew what Velez did (and did not do) with her children because she "never" left Velez alone with them. *Id.* at 19. She consistently said that though Velez was at times rough in his play with Angel Moreno, he did not act maliciously. *Id.* at 4, 9, 10, 18, 26, 27, 28, 35, 43. She stated that Velez appeared to bite the child while putting him in his mouth, grabbed the child's cheeks, threw him in the air and caught him, and shook him gently two or three times. *Id.* at 4, 9, 13, 26, 27, 36, 42, 43, 45. When throwing him in the air and catching him, Velez said "my son" and acted sweetly. *Id.* at 43. In response to Velez holding or "playing" with him, the child often cried. *Id.* at 4, 11, 18, 28, 30, 43. Velez "never" burned the child with a cigarette, never burned him while playing, and never hit him with a belt or with his hand. *Id.* at 12-14.

The police repeatedly accused Moreno of lying to protect Velez – either because she feared violence from him or loved him. But she consistently

[8] Neighbor Veronica Aparicio testified for the State that Velez originally asked for her telephone to dial 911 because Angel Moreno was "choking," but then returned the telephone because he said it did not work. 14 RR 56. The telephone was working, however, so Aparicio made the call to 911 herself. 14 RR 57. Aparicio insisted on cross examination that Velez did not appear nervous, but she signed a statement for the police – the very same day as this incident – stating that Velez was so nervous that he could not dial 911. 14 RR 87, 92; Def. Ex. 1 (proffered, not admitted). (Although the statement itself was not admitted into evidence, Aparicio was apparently confronted with her prior statement on cross examination, acknowledged that her statement said Velez was too nervous to dial 911, but professed not to know why the police put that in her statement. 14 RR 87.) *See* Point 17, *infra*. Aparicio admitted that Velez asked for rubbing alcohol and then put it on the child's face. 14 RR 85. Describing Moreno's demeanor, Aparicio stated, "Well, she only would complain, she would say my baby, my baby, but I never really saw any tears." 14 RR 85.

responded that Velez had never beat her, that she did not fear him, and she did not love him. *Id.* at 12, 33, 36-37, 48.

(During their investigation, the police also interviewed Velez's former girlfriend, Maria Hernandez, who had lived for years with him, her own three young children, and two children they had together. 18 RR 10-11. She testified at the trial that Velez "never" abused or struck any of the children. 18 RR 10-23. He was not a violent man. 18 RR 12.[9] Accused by the prosecutor of seeking to help Velez instead of telling the truth, Hernandez responded, "It's not that. It's all the time I spent with Manuel so many years and he's not the person that – the way you all are describing him. The proof is with my children, the ones that are not his. Just because I couldn't bring [my son] because of my economic situation, but he wanted to come. He wanted to come and testify." 20 RR 114.)

Moreno's trial testimony: Much of Moreno's trial testimony was consistent with her video statement, including her admission that she was the only adult with Angel Moreno before she left him on the couch because Velez was napping, 16 RR 87, but also her conspicuous failure to admit that she had struck her child's head on October 31, 2005. *See* State's Ex. 49A; 16 RR 84-92.

[9] Velez was 40 years old in 2005 and his only "violent" conviction was a 14-year-old misdemeanor assault stemming from a 1991 Wisconsin bar fight "where a gentleman had attacked another man with either a baseball bat or ax handles." 20 RR 67, 46. His only felony conviction was a 1984 forgery. 20 RR 88. At the penalty phase, the State also presented evidence that Velez had been convicted for writing three "hot checks" (2007), evading arrest (2004), driving while intoxicated (2004), criminal mischief (1988), and forgery (1985). 20 RR 46, 64, 75-84; State's Exs. 67, 69c, 70, 71, 71A, 72, 73, 74, 75. Additionally, the State presented evidence that Velez had used aliases and fake dates of birth, 20 RR 86, that his sentence of probation for the forgery conviction had been revoked, and that his subsequent parole on that offense had also been revoked. 20 RR 77-78.

Yet although Moreno swore at trial that everything she said in her recorded interrogation was true, 16 RR 99, 104, some of her trial testimony painted Velez's conduct as more violent. Furthermore, by the time of Velez's trial, Moreno was not admitting to having injured Angel Moreno, even by accident. For example, whereas in her video statement she said that she had burned her son but Velez never did, State's Ex. 49A at 12-14, 41-42, 45, at trial Moreno said she saw burn marks on her son and blamed them on Velez. 16 RR 82. Similarly, whereas in her video statement she said that Velez never acted with malice, State's Ex. 49A at 4, and repeatedly stated that Velez was merely playing when he hurt the child, State's Ex. 49A at 4, 6, 9, 11, 26, 27, 36, 38,[10] at trial Moreno claimed that Velez was harming her child and was not merely playing. 16 RR 82, 94, 103.

Moreno also testified about the five months leading up her child's death, a topic not covered in her recorded interrogation. Around June or July of 2005, she and her children moved into "their own apartment" with Manuel Velez until Velez left for work in another state in September of 2005.[11] 16 RR 77-78. *See also* 14 RR 42 (testimony of Acela Moreno's sister confirming this fact).[12] During the

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[10] Only on one occasion in her police statement did Moreno accuse Velez of not "playing." State's Ex. 49A at 38. After the police officers repeatedly pressured Moreno to accuse Velez of shaking Angel Moreno, she finally acquiesced by saying he shook the baby gently. *Id.* at 9, 10, 11, 16, 17, 18, 25, 27, 28, 42-43, 44, 46. Expert medical testimony, however, disproved the "shaken baby" theory of death the officers were apparently pursuing. 17 RR 142.

[11] Moreno's testimony contradicts the prosecutor's false claims in opening statement and summation that Moreno, Velez and the children lived with family and friends during this time period. 14 RR 19; 18 RR 143. The prosecutor alleged this false fact to argue that Velez lacked an opportunity to harm the child during this time period, thus explaining why medical records reflected no injuries to the child during this period.

[12] Moreno moved in with Velez soon after Juan Chavez (Angel Moreno's father) beat her because he found out she "was going around with Manuel Velez." 16 RR 76-77. Chavez was arrested, and went to jail on assault charges. 16 RR 62.

time period when Velez lived with Moreno and her children, a pediatrician and/or his staff had seen him seven times in June, July, August, and then on October 18, 2005. 15 RR 66-80. But the pediatrician said he had never before seen the burns, bites, and bruises authorities found on the child on October 31, 2005. *Id.*

When on September 10, 2005, Velez left Brownsville for work out of state, 14 RR 43,[13] Moreno moved her family into the home of Yvonne Salazar, 16 RR 79, a person a State witness said took "a lot of men into her home." 16 RR 66. Velez returned on October 14, 2005. 16 RR 78. On October 18, 2005, Velez borrowed his sister's car to take Moreno and Angel to the doctor. 16 RR 81. There were no signs of injury on the child. 15 RR 80.[14]

Also on October 18, 2005, Moreno and her children moved with Velez into the home to which the police would later respond in this case. 16 RR 80-81. The prosecution tried to establish that Velez had an opportunity to hurt Angel Moreno when the family moved into this home together – an important issue given the child's prior injuries, including his skull fractures. The State asked Moreno, "Okay. So was [Velez] home all the time?" 16 RR 81. She answered, "no, because he used to go out." *Id.* Moreno herself admitted to staying home all of the time. 16 RR 81-82.

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[13] During his opening statement, the prosecutor told the jury that Velez left town on September 10, 2005, 14 RR 19, a fact testified to at trial by Magnolia Medrano, Moreno's sister. 14 RR 43. Perhaps due to a transcription or translation error, Moreno's testimony differed, stating that the date was September 30, 2005. 16 RR 78.

[14] Angel Moreno's pediatrician did not examine him: his nurse practitioner did. 15 RR 78. She did not testify at trial.

Velez's police statement: After emergency personnel arrived, Deputy Lieutenant Jesus Coria observed Velez watching as Angel Moreno received medical treatment, "[l]ike what's going on with the baby." 14 RR 103. Investigator Alvaro Guerra approached Velez and claimed Velez looked "normal" and "indifferent," as he gave the officer a statement about what had happened. 16 RR 12. When Sergeant Rene Gosser arrived at the scene, Angel Moreno had already been rushed to the hospital, 17 RR 47, and Gosser saw Velez standing outside, holding the hand of a little girl. 17 RR 49. Investigator Guerra confirmed that Velez was watching "the children" (apparently his and Moreno's) at the scene. 16 RR 14-15. The police then transported Velez to the police station and interrogated him. Velez signed an English-language waiver of his rights under *Miranda v. Arizona* and Texas Code of Criminal Procedure art. 38.22 and an English-language statement, typewritten by the police. State's Exs. 63, 64.[15]

Velez speaks Spanish; an English-Spanish translator aided him at trial. 1 CR 117, 122; 3 RR 9; 18 RR 131; 18 RR 34-35. Velez could read English only at a first or second-grade level. 17 RR 170; 1 CR 120; Def. Ex. 6 at 8. The police witness who took Velez's statement did not claim to have read the statement to Velez before Velez signed it, only that Velez appeared to have read the statement himself before signing it. 17 RR 72.

[15] The State had provided Velez's counsel with a two-page statement that was nearly identical to the three-page statement the State placed in evidence, save one additional paragraph in the three-page statement. *See* Def. Ex. 2; 3 CR 339-40; 8 RR 141-49. Both the two-page statement provided to the defense, Def. Ex. 2, and the three-page statement the State placed in evidence, State's Ex. 64, state the statement was signed at 8:41 p.m. on October 31, 2005. Where citing to the three-page statement for the purpose of this appeal, Velez does not concede that he signed that statement, rather than the two-page one. *See* Point 12, infra.

In the statement, Velez stated that when he awoke from a nap he found Angel Moreno on a sofa struggling to breathe. State's Ex. 64. This is consistent both with Moreno's admitted opportunity to have hurt Angel while Velez was napping, 16 RR 87, her admission to having struck the child's head that day, 6 SRR1 6-8, 1 SRR2 State's Ex. 1 at 4, and with the medical testimony that the child's injury that day could have caused him "to go into a sleepy state," rather than become immediately unconscious. 17 RR 34-35. *See also* 17 RR 135 (expert stating injury could have been caused "minutes" or an "hour or two" before child became unconscious).[16]

Velez also corroborated Moreno's admissions of abuse at her guilty plea, to her sister, and to the State, as well as Saenz's statement at Moreno's plea hearing that she had harmed the child through her own acts: Velez said that Moreno beat her children, including Angel Moreno, repeatedly and mercilessly. State's Ex. 64. The statement also said that Velez never hit Angel or any of the children; but he had played very roughly with Angel. State's Ex. 64. According to this statement, although Velez never intended to hurt Angel Moreno, he bit him on the cheek and buttocks while playing with him, threw him in the air and caught him, bruising his ribs, and had shaken him "with force" to try to get him to laugh. *Id.* As noted

[16] The scientific literature amply supports the State's expert's testimony that not all fatal head injuries result in *immediate* loss of consciousness. *See, e.g.*, Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH U. LAW REV. 1, 18-19, n.110 (2009) (citing M.G.F. Gilliland, *Interval Duration Between Injury and Severe Symptoms in Nonaccidental Head Trauma in Infants and Young Children*, 43 J. FORENSIC SCI. 723 (1998), and collecting other authorities).

above, however, Dr. DiMaio testified unequivocally that the child did not die from violent shaking. 17 RR 142.

Issues with the court's jury charge: Acela Moreno was legally an accomplice by virtue of her status as a codefendant charged with capital murder, as well her conviction on the lesser-included offense of injury to a child. But the trial court failed to charge the jury on the need for accomplice corroboration, as required by Texas Code of Criminal Procedure article 38.14. *See* Point 3, *infra*. In addition, the trial court used a charge that this Court has repeatedly condemned, *see* Point 4, *infra*, instructing the jury to consider whether Velez acted "intentionally or with intent with respect to the nature of his conduct" or "act[ed] knowingly or with knowledge with respect to the nature of his conduct" – rather than limiting the jury's consideration to whether Velez intended or knowingly caused the results of his conduct. 18 RR 83.

A.P. Merillat's sentencing testimony: A.P. Merillat was the State's lead sentencing witness.[17] He knew nothing about Velez, 20 RR 34, and did not testify about Velez's potential for future dangerousness or anything pertinent to the special issues. *See* Art. 37.071. Rather, he told of abhorrent acts by other inmates in Texas prisons, which he had heard about as an investigator for the Special Prosecution Unit. *See also* Point 6, *infra*.

Merillat also claimed to have knowledge about the prison classification of inmates sentenced to life without parole for capital murder. 20 RR 16-18.

[17] The transcript incorrectly spells his name, "A.P. Marilock." 20 RR 13.

Merillat told the jury that prison officials initially classify capital murderers at level "G3," 20 RR 16, but that they can be "promote[d] up to better classification if [they] behave. . . ." *Id.* The claim that capital murderers sentenced to life without parole can achieve a "better" classification than G3 was false. The Texas Department of Criminal Justice ("TDCJ") policy in place since 2005 clearly and unequivocally states that offenders convicted of Capital Murder and sentenced to "life without parole" will not be classified to a custody less restrictive than G3 throughout their incarceration. *See Estrada v. State*, 313 S.W.3d 274, 287 (Tex.Crim.App. 2010) (taking judicial notice of pertinent TDCJ policy), *cert. denied*, 131 S.Ct. 905.

Velez's sentencing evidence: Velez grew up in a family of seven children, raised only by his mother. 20 RR 95. One of his sisters, Leticia Velez, testified that her brother did not finish high school, but instead worked and used his money to buy clothing, take his mother to eat, or buy food for the family. 20 RR 100. Her brother could not read or write English, and attended special classes in school. 20 RR 95, 99-100.

Leticia Velez never saw her brother Manuel fight anyone when he grew up. 20 RR 101. He was never thrown out of school for fighting. *Id.* She never heard of him hurting anyone. *Id.* He was in jail awaiting trial for three years, but never had any problems there. 20 RR 102. *See also* 18 RR 102 (prosecutor acknowledging this fact); Def. Ex. 6 at 6 ("[Velez's] prison records do not indicate any misconduct or disciplinary actions.").

Leticia Velez could not believe that her brother was capable of mistreating Angel Moreno: "I know that he never mistreated that child. He loves his children very much, and apart from that he always loved them very much and he's taken care of them and that's all he's done." 20 RR 104.

Maria Hernandez, who had also appeared as a witness at the culpability phase, testified that she lived with Velez from 1998 to 2004 with her three children, and then had two more children with Velez. 20 RR 109-110. Velez never struck any of these children and treated them all well. 20 RR 110. Hernandez could not believe that Velez is guilty of murdering Angel Moreno. 20 RR 114.

Velez's nine year-old son, Jose Manuel, also testified. 20 RR 115. Jose Manuel said he spent time with his dad before he went to jail, but sometimes dad was at work. 20 RR 120. His dad took care of him, his brother and half brothers and sisters. *Id.* Dad never hit any of them. *Id.* Jose Manuel misses his dad and wants him back. 20 RR 121-22.

At the conclusion of the culpability phase, the jury found Velez guilty of capital murder. At the conclusion of the sentencing phase, the jury returned a verdict answering yes to the first special issue and no to the second, and sentencing Velez to death. 20 RR 161-63. This appeal followed.

ARGUMENT

1. The State corrupted the truth-seeking function of Velez's trial when it failed to correct the false and highly misleading testimony of its star witness at the guilt-innocence phase, requiring reversal.

Constitutional due process bars the State from obtaining a conviction through the use of false or highly misleading evidence. *See* U.S. Const. amend. XIV.[18] Such a conviction must be set aside unless the State can prove the error harmless beyond a reasonable doubt.[19] This Court has been extremely diligent in protecting the rights of defendants convicted or sentenced at a trial at which false testimony is presented.[20] Velez is entitled to relief because (1) Moreno gave false and highly misleading[21] testimony that she herself did not injure her child and was guilty merely of not reporting Velez's alleged abuse, (2) Saenz, representing the State, knew or should have known that this testimony was false and highly misleading,[22] and (3) the State cannot prove beyond a reasonable doubt that its failure to correct

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[18] *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment") (citations omitted).
[19] *See Ex parte Adams,* 768 S.W.2d 281, 292-93 (Tex.Crim.App. 1989) (applying constitutional harmless-error test for *Napue* violation). *See also United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (equating *Napue* prejudice standard to harmless error test under *Chapman v. California*, 386 U.S. 18, 24 (1967)).
[20] *See Ex parte Chabot,* 300 S.W.3d 768, 772 (2009) (granting defendant relief when testimony of accomplice, the only eyewitness, was found to be false after a DNA test); *Ex parte Carmona,* 185 S.W.3d 492, 497 (2006) (granting relief because defendant's due process rights were violated when community supervision was "revoked solely on the basis of perjured testimony"); *Estrada,* 313 S.W.3d at 287 (granting new sentencing hearing because there was "a fair probability" that the death sentence was based on incorrect testimony).
[21] *See Duggan v. State,* 778 S.W.2d 465, 468 (Tex.Crim.App. 1989) (stating test is whether prosecutor "should have recognized the misleading nature of the evidence"); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) (similar and quoting *Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976)); *Blakenship v. Estelle,* 545 F.2d 510, 514 (5th Cir. 1977) (granting relief when the testimony was not technically perjurious but highly misleading).
[22] *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (due process violation results when prosecutor knew, or should have known, that perjured testimony was presented, and testimony would have affected the outcome of the trial); *Ex Parte Castellano,* 863 S.W.2d 476, 479 (Tex.Crim.App. 1993) (addressing State's "knowing use of perjured testimony"); *Duggan* 778 S.W.2d at 468 (stating that test is not only whether prosecutor knows evidence is false but also whether he or she "should have recognized the misleading nature of the evidence").

the testimony did not contribute to the jury's verdict. Therefore, Velez is entitled to a new trial. *Ex parte Chabot*, 300 S.W.3d at 772 (remanding for new trial).

Factual History: On May 18, 2007, Moreno pled guilty to Count III of the indictment under 06-CR-83-G. Count III stated,

> Acela Rosalba Moreno… on or about the 31st day of October, 2005… did then and there intentionally or knowingly cause serious bodily injury to Angel Moreno, a child 14 years of age or younger, *by striking Angel Moreno on or about the victim's head with the defendant's hand, or striking the victim's head against a hard surface unknown to the Grand Jury, or by striking victim's head with an object unknown to the Grand Jury.*

1 SCR3 6-8 (Indictment) (emphasis added); 6 SRR1 5-8. In Moreno's plea papers, someone wrote, "State Abandons 'serious bodily injury'—Defendant will plea to 'bodily injury.'" 1 SRR2 State's Ex. 1 at 3. Explaining the plea's factual basis, Saenz stated, "As the investigation developed . . . , the state does not have any evidence to show that the defendant before this court actually participated in the death of the child. We do have evidence that she participated in acts that led to injuries to the baby but not the actual death of the child." 6 SRR1 5.

In the written guilty plea to which she swore that day, Moreno affirmed that "that each and every allegation in [the indictment] with the offense of injury to a child . . . is true and correct." 1 SRR2 State's Ex. 1 at 4. Saenz (and defense counsel) also signed this document, under the words "approved and agreed." *Id.*

Moreno reaffirmed in open court that the allegations in Count III were, in fact, true:

Judge: The state is alleging in Count III that on or about the 31st of

October of the year 2005 here in Cameron County, you did commit the offense of injury to a child causing bodily injury here in Cameron County. Is that allegation true and correct?

Moreno: Yes.

6 SRR1 6. The judge later confirmed that Moreno was pleading guilty because she was, in fact, guilty as charged:

Judge:	And are you pleading guilty because you are guilty?
Moreno:	Yes.
Judge:	You are guilty?
Moreno:	Yes.

6 SRR1 8. Defense counsel said that Moreno had been debriefed twice by the State and the State said her plea was "consistent" with the debriefings. 6 SRR1 12. The court also had Moreno affirm that her attorney had showed her the evidence against her, that she understood everything that had been said that day, and that she did not need anything explained to her further. 6 SRR1 11. "Based on the evidence submitted, the court [found Moreno] guilty." 6 SRR1 12.

When Moreno answered Saenz's questions at Velez's trial, however, she told a different story. Whereas she had pleaded guilty to intentionally or knowingly causing bodily injury to her child by striking him on his head or striking his head against an unknown surface on October 31, 2005, Moreno's trial testimony described the entirety of that day without ever admitting having struck the child's head. Moreno described breakfast, housecleaning, lunch, going to a bedroom to nap, and arising to find Angel Moreno injured and taking his last breath. 16 RR

84-92. Leading Moreno through the events of that day, Saenz variously asked "what happened," what was Moreno "doing," and what Moreno "did." *Id.*

Moreno alleged that the child became injured only after he was alone with Velez while she was in a bedroom with another child for twenty minutes. 16 RR 89-92. At no point in describing the events of October 31, 2005, did Moreno admit that she hit Angel Moreno on the head or hit his head against a surface. And at no point did Saenz correct the false impression Moreno left.

Answering Saenz's question, Moreno also testified falsely about why she was serving a ten year sentence:

> Saenz: And what is your understanding as to why you're going to be serving 10 years?
> Moreno: Because I am guilty of not having reported to the police that Manuel was hurting my child.

16 RR 95. Of course, Moreno's oral and signed plea each show that her sentence of ten years was for having intentionally or knowingly injured her child by hitting his head or hitting his head against something, *not* for having failed to report to the police that Velez was hurting the child. 1 SRR2 State's Ex. 1 at 4; 6 SRR1 5-8. Again, at no point did Saenz correct this false testimony.

While Moreno testified to a different story at trial, the State's medical experts found the acts she had pled guilty to – striking her son's head with an object or striking his head against something – consistent with the fatal injuries he suffered. 17 RR 42-43, 138.

During Saenz's culpability-phase summation, he bolstered Moreno's lies, rather than following his constitutional duty to correct them. *See* 18 RR 148-149 ("What she did was not advise people, not call the police and for that you get 10 years maximum and that's what she got."); 18 RR 112 ("His mother did not call the police. His mother only told the defendant don't do it. Why are you doing it. And she didn't think that anything else would happen. She let him down .... She made bad choices and because of those choices that she made, she is doing her time. She accepted responsibility for her inaction.").

Actually False and Highly Misleading: Moreno's testimony about events of October 31, 2005 – the lynchpin of the State's case against Velez – was false and highly misleading. In her testimony about that day, she refused to admit that she herself had intentionally or knowingly caused her child bodily injury by hitting his head. Moreno's testimony that she was serving a prison sentence because she did not stop Velez from hurting her child was also false and highly misleading. Moreno pled guilty to Count III, which specifically states that she "*intentionally or* knowingly *cause[d]* bodily injury" by *striking the child on the head with her hands or some unknown object, or by striking his head against a hard surface*. 1 SCR3 6-8. And she pled guilty because she was guilty. 6 SRR1 8.

Given Moreno's repeated admission of guilt of Count III of the indictment, Saenz's statement to the plea court that "she participated in acts" harming the child, 6 SRR1 5, his signature to the plea documents stating that every allegation

in the charge was "true and correct,"[23] 1 SRR2 State's Ex. 1 at 4, and the absence of any mention of the theory of omission, there is no question that evidence from the plea proceeding conclusively proves Moreno's contradictory trial testimony was false and misleading.[24]

The issue here is not one of inattention to the particulars to the indictment. Saenz and Moreno knew the indictment's specific allegations, as evidenced by the handwritten change of "serious bodily injury" to "bodily injury." 1 SRR2 State's Ex. 1 at 3. Had the parties wanted and agreed to amend the charge against Moreno to injuring a child under a theory that she failed to call the police and therefore caused injury by a culpable omission, PENAL CODE § 22.04, they could have made that change. Under PENAL CODE § 22.04 (a), "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or *recklessly by omission*, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury." (emphasis added). Instead of amending the charge to reflect that Moreno committed a culpable omission, the only alteration they made was to change "serious bodily injury" to "bodily injury."

[23] "This Court accepts as true factual assertions made by counsel which are not disputed by opposing counsel." *Pitts v. State*, 916 S.W.2d 507, 510 (Tex.Crim.App. 1996).

[24] *See Prochaska v. State,* 587 S.W.2d 726, 728 (Tex.Crim.App. 1979) (stating that "by entering a guilty plea a Texas state defendant admit[s] all facts charged in the indictment" (citing *Hoskins v. State*, 425 S.W.2d 825, 829-830 (Tex.Crim.App. 1968) (same)). *See also Fairfield v. State*, 610 S.W.2d 771, 776 (Tex.Crim.App. 1981) (noting "conclusive effect of the entry of a guilty plea before the jury for evidentiary purposes on the issue of guilt" (citing, *inter alia*, *Warren v. State*, 68 S.W. 275, 276 (Tex.Crim.App. 1902) ("It has been held that the plea of guilty admits the charge in the indictment."), and *Crow v. State*, 6 Tex. 334, 334 (Tex. 1851) (establishing that guilty plea is "acknowledgment of the facts charged")). *Cf. Hodges v. Epps*, No. 07-cv-00066, 2010 WL 3655851, at *11-14 (N.D. Miss. Sept. 13, 2010) (relying on petitioner's guilty-plea transcript concerning prior crime to find prosecutor testified falsely at capital sentencing trial about that plea, and granting relief on *Napue* grounds).

Significantly, it appears that the plea itself was structured to manipulate the trial process. Moreno pled guilty and was sentenced under a theory of intentionally causing bodily harm, PENAL CODE § 22.04 (f), a third-degree felony punishable by up to ten years imprisonment. PENAL CODE § 12.34; 16 RR 82. Had Moreno been guilty merely of causing bodily injury "recklessly by omission" – as she swore at Velez's trial – her sentence of ten years would have been overkill. She could only have been sentenced to a state jail felony, PENAL CODE § 22.04 (f), and thus could have served a maximum sentence of two years imprisonment. *See* PENAL CODE § 12.35. By the time of Velez's trial in October of 2008, Moreno had been imprisoned for nearly *three* years from the time of her arrest in October of 2005. 16 RR 34; 1 SCR3 13; 6 SRR1 13-14. Sentencing Moreno for the actual crime she admitted to at Velez's trial would not have kept her imprisoned long enough to testify against Velez while in State custody; moreover, such a light sentence would have undercut the State's argument that she was serving an appropriately-harsh sentence and thus could be believed. *See* 18 RR 148-149 (Saenz: "What she did was not advise people, not call the police and for that you get 10 years maximum and that's what she got.").

The State now may argue that the plea itself did not represent the truth – that the plea was merely a settlement decision the State made to resolve its cases against Moreno and Velez. Although this Court should not permit the State to rewrite the history of this case and to unsettle what has been settled, this argument also fails on its own merits. Saenz and Moreno misrepresented the truth and

misled the jury about the plea itself. Moreno claimed that she was "guilty of not having reported to the police that Manuel was hurting my child." 16 RR 95. Saenz repeated and emphasized this testimony in his summation. 18 RR 112, 148-149. But Saenz knew – and said in open court as a representative of the State – that "[w]e do have evidence that she participated in acts that led to injuries to the baby." 6 SRR1 5. And Moreno admitted she had done so, while Saenz, defense counsel, and the plea judge accepted her admission as true.

The State Knew Moreno's Testimony was False and Highly Misleading. *Napue* requires that the State knew, or should have known, that the testimony was false or highly misleading.[25] In this case, the State generally, and Saenz specifically, knew that Moreno's trial testimony was false. Saenz both led Velez's prosecution and appeared for the State at Moreno's plea, where she admitted she was pleading guilty because she was guilty. 6 SRR1 2. He moved to dismiss Counts I and II of the indictment, and verified that the plea on Count III would be accepted in exchange for testimony at Velez's hearing. 6 SRR1 4-5, 14. He explained to the judge that the State had evidence that Moreno participated in acts injuring the child. 6 SRR1 5. His signature appears on the bottom of Moreno's plea papers. 1 SRR2 State's Ex. 1 at 4.

With unquestionable knowledge of Moreno's guilt, Saenz conducted her direct examination when she testified falsely at Velez's trial. Once Moreno lied on the stand about her plea, Saenz, representing the State, had a duty to correct the

[25] *See Napue*, 360 U.S. at 269; *Ex parte Adams*, 768 S.W.2d at 291.

testimony: "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue,* 360 U.S. at 269-70. Despite his duty to correct Moreno's false testimony, *Estrada,* 313 S.W.3d at 288, Saenz allowed her to lie both about the events of October 31, 2005, and the reason for her conviction. Moreno lied. Saenz knew she lied, but did nothing to correct it. The result was a violation of Velez's due process rights.

Highly Prejudicial: Moreno's testimony was the cornerstone of the State's case. Given that her admissions at her plea would likely have caused the jury to substantially discredit her trial testimony and to reasonably doubt Velez's guilt, the State cannot prove beyond a reasonable doubt that her false statements did not contribute to Velez's verdict. *See Ex parte Adams*, 768 S.W.2d at 292-93.[26]

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[26] In *Ex parte Napper*, 322 S.W.3d 202, 241-43 (Tex.Crim.App. 2010), this Court discussed the different prejudice standards to be applied in habeas corpus proceedings and divided the State's use of false testimony into three categories: 1) knowing use of perjurious testimony, 2) unknowing use of perjurious testimony, and 3) use of false but not perjurious testimony. In dicta, the Court stated that the most favorable prejudice standard - requiring the State to prove beyond a reasonable doubt that the false testimony did not contribute to the conviction - is available to a defendant on direct appeal who shows the state knowingly relied on *perjurious* testimony. As the Court also acknowledged, however, the Supreme Court has not distinguished between perjurious and false testimony in this context. *Id.* at n.159. Moreover, although many decisions discussing *Napue* claims "refer to the testimony as being 'perjured testimony' or as involving 'perjury,' ... it is sufficient if the testimony is false and misleading to the trier of fact." *Ramirez v. State*, 96 S.W.3d 386, 395 (Tex.App.-Austin 2002, *pet. ref'd*) (citing *Napue*, 360 U.S. at 269; *Alcorta v. Texas*, 355 U.S. 28, 32 (1957)). *See also Rivera Pedin*, 861 F.2d at 1530 n.14; *Dupart*, 541 F.2d at 1150; 42 George E. Dix & Robert O. Dawson, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.53 (2d ed. 2001). Thus, regardless of whether Moreno's testimony was technically perjury, this same prejudice standard applies.

Further, in any case, Moreno's testimony – which the State definitely knew to be false – was perjurious under all of the definitions this Court considered in *Napper*, 322 S.W.3d at 241-43 (citing three possible definitions: not candidly responding to questions posed; making false statement under oath with intent to deceive; and having willful intent to provide false testimony). Moreno was certainly less than candid in her trial testimony; further, she must have intended to deceive or provide false testimony with her false claims both that she did not harm Angel Moreno on October 31, 2005, and that she was sentenced to ten years merely for failing to report Velez's alleged abuse.

The State's case against Velez was paper thin. It hinged on Moreno, whose testimony alone inculpated Velez. She was the only witness to allege any facts leading up to Angel Moreno's fatal injuries on October 31, 2005. No other witness corroborated these allegations, accused Velez of injuring Angel Moreno, or accused him of harming any other child.[27] No crime-scene, biological, or other evidence pointed to Velez's guilt. Highlighting the importance of Moreno's testimony, the jury asked in its first note for all of her statements, both the video and her trial testimony. 19 RR 4; 3 CR 399. The State introduced a statement by Velez, in which Velez denied intentionally harming the child even if he did play roughly with him, said he was sleeping immediately before waking up and finding the child struggling to breathe, and said that Moreno repeatedly and mercilessly abused her own children. *See* State's Ex. 64; 17 RR 75-81. *But see* note 15, *supra*. Responding to police interrogation, Velez admitted to shaking the child "with force" to get him to laugh, but State's expert Dr. DiMaio stated that the child's injuries could not have been caused by shaking. 17 RR 142. In sum, without Moreno's statement, the State had no case against Velez.

Had Saenz corrected Moreno's false testimony, it would have dramatically weakened the State's case.[28] The jury undoubtedly already viewed Moreno's

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Finally, even if some different standard of prejudice were to apply, Velez would certainly meet it because, as explained in the text, his conviction completely turned on Moreno's false testimony.

[27] In fact, the police interviewed Velez's former girlfriend, Maria Hernandez, who had lived for years with Velez, her own three young children, and the two children they had together. 18 RR 11. She told the police that Velez was not a violent man. 18 RR 12. Velez "never" abused or struck any of the children. 18 RR 10, 12-13, 15-16.

[28] *Thomas v. State*, 841 S.W.2d 399, 405 (Tex.Crim.App. 1992) (noting that where State relied exclusively on two witnesses to inculpate defendant and no other evidence implicated him, "evidence tending to

testimony with some level of suspicion because the State had dropped charges of capital murder against her and allowed her to escape with a sentence of ten years in exchange for her testimony against Velez. 1 CR 107, 16 RR 35, 95-96. The jury learned of Moreno's opportunity to harm Angel Moreno while Velez was sleeping, 16 RR 87, at the time she claimed to have put Angel on a couch doing "well." State's Ex. 49A 20, 29, 30; 16 RR 95. Had the jury known that, contrary to her testimony , Moreno *had* injured Angel Moreno by striking his head or striking it against something on the same day as his fatal injuries – acts medical experts found consistent with the injuries Angel suffered, 17 RR 42-43, 138 – it would likely have strongly suspected Moreno was the culprit and have had serious doubts about Velez's guilt. Had the jury also known that Moreno lied when she said she was imprisoned merely for failing to protect her child, it would have had every reason to discredit her testimony.

But rather than correcting the false testimony, disclosing that Moreno did far more than failing to protect Angel Moreno, and thus allowing the jury to assess Moreno's credibility on an accurate record, Saenz emphasized the false testimony in summation. He thereby exacerbated the prejudice and caused error in itself.[29]

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exculpate appellant or impeach their testimony would have undermined the State's case"); *Graves v. Dretke*, 442 F.3d 334, 344-45 (5th Cir. 2006) (vacating capital murder conviction based on testimony of single witness due to State's suppression of evidence impeaching his testimony where State's presentation of "false misleading testimony at trial that was inconsistent with the suppressed facts").

[29] *See Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (finding that prosecutor's summation "falsely suggesting the absence of a deal between [witness] and the prosecution" only "sharpened the prejudice" flowing from the untruthful testimony itself); *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990) (observing that State's reliance on particular issue bears on whether error regarding that issue is harmless). *See also* Point 22, *infra*.

Recently, this Court granted relief in a case where it was discovered that the State's key witness lied to the jury about his own involvement in a crime while inculpating the defendant. In *Ex Parte Chabot*, a State's witness "provided the only direct evidence" that the accused had committed the crime. 300 S.W.3d at 772. The witness's testimony "was critical to [the State's] case and [the State] predicated its trial theory on his testimony." *Id.* In his testimony, the witness shifted all responsibility to the accused while lying about the extent of his involvement. *Id.* DNA evidence later contradicted his testimony. This Court found a due process violation and ordered a new trial. *Id.* Here, too, Moreno was critical to the State's case; she too lied at trial by minimizing her involvement while accusing Velez; she too offered the testimony on which the State predicated its case. Because appellant has now shown her testimony to have been false, highly misleading, and highly prejudicial, the Court should also grant relief here.

Diligence and preservation: Any "lack of diligence by the defense counsel" does not obviate the requirement of reversal of this unjust conviction.[30] With this *Napue* claim, "relief ... may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own."[31] In short, counsel's level of diligence is not the issue.[32]

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[30] *Crutcher v. State,* 481 S.W.2d 113, 115-16 (Tex.Crim.App. 1972) (citing *Means v. State,* 429 S.W.2d 490, 494 (Tex.Crim.App. 1968)).

[31] *Levin v. Katzenbach,* 363 F.2d 287, 291 (D.C. Cir. 1966) (finding lack of diligence by defense counsel not a defense). *See also Banks v. Dretke,* 540 U.S. 668, 696 (2004) ("A rule...declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *Scott v. Mullin,* 303 F.3d 1222, 1229 (10th Cir. 2002) (similar).

[32] In any event, defense counsel was ineffective for failing to correct the record. *See* Point 6, *infra.*

Similarly, this Court may review this error despite counsel's lack of objection to Moreno's false testimony. In the *Napue* cases this Court, the federal courts, and the Supreme Court of the United States have decided, counsel's failure to object has never been a bar to relief. That is undoubtedly because it is the *prosecutor* who carries the "duty to correct 'false' testimony whenever it comes to the State's attention." *Estrada*, 313 S.W.3d at 288 (quoting *Napue,* 360 U.S. at 269).

To be sure, in *Estrada*, this Court also stated that it need not decide whether to apply TEXAS RULE OF APPELLATE PROCEDURE Two to suspend preservation rules because appellant could "not reasonably be expected to have known that the testimony was false." *Id. See also Ex parte Napper,* 322 S.W.3d at 241 (citing *Estrada* and leaving open this question). Here, as shown in Point 6, *infra*, counsel certainly should have known Moreno's testimony was false, but ineffectively failed to challenge it. Yet because this Court has repeatedly held that the diligence of counsel is not required for *Napue* relief, *see Crutcher*, 481 S.W.2d at 115-16 (citing *Means*, 429 S.W.2d at 494), it is clear as a matter of logic that the preservation rule does not apply. *See* TEX. R. APP. P. 33.1 (a). If it does, the interests of justice are "good cause" for suspension of the rule in these circumstances. TEX. R. APP. P. 2. Or, in the alternative, the Court should review this *Napue* violation as "fundamental error." TEX. R. EVID. 103 (d).[33]

[33] Fundamental-error review is appropriate because the preservation rule of Texas Rule of Appellate Procedure 33.1 (a) does not foreclose this Court's review of constitutional errors invoking "waivable-only right[s] that [appellant] did not waive." *Mendez v. State*, 138 S.W.3d 334, 342 (Tex.Crim.App. 2004). As Velez did not waive his right to a fair trial, his counsel's failure to object does not foreclose appellate review.

Eighth Amendment violation: Velez's conviction was predicated on Moreno's false testimony. Therefore, his death sentence, including the jury's finding of future dangerousness under special issue one, was predicated on tainted evidence and a tainted conviction. *See, e.g.*, 20 RR 93 (granting State's motion to permit jury to consider all guilt phase evidence at sentencing). Therefore, under the Eighth Amendment and article I, section 13 of the Texas Constitution,[34] this death sentence cannot stand. *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988); *Estrada,* 313 S.W.3d at 288.

Conclusion: Saenz's failure to honor the State's critical role in our system of justice as well as Velez's rights by correcting the false testimony of his star witness not only "corrupt[ed] . . . the truth-seeking function of the trial process," *Agurs*, 427 U.S. at 104, but also cost Velez a fair trial. Reversal is required.

2. The trial court's denial of the defendant's motion to disqualify the special prosecutor violated Article 2.01 and the Due Process Clause of the United States Constitution, and requires reversal.

Because Saenz had received privileged information about Velez's case from his sister, Marisol Velez, who acting as her brother's agent had sought to retain Saenz to represent him, Saenz was disqualified from representing the State at

[34] For the reasons stated in *People v. Anderson*, 493 P.2d 880 (Ca. 1972), which analyzed California's constitutional ban on cruel *or* unusual punishment and found it provided greater protection than the Eighth Amendment ban on cruel *and* unusual punishment, Texas's constitutional ban on cruel *or* unusual punishment also provides greater protection than the Eighth Amendment. *See* Tex. Const. art. I, § 13. *See also Tillman v. State*, 591 So. 2d 167, 169 n.2 (Fla. 1991) (finding greater protection than Eighth Amendment in state constitutional bar against cruel or unusual punishment); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (same); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003) (same). *Cf. Anderson v. State*, 932 S.W.2d 502, 509-10 (Tex.Crim.App. 1996) (assuming for the purpose of argument that the Texas Constitution bars both cruel punishments and unusual punishments, but finding Texas statute neither cruel nor unusual). For economy, this footnote is incorporated by reference each time article I, section 13 of the Texas Constitution is cited in this brief.

Velez's trial. *See In re Gerry*, 173 S.W.3d 901, 903 (Tex.App.-Tyler 2005, *no pet.*) (holding that an attorney's receipt of confidential information during a meeting concerning employment by potential client disqualifies attorney from representing party adverse to potential client); *State v. Laughlin*, 652 P.2d 690, 692 (Kan. 1982) ("Prosecuting attorney cannot be permitted to participate in a criminal case if by reason of his professional relations with the accused he has acquired any knowledge of facts upon which the prosecution is predicated, or which are closely related thereto.").

At the hearing on the defendant's motion to disqualify Saenz on these grounds, the defense introduced evidence that Velez's sister, Marisol Velez, told Saenz privileged and confidential information about the nature of Velez's proposed defense. 7 SRR1 15-17. Saenz did not deny it, though he tried to minimize the extent of this meeting. 7 SRR1 21-23. The trial court's denial of Velez's motion to disqualify Saenz violated Velez's rights under Texas law and his rights to due process, a fair trial, the assistance of counsel, and a reliable sentencing determination guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. 7 SRR1 23; 2 CR 219. *See* art. 2.01; U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. art. I, § 13.

Factual Background: Acting as the agent and representative of her brother, Manuel Velez, Marisol Velez met with Saenz in his law office and discussed her brother's case when seeking to retain Saenz to represent her brother. 2 CR 199-202. Marisol told Saenz that Manuel was in jail, charged with murder of a child.

7 SRR1 61 (Aff. of Marisol Velez).[35] Saenz asked if Marisol knew anything about the case. *Id.* Marisol stated that Manuel had been "up north" working, and had just returned two to three weeks before the child's death. *Id.* Marisol also told Saenz that the baby's mother, Acela Moreno, was "a very irresponsible mother." *Id.*[36] Saenz informed Marisol "the State did not have a case against [Manuel.]" *Id.* He also told her that he had experience with this kind of case. *Id.* Although Marisol did not recall that Saenz quoted a fee, 7 SRR1 16-17, 19, Saenz recalled that he quoted a fee of $30,000.[37]

On cross examination, Marisol, struggling with English, 7 SRR1 16, 18, stated that she told Saenz that it was a "baby shake syndrome" case and told him what was in the media and "that's about it." 7 SRR1 18-19. Marisol neither disavowed nor was asked by the State on cross to disavow her sworn statement that she told Saenz that Velez has been "up north" working around the time the child was injured and that Moreno was an irresponsible mother. Saenz testified that it was a brief consult, five to eight minutes, and that he did not want to take the case, although he acknowledged quoting a fee. 7 SRR1 21-23. He did not dispute

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[35] Like Velez and their other siblings, Marisol Velez did not have a strong command of English. 7 SRR1 14, 16, 18 (Marisol failing to understand questions and switching between English and Spanish in testimony). *See also* 20 RR 96-99, 107 (Leticia Velez struggling with English). Instead of having her testify on direct to her interaction with Saenz, Velez's attorneys introduced her affidavit into evidence, 7 SRR1 15, and she then testified on cross examination by the State.

[36] Marisol did not state in her affidavit her basis of knowledge for concluding Moreno was an irresponsible mother, but the trial record shows that Marisol was present at least once when Acela and Angel Moreno were in her home on October 13, 2005; that day, while Velez was out of state, State's witness Magnolia Medrano was also in Marisol's home. 14 RR 44-45. Although the record is unclear, this could well have been the date when Medrano noticed that Angel Moreno had been bitten by Acela Moreno. 14 RR 47. That Saenz met with Marisol – a witness to events on the dates leading up to the child's death – is yet another reason Saenz should have been disqualified.

[37] Saenz told the court that he had hoped this fee would be high enough to deter the Velez family from coming back because he was uncomfortable taking on this kind of case. 7 SRR1 22.

Marisol's sworn statement that she had told him about Velez's whereabouts around the time of the injury, that Moreno was an irresponsible mother, and that it was a shaken baby case.[38]

Saenz instructed Marisol to call him back in a few days. 7 SRR1 61; 2 CR 212. After several failed attempts to speak with Saenz, Elmita Velez, Manuel's other sister, finally spoke with his secretary who said that Saenz could not take the case because he did not have the time. 2 CR 202 (Aff. of Elmita Velez). Saenz later accepted employment as the special prosecutor for the State in this case.

As a lay person, Marisol may not have believed she was saying anything significant to Saenz. But what she said was legally confidential information that about Velez's case, including what would become his defense against the murder charge.[39]

Disqualifying Conflict of Interest: Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines "confidential information" as "privileged information … protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence." *See* TEX. DISC. R. PROF. COND. 1.05 (a). As pertinent here, Rule of Evidence 503 defines a client as a person "who consults a lawyer with a view to obtaining professional legal services from [a] lawyer." TEX. R. EVID.

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[38] As an evidentiary matter, Marisol Velez's affidavit was probative as to the truth of the matter asserted, given that the State did not object. *See* TEX. R. EVID. 802.

[39] *See, e.g.*, 18 RR 119, 124, 133 (defense counsel arguing in summation that Moreno was the guilty party and went from "house to house to house looking for somebody to take care of her, not working, drinking and just doing what she wanted to do regardless of who it affected"); 18 RR 127 (defense counsel arguing in summation that timeline of injuries excluded Velez as perpetrator as he was out of state); 4 SRR1 9 (defense counsel discussing need for testimony of pathologist who would testify that child's injuries occurred while Velez was out of state and comparing defense to an "alibi"); 5 SRR1 8 (similar).

503.[40] Further, this rule defines privileged communications as information conveyed "for the purpose of facilitating the rendition of professional legal services to the client . . . between the client or a representative of the client and the client's lawyer." TEX. R. EVID. 503 (b)(1)(A).[41]

Under these binding rules, there can be no question but that Marisol Velez, acting as Velez's representative,[42] conveyed privileged information to Saenz when she consulted with him to obtain his representation of Velez. As noted above, the information she conveyed outlined Velez's defense that he was not in the state when the child suffered many serious injuries and that Moreno was a very irresponsible mother who was the guilty party. This privileged information under

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[40] *See State v. DeAngelis*, 116 S.W.3d 396, 404 (Tex.App.-El Paso 2003) (citing TEX. R. EVID. 503 (a) (1) to define "client" using these terms). *See also In re Z.N.H.*, 280 S.W.3d 481, 485 (Tex.App.-Eastland 2009, *no pet.*) (relying on definition of client in Rules of Evidence in resolving conflict issues because the Texas Disciplinary Rules of Professional Conduct do not define client). Texas Rule of Evidence 503, cited in each of these decisions, states that a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client[.]"

[41] A representative of the client is "person having authority to obtain professional legal services[.]" TEX. R. EVID. 503 (a) (2) (A). Marisol Velez clearly had this authority.

[42] *See* TEX. R. EVID. 503 (a)(2), (b)(1)(A). *See also Restatement (Third) of The Law Governing Lawyers* § 70 (2000) (explaining that "privileged persons" include "the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation"); *id.* at § 70f (explaining that an agent is a "confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence"). Under this standard, which mirrors Texas Rule of Evidence 503 (a)(2), Marisol acted as Velez's agent during her conversation with Saenz, rendering any communication between them privileged. Velez required an intermediary to obtain counsel because he was incarcerated at the time of their meeting and Velez had every reason to believe his sister would hold the communication in confidence. In addition, the nature of the communication was appropriate considering the situation, as Marisol was seeking to obtain counsel on Velez's behalf. *See Gerheiser v. Stephens*, 712 So. 2d 1252, 1254 (Fla. Dist. Ct. App. 1998) (finding mother's statements to an attorney were privileged when mother acted as son's agent in attempt to hire lawyer to represent him in criminal matter); *Holstein v. Grossman*, 616 N.E.2d 1224, 1240 (Ill. App. Ct. 1993) (recognizing that a third party can create an attorney-client relationship for the benefit of another); *State v. Blacknall*, 760 A.2d 1151, 1153 (N.J. Super. Ct. Law Div. 2000) (finding attorney client privilege extends to any agent of the attorney or client, including "any 'necessary intermediaries ... through whom communications are made'") (citations omitted); *People v. Osorio*, 549 N.E.2d 1183, 1186 (N.Y. 1989) ("[C]ommunications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged.").

Rule 503 is explicitly considered "confidential information" under Texas Disciplinary Rule of Professional Conduct 1.05 (a).

Where, as here, a potential client or his agent consults with a lawyer to obtain professional services and conveys privileged and confidential information, ethical obligations attach, even if the attorney is not hired. *See* TEX. DISC. R. PROF. COND. 1.05 (b)-(c) (dictating lawyer's ethical obligations with respect to confidential information); TEX. R. EVID. 503 (b) (stating client's "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client"); *In re Gerry*, 173 S.W.3d at 903; *People v. Canfield,* 12 Cal.3d 699, 705 (Cal. 1974). As the Fifth Circuit has held, "[t]he fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention." *Nolan v. Foreman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982).[43]

Thus, here, Saenz's ethical obligations attached when he met with Marisol Velez and received information about Velez's defense. And those ethical obligations precluded Saenz from representing the State in its prosecution of

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[43] *See also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (same as *Nolan*); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961) ("In order for a person to have complete freedom in seeking the services of an attorney, it necessarily follows that disclosures made by such person to an attorney with a view of enlisting the attorney's services in his behalf fall within the rule making communications between an attorney and his client privileged."); McCormick on Evidence, 88, 179 (2d ed. 1972) (similar); *ABA/BNA Lawyers' Manual on Professional Conduct: Lawyer-Client Relationship* (similar). *See also Fisher v. United States,* 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."). *See also Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *State v. Stenger,* 760 P.2d 357, 360 (Wash. 1988).

Velez, which representation was a clear conflict of interest and violated Velez's constitutional rights to due process, a fair trial, and the assistance of counsel. *See, e.g., Ex parte Spain*, 589 S.W.2d 132, 134 (Tex.Crim.App. 1979); *In re Gerry*, 173 S.W.3d at 903 (finding conflict of interest disqualifying attorney from representing husband in divorce proceeding because attorney had interviewed wife as a potential client);[44] TEX. R. PROF. COND. 1.06, 1.09.

In *Ex parte Spain*, this Court found a denial of due process because the prosecutor, who filed a motion to revoke the petitioner's probation and represented the State at that hearing, had previously represented the defendant when he pled guilty to the original offense. *Id.* The Court explained:

> [T]here exists the very real danger that the district attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant. Use of such confidential knowledge would be a violation of the attorney-client relationship and would be clearly prejudicial to the defendant.

589 S.W.2d at 134. Thus, the Court concluded, "[t]he prosecutor in this case should never have … participated in the … proceedings." *Id.* at 134. Further, the Court held that reversal was required regardless of prejudice. *Id. See also Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex.Crim.App. 1981) (citing *Ex parte*

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[44] *See also Restatement (Third) of the Law Governing Lawyers* § 15, at 139 (stating that when a prospective client consults with an attorney for the purpose of forming an attorney-client relationship, the attorney "may not represent a client whose interests are materially adverse to those of a former prospective client in the same or substantially related matter when the lawyer … has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter"). Both this Court and the courts of appeals have repeatedly relied on this Restatement as authority. *See Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex.Crim.App. 1999); *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 471 (Tex.App.-Houston 2008, *rev. granted*); *see also*, 48 Robert P. Schuwerk & Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges*, § 1:2: Forming the relationship (2010-2011 ed.).

Spain's concern about the prosecutor using confidential information he obtained through representation of former client in same case and reversing judgment, irrespective of prejudice).

Regardless of whether Saenz and Velez formed an attorney-client relationship for other purposes,[45] the automatic reversal rule of *Ex parte Spain* and *Ex parte Morgan* should apply here, too, because there is the same "very real danger" that existed in those cases. Here, too, by virtue of information Saenz learned through his attorney-client relationship with Velez, *see* TEX. R. EVID. 503 (a)(1), there was a real danger Saenz would use the information he had obtained to prosecute Velez. Indeed, Saenz's prosecution of this case prominently featured efforts to shift responsibility from Moreno to Velez, *see* Point 1, *supra*, and to disprove Velez's defense that he was not present when the child sustained several injuries.[46] And, to the extent prejudice is required, it is certainly shown by the State's employment of strategies to defeat the defense strategies Marisol Velez reported to Saenz at the outset of this case.

Courts have repeatedly reversed convictions obtained by prosecutors who learned confidential information from a defendant when interviewing him as a prospective client.[47] Similarly, this Court has found no basis for disqualification

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[45] *Cf. Upton v. State*, 853 S.W.2d 548, 557 (Tex.Crim.App. 1993) (finding attorney-client relationship for purpose of resolving Sixth Amendment issue arising during interrogation).

[46] *See* Point 22, *infra* (prosecutorial misconduct in summation point describing Saenz's false arguments about Velez and Moreno's living arrangements); 17 RR 28-30 (testimony by Dr. Farley that child sustained first head injury seven to fourteen days before autopsy, but conceding that she did not know the date with certainty because it was based on microscope dating using data related only to "older people").

[47] *See Satterwhite v. State*, 359 So. 2d 816, 818 (Ala. Crim. App. 1977) (reversing conviction due to violation of due process resulting from conflict of interest of prosecutor who had conferred with accused

of prosecutors who may have had contact with the accused, but had "absolutely no discussion" with the accused "of the facts of the instant case." *Munguia v. State*, 603 S.W.2d 876, 878 (Tex.Crim.App. 1980).[48]

Arguing against his recusal below, Saenz claimed that he never formed an attorney-client relationship. 7 SRR1 22. But as the cases cited above illustrate, that is not the test. *See, e.g., In re Gerry, supra* (attorney disqualified from representing party adverse to former potential client). Saenz owed a clear duty to Velez due to his status as a potential client from whose agent Saenz had received privileged and confidential information. TEX. R. EVID. 503; TEX. DISC. R. PROF. COND. 1.05. Saenz violated this duty when he accepted an offer from the State to prosecute Velez.

Furthermore, the Eighth Amendment to the United States Constitution also required Saenz's disqualification. The Eighth Amendment requires that capital trials employ procedures affording heightened reliability. *See Gardner v. Florida*,

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about possible representation in same case and quoted a fee for his service and stating "if an attorney has discussed the case with his client or [his] proposed client, or voluntarily listens to his statement of the case preparatory to the defense, he is thereby disqualified to accept employment on the other side as a prosecutor or assistant prosecutor") (quotation omitted); *Gray v. State*, 469 So. 2d 1252, 1254 (Miss. 1985) (finding disqualifying conflict due to attorney having conferred with defendant whom he later prosecuted and stating "[t]here can be no question that the subsequent prosecution of a criminal defendant by an attorney who has previously gained confidential information from the accused relative to the charges against him is inherently incompatible with the right of a criminal defendant to receive a fair trial"); *State v. Leigh*, 289 P.2d 774, 777 (Kan. 1955) (finding impermissible conflict of interest and reversing conviction obtained by prosecutor who had previously consulted with defendant and defendant's wife about details of case); *People v. Rhymer*, 336 N.E.2d 203, 205 (Ill. App. Ct. 1975) (finding impermissible conflict and reversing conviction as plain error because prosecutor consulted with defendant as prospective client about same case).

[48] *See also Emerson v. State*, 114 S.W. 834, 836 (Tex.Crim.App. 1908) (same where prosecutor who had briefly spoken with accused about representing him never "secured any confidence . . . with reference to his defense"); *Kizzee v. State*, 312 S.W.2d 661, 664 (Tex.Crim.App. 1958) (same where special prosecutor "never talked to the accused or any witnesses during the time he was [previously] tentatively appointed to defend him").

430 U.S. 349, 357-58 (1977). Velez was not afforded this requisite heightened protection because he was tried by a prosecutor who should have been disqualified under Texas law and the basic dictates of due process. *See* Art. 2.01; U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. art. I, § 13.

Velez's prosecution by Saenz, who was privy to confidential information about his defense from the outset, was "inherently incompatible with [Velez's] right . . . to receive a fair trial." *Gray*, 469 So. 2d at 1254. The trial court committed reversible error by denying Velez's motion to disqualify.

3. The court's failure to instruct on accomplice corroboration as required by articles 38.14 and 36.14 caused egregious harm and requires reversal.

Because Moreno was indicted with Velez for capital murder, 1 CR 107, 16 RR 35, 95-96, she was an accomplice as a matter of law. *Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex.Crim.App. 1991). Moreno was also an accomplice as a matter of law because she was convicted of the lesser included offense of injury to child. 17 RR 115 & 1 CR 107 (establishing Moreno pled guilty to injury to a child).[49] Therefore, the trial court erred by failing to charge the jury, as required by articles 38.14[50] and 36.14,[51] that it could not convict Velez without finding that other evidence corroborated Moreno's accomplice testimony. *See, e.g., Saunders v. State*, 817 S.W.2d 688, 692 (Tex.Crim.App. 1991) (holding trial court erred as a

[49] *See Paredes v. State,* 129 S.W.3d 530, 536 (Tex.Crim.App. 2004) (holding that conviction on lesser included offense makes codefendant accomplice as matter of law); *Paz v. State*, 44 S.W.3d 98, 101 (Tex.App.–Houston 2001, *no pet.*) (holding injury to child is lesser included offense of capital murder).
[50] Article 38.14 provides that "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."
[51] Article 36.14 requires the trial court to "deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case . . . ."

(Tex.Crim.App. 1991) (holding trial court erred as a matter of law in failing to charge the jury, sua sponte, on accomplice-corroboration requirement).[52]

Moreover, the error caused Velez egregious harm and requires reversal.[53] *Id.* In assessing if a charge error caused egregious harm, this Court examines arguments of counsel, "the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence . . ., and any other relevant information revealed by the record of the trial as a whole." *Warner v. State*, 245 S.W.3d 458, 461 (Tex.Crim.App. 2008) (citation omitted). Here, the State relied heavily on Moreno's testimony in summation,[54] while defense counsel sought to discredit her for trading testimony for leniency.[55] Nothing in the charge informed the jury that it needed to find corroboration of Moreno's accomplice testimony to convict. 18 RR 82-94. Indeed, the jury received no guidance whatsoever on how Moreno's accomplice testimony should be evaluated.

As regards the "state of the evidence," Moreno's accomplice testimony was the lynchpin of the State's case. She was the only witness to allege any facts leading

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[52] *See also Hall v. State*, 161 S.W.3d 142, 151 (Tex.App.–Texarkana 2005, *pet. ref'd*) (same); *Mize v. State*, 915 S.W.2d 891, 897 (Tex.App.–Houston 1995, *pet. ref'd*) (same); *Simmons v. State*, 205 S.W.3d 65, 79 (Tex.App.–Fort Worth 2006, *no pet.*) (same with respect to corroboration required for confidential informant under article 38.141).

[53] Although counsel requested an accomplice corroboration charge in a pretrial written filing, 1 CR 136-37, the record does not disclose that counsel brought the written request to the judge's attention in open court. Egregious harm therefore is the proper prejudice standard. *See DeBlanc v. State*, 799 S.W.2d 701, 709 (Tex.Crim.App. 1990).

[54] The State repeatedly relied on Moreno's testimony to argue Velez was in the room alone with the child before his fatal injuries. The prosecutor argued that the breaths and water Moreno heard must have meant that Velez had tried to revive the child after injuring him. 18 RR 100, 111-14, 144-48, 150.

[55] Defense counsel countered the State's arguments by arguing that Moreno, who received a sentence of ten years imprisonment, played "let's make a deal" for her testimony against Velez. 18 RR 119, 126-27, 133-34, 137.

up to Angel Moreno's fatal injuries on October 31, 2005. No other witness corroborated these allegations, accused Velez of injuring Angel Moreno, or accused him of harming any other child. No crime-scene, biological, or other evidence pointed to his guilt.

When assessing the harm caused by a trial court's failure to give an accomplice corroboration charge, this Court examines the "reliability or believability" of the non-accomplice evidence in the record, "the strength of its tendency to connect the [appellant] to the crime," *Herron v. State*, 86 S.W.3d 621, 632-33 (Tex.Crim.App. 2002), and whether it conflicts with other evidence. *Saunders*, 817 S.W.2d at 693 (considering evidence conflicting with State's non-accomplice evidence to find egregious harm). The Court asks if there is an "articulable basis for disregarding the non-accomplice evidence or finding that it fails to connect the [appellant] to the offense." *Herron,* 86 S.W.23d at 633. If there is an articulable basis to disregard a particular piece of non-accomplice testimony and that basis is not "especially weak," then the testimony does not fulfill the corroboration requirement. *Id.*[56]

Here, the only evidence that the State can possibly point to as non-accomplice evidence did little if anything to connect Velez to the crime and was of dubious reliability. Put another way, the sparse evidence even arguably corroborating

[56] Finding reversible error in a trial court's failure to provide the jury with an accomplice-corroboration charge is distinct from finding the corroboration itself legally insufficient. Sufficiency challenges require the reviewing court to view the evidence in the light most favorable to the State and, if successful, result in a judgment of acquittal. The remedy for the charge error is a new trial. Reviewing courts have found accomplice corroboration sufficient as a matter of law, but at the same time found reversible error in a court's failure to give this charge. *See, e.g., Hall*, 161 S.W.3d at 151; *Simmons*, 205 S.W.3d at 79.

Moreno's accomplice testimony proves "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Saunders,* 817 S.W.2d at 692.

The State may, for example, point to Velez's purported statement to the police as corroboration. State's Ex. 64; 17 RR 75-81. In *Burns v. State*, 703 S.W.2d 649, 652 (Tex.Crim.App. 1985), the Court considered a similar argument and rejected the appellant's confession as possible corroboration because the appellant challenged its voluntariness before the jury. The Court reasoned: "we are presented with a situation where the jury correctly following the jury charge as given, quite plausibly could have improperly convicted appellants because they could have found the statements involuntary and yet convicted appellants on [accomplice] testimony alone." *Id.* The Court applied precisely the same reasoning to discount the challenged confession offered as corroboration in *Herron*, 86 S.W.3d at 633.

Just as the appellants in *Burns* and *Herron* had done, Velez vigorously argued that the jury should not consider the statement. He presented the jury with two grounds: 1) he did not "make" the typewritten statement the police gave him to review and sign because his intellectual limitations made it *impossible* for him to read, comprehend, and adopt it, and the police did not read it to him;[57] and 2) he lacked the ability to knowingly and intelligently waive his *Miranda* rights. 18 RR

[57] Neither at the pretrial suppression hearing nor at trial did the State ever claim that the statement was read to Velez.

131, 134-35 (jury argument); 18 RR 88-89 (pertinent jury charge). As established by the testimony of Dr. Michael Rabin, a forensic psychologist for over thirty years, and a Diplomate in Forensic Psychology and Forensic Neuropsychology, because Velez read English only at the second-grade level, 17 RR 170, there was "no way" he had the ability to read the tenth-grade-level statement he signed. 17 RR 172, 174-75. The State failed to rebut this expert testimony.[58] Dr. Rabin also testified that extensive testing showed Velez unable to understand the *Miranda* warnings the police said he waived. 17 RR 174.

Having heard Dr. Rabin's expert testimony – and a jury charge to disregard Velez's statement if the State did not prove both that Velez "ma[d]e" the statement voluntarily and that he knowingly and intelligently waived his *Miranda* warnings, 18 RR 88-89 – "the jury correctly following the jury charge as given, quite plausibly could have" disregarded Velez's statements. *Burns*, 703 S.W.2d at 652. With its very first note, the jury showed its potential interest in doing so: the jury requested both Dr. Rabin's report and testimony. 19 RR 4; 3 CR 399. Moreover, the jury likely credited Dr. Rabin's unrebutted expert testimony that Velez could not have read the typewritten statement he signed. State's Ex. 64. As this Court has explained, "[r]ational jurors may not utterly disregard undisputed evidence

[58] In an attempt to rebut the expert evidence of both Velez's inability to read the statement and to understand the *Miranda* warnings he purportedly waived, the State used two jail inmates who said that Velez spoke English in jail and read police blotters and horoscopes in English-language newspapers. 18 RR 45-56. But Dr. Rabin testified that even if Velez could read newspapers, which he doubted given Velez's second-grade reading level, that did not show he could have read the statement he signed. 17 RR 171, 174-75. Newspapers are written at the third to fifth grade level; Dr. Rabin and another expert found that a reader would need to read at a tenth-grade level to read Velez's statement. *Id.* The State did not contradict this expert testimony.

without a sensible basis for thinking it unreliable . . . ." *Saunders*, 817 S.W.2d at 693.[59] There was no basis, sensible or not, for doing so here.

Even if the jury somehow did consider Velez's statement, however, its "tendency to connect the [appellant] to the crime" was negligible at best. *Herron*, 86 S.W.3d at 632. In it, Velez denied intentionally harming the child even if he did play roughly with him. State's Ex. 64; 17 RR 75-81 Responding to police interrogation, Velez admitted to shaking the child "with force" to get him to laugh, but State's expert Dr. DiMaio testified that the child's injuries could not have been caused by shaking. 17 RR 142.

Velez's statement also said that he was sleeping immediately before waking up and finding the child struggling to breathe. State's Ex. 64. Although Velez's statement and Moreno's testimony both say that he left the bedroom as she entered it for a nap, Velez's statement in no way corroborates Moreno's pivotal claim that Angel Moreno was "well" when she left him on the couch at a time when she was the only adult with the child. State's Ex. 49A at 20, 29-30; 16 RR 87, 94-95. Instead, it suggests that the child was injured *before* Velez came out from the bedroom. Velez's statement also said that Moreno repeatedly and mercilessly abused her own children. State's Ex. 64. In short, Velez's statement accuses Moreno. It is difficult to fathom what inference of *his* guilt it raises, particularly when Moreno's conflicting accomplice claims are set aside.

[59] *See also Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006) (holding that expert testimony may only be rejected with a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons).

The remainder of the non-accomplice evidence introduced by the State says even less.[60] The State also sought to rely on: 1) the neighbor, Aparicio, who accused Velez of falsely claiming her phone did not work when he attempted to dial 911, resulting in the neighbor making the call; 2) Velez's alleged indifference as he remained at the crime scene; and 3) a timeline alleging that Angel Moreno was injured while he lived in a home with Velez and his mother. As the Court found of the corroborating evidence in *Saunders*, 817 S.W.2d at 693, however, this evidence is "exceedingly weak." It does next to nothing "to connect the [appellant] to the crime." *Herron*, 86 S.W.3d at 632.

To begin, Veronica Aparicio admitted during her testimony that Velez came to her door, asked to use the phone to call 911, and when he said he could not make the call, handed her back the phone so that she could call 911, which she immediately did. 14 RR 56-57. Moreover, her trial testimony that Velez falsely said her phone was not working was contradicted by a police statement she signed stating that he was "too nervous" to make a telephone call, 14 RR 87, which she partially disavowed at trial by claiming that she did not "know" how that got in her statement. This contradiction provided the jury with an "articulable basis" to disregard Aparicio's trial testimony. *Herron*, 86 S.W.3d at 633. In any case, that

[60] Moreno's recorded interrogation (State's Ex. 49) plays no role in the corroboration analysis because an accomplice cannot corroborate herself with her own out-of-court statements. *See McDuff v. State*, 939 S.W.2d 607, 612 (Tex.Crim.App. 1997) ("hearsay from an accomplice cannot corroborate the accomplice's trial testimony"); *Beathard v. State*, 767 S.W.2d 423, 429 (Tex.Crim.App. 1989) ("a prior consistent statement made by that same witness fails to provide the additional degree of reliability that corroboration by *independent* evidence would provide and that Art. 38.14 requires") (emphasis in original); *Korell v. State*, 253 S.W.3d 405, 413 n.6 (Tex.App.–Austin 2008, *pet. ref'd*) (same).

Velez came to her home and caused her to dial 911 – even if he made a false excuse and did not dial it himself – shows, if anything, that he was innocent.[61]

An equally thin reed is Velez's alleged indifference. While some police testimony suggested he was "indifferent" at the crime scene, 16 RR 12,[62] other police testimony disclosed that at the crime scene Velez was taking care of the Velez and Moreno young children, 16 RR 14-15, 17 RR 49 – as any responsible parent would do, even while another child is being treated for critical injuries. Further, the police saw Velez watching Angel Moreno's medical treatment "[l]ike what's going on with the baby." 14 RR 103. In comparison, Aparicio stated of Moreno, "Well, she only would complain, she would say my baby, my baby, but I never really saw any tears." 14 RR 85. The State's demeanor theory is internally inconsistent, proves nothing, and certainly does not identify *Velez* as the culprit.

The State's timeline theory suffers from similar internal contradictions. Together, the testimony of Magnolia Medrano (Moreno's sister) and Juan Chavez established that Velez and Moreno began living in the same home together – their very own home – in June or July of 2005. 14 RR 42-43; 16 RR 57-58. Dr. Zamir examined Angel Moreno multiple times from June to October 18, 2005, 15 RR 59-80, an extended period when the child lived with Velez. Dr. Zamir never saw any

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[61] "What is an innocent man or woman's reaction when a baby has a serious accident? . . . He or she administers first aid, calls an ambulance, calls a neighbor for help, drives the baby to the hospital-in short, takes remedial action." *Ex parte Henderson*, 246 S.W.3d 690, 697 (Tex.Crim.App. 2007) (Keasler, J., dissenting).

[62] *But cf. Hall*, 161 S.W.3d at 152 (rejecting as insufficient evidence that appellant slouched in his seat and failed to make eye contact with police officer).

evidence that the child had been injured or abused during these visits and, were it otherwise, would have been under a legal obligation to report it. 15 RR 77-80. The State's theory that Angel Moreno began getting injured only when he lived alone in a house with Velez – and thus that Velez must have injured him – holds no water.[63]

The State's non-accomplice circumstantial case is not only weak; it also conflicts with Velez's undisputed defense case. *See Saunders*, 817 S.W.2d at 693 (considering evidence conflicting with State's non-accomplice evidence to find egregious harm). Velez's evidence demonstrates that he never harmed other children when he had an opportunity. He lived for years with a former girlfriend and never harmed her children or the children they had together. 18 RR 10-23. The State's already weak non-accomplice case crumples in light of this "undisputed evidence" of Velez's nonviolent behavior toward children, *Saunders*, 817 S.W.2d at 693, both his own and others. Moreover, the State's own evidence was at least partially inconsistent with its theory that Velez was the child's abuser: the State's lead witness, Moreno's sister, Magnolia Medrano, saw a bite on Angel Moreno and testified that *Acela Moreno* had admitted biting him. 14 RR 48.

[63] The prosecutor argued to the jury: "Prior to [October 18, 2005], they've been living with – and keep in mind she met Velez around July of '05. So from July of '05 through September 9, they are living at different places. And what's important about that is that if you're living with somebody else, there's other people there. They see what's going on. There's other people there, their friends and relatives you can't be doing anything because they'll see you here so that's what's important about that." 18 RR 143. No evidence supports this argument. On the contrary, the only evidence on this issue – the State's witnesses, Medrano and Moreno – established that Velez, Moreno and the children lived in their *own home* during the only times they lived together. 14 RR 42- 43 (Medrano); 16 RR 78-80 (Moreno testifying they lived in their own home on Chilton when they got together and then in their own home when he returned from out of state on October 14, 2005).

All in all, the totality of the State's non-accomplice evidence proves far more tenuous and equivocal than the corroboration rejected by this and other Texas courts under egregious harm analysis.[64]

This is most definitely not a case that would "'clearly warrant[] conviction independent of the accomplice's testimony.'" *Solis v. State*, 792 S.W.2d 95, 98 (Tex.Crim.App. 1990) (quoting *Thompson v. State*, 493 S.W.2d 913, 916 (Tex.Crim.App. 1971)). Instead, it is a case where the most incriminating evidence by far came from the accomplice, *Saunders*, 817 S.W.2d at 692, who alone testified about the events prior to the child's death. The State's case–weakly circumstantial even *with* the accomplice testimony – falls apart without it. The sparse evidence to which the State might point as corroborating Moreno's claims is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Id.* Without the accomplice-

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[64] *See Saunders*, 817 S.W.2d at 692-93 (rejecting the following corroboration of accomplice allegations of arson under egregious harm analysis: appellant 1) removed his own belongings from the burned home before the fire; 2) had augmented his insurance policy on the home; 3) had taken on large debts; and 4) allegedly destroyed evidence that could have impeded the investigation of the fire); *Hall*, 161 S.W.3d at 152 (same in drug case where appellant was passenger in rental car leaving Dallas with illegal narcotics in a cooler in the trunk, he slouched in the seat and failed to make eye contact with police officer who stopped the car, he lied to the officer about his prior arrests, and evidence showed narcotics traffickers often used rental cars and obtained their product in Dallas); *Howard v. State*, 972 S.W.2d 121, 128 (Tex.App.–Austin 1998, *no pet.*) (same where non-accomplice evidence linking appellant to narcotics offense consisted of officer observing appellant leave bedroom where narcotics were found and the discovery of "white residue" and razor in car which appellant said he owned, even though it was registered in another person's name); *Mize*, 915 S.W.2d at 897 (similar rejection of circumstantial evidence as sufficient corroboration under egregious harm analysis); *Simmons*, 205 S.W.3d at 78 (same where non-informant evidence showed that appellant was present at scene of planned drug buy and where newspaper containing cocaine was passed from informant to appellant, but later recovered from third party). *Cf. De La Rosa v. State*, 919 S.W.2d 791, 796 (Tex.App.–San Antonio 1996, *pet. ref'd*) (finding both some harm and egregious harm because the State's case would have been "significantly less persuasive" had the accomplice-corroboration charge been given even though it was "arguable, perhaps even probable, that the non-accomplice evidence showed that appellant was a party to a burglary of a habitation, given appellant's own written statement, fingerprint evidence and the like").

corroboration charge required by articles 38.14 and 36.14, Velez did not have a fair trial. This Court must reverse.

Federal constitutional error: The trial court's violation of state law, in turn, denied Velez his rights to due process of law, a fair trial and a reliable sentencing determination. *See* U.S. Const. amends. VIII,[65] XIV; Tex. Const. art. I, § 13. By failing to follow statutorily-mandated state procedure, *see* Arts. 38.14 and 36.14 , the trial court violated Velez's right to due process of law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 424, 432-34 (1982) (concluding that state's failure to "comply with a statutorily mandated [state] procedure" violated due process).

4. The court's expansion of the intent charge beyond the result of Velez's actions to the "nature of his conduct" was reversible error.

a. *Texas-law error*: Because "[i]ntentional murder . . . is a 'result of conduct' offense, [a] trial judge err[s] in not limiting the culpable mental states to the *result* of appellant's conduct" in its jury charge. *Cook v. State*, 884 S.W.2d 485, 491 (Tex.Crim.App. 1994) (emphasis added). *See also Hughes v. State*, 897 S.W.2d 285, 296 (Tex.Crim.App. 1994) (applying *Cook* to intentional murder in capital case). The court below thus erred under Texas law by charging the jury that a person acts "intentionally or with intent with respect to the *nature of his conduct*" or "acts knowingly or with knowledge with respect to the *nature of his conduct*" –

[65] Because the capital murder conviction stemming from the court's error made Velez eligible for the death penalty, *Brown v. Sanders*, 546 U.S. 212, 219 (2006), this instructional error violated his Eighth-Amendment rights.

rather than limiting its charge to when a person intends or knowingly causes the *results of his conduct*. 18 RR 83 (emphasis added).

The pertinent sections of the court's charge read as follows:

> A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. A person commits the offense of capital murder when such person commits the offense of murder as defined herein, if any, to an individual under six years of age. Individual means a human being who is alive including an unborn child at every stage of gestation from fertilization until birth. A person acts intentionally or with intent with respect to the *nature of his conduct* or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. A person acts knowingly or with knowledge *with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct and that the circumstances exist.* A person acts knowingly or with knowledge with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> . .
>
> Now, if you find from the evidence beyond a reasonable doubt that on or about the 31st day of October of the year 2005 here in Cameron County, Texas, the defendant, Manuel Velez, did intentionally or knowingly cause the death of an individual, namely, Angel Moreno, by striking Angel Moreno on or about the victim's head with the defendant's hands or feet, or striking the victim's head against a surface unknown to the Grand Jury, or by striking the victim's head with an object unknown to the Grand Jury and the said Angel Moreno was then and there an individual younger than six years of age, then you will find the defendant Manuel Velez guilty of capital murder as charge in the indictment.

18 RR 82-85 (emphasis added).

This charge was thoroughly confusing as to whether the jury, in determining whether Velez "did intentionally or knowingly cause the death of" Angel Moreno, could consider Velez's intent or knowledge with respect to the nature of his conduct and its surrounding circumstances, or whether it was limited to

considering his intent or knowledge with respect to the *result* of his conduct. *See Cook*, 884 S.W.2d at 491 (finding same charge error).

Though not met with objection, the trial court's error requires reversal because it caused Velez "egregious harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984). That is so for two reasons. First, the evidence supported a conviction on the unlawful theory that the accused merely engaged in intentional acts which happened to cause death. And second, the prosecutor urged conviction on this improper ground.

The State's evidence that Velez intended to kill the child was weak at best. *See* Point 7, *infra* (challenging legal sufficiency of evidence of intent). In his purported statement, he said he did not intend to hurt the child. State's Ex. 64. Moreover, even assuming Velez was the one whose actions resulted in the child's death, his attempt to revive the child immediately was inconsistent with an intent that the child die. *See* note 61, *supra*.

The summations argued by three different prosecutors and spanning 32 pages virtually ignored the State's burden of proving Velez intended the child's death. 18 RR 97-114, 137-52. Rather, the jury that heard the trial court's erroneous instruction expanding intent to the nature of Velez's conduct later heard the State specifically pitch this theory,[66] urging the jury to convict on proof merely that Velez intended his actions and to injure the child. *See, e.g.,* 18 RR 98-99 ("A

[66] In fact, only one prosecutor uttered any argument that Velez *knowingly* or *intentionally* killed. She did so in the following sentence added as an afterthought to an entire paragraph arguing that Velez intended the child *harm*: "As a matter of fact, he wanted to kill that baby." 18 RR 111.

small child, okay, on a baby's feet that somebody doesn't recklessly or negligently take a cigarette that's burning, extinguish it into a child's foot, into a baby's tender skin. Give me a break. *There's nothing reckless or negligent about that. That is knowingly. That is intentional, Ladies and Gentleman.... These are intentional knowing injuries, okay?"* (emphasis added)). *See also* 18 RR 111 ("We all know that when you bite a baby, when you throw a baby up in the air, we know that that can harm a baby. We also know that if you grab a baby and slam him, that will hurt a baby. There is nothing reckless and nothing negligent about what the defendant did. He knew exactly what he was doing. He wanted to hurt that baby.").

Second, the prosecutor argued that Velez tried to revive the child by putting water on him and blowing air, as he had allegedly done to revive the child the first time he was injured and knocked unconscious. 18 RR 144-45. This argument was inconsistent with a finding that Velez intended the child's death.

Third, the prosecutor adopted Velez's expert evidence that Velez was prone to impulsive action and then applied it to show why Velez "beat the child." 18 RR 139 (citing Def. Ex. 6 at 22). The prosecutor argued: "Why would he beat the child? Well here is the answer. From his own doctor, from his own expert. 'Owing to his haphazard and careless approach, his lack of sensitivity to subtle aspects of situations and his overly simplistic problem solving, he will act impulsively.'" 19 RR 139-40 (quoting Def. Ex. 6 at 22). This argument teaches two important lessons: One, the prosecutor sought to explain Velez's "beating" of

the child, not his killing him. Two, Velez supposedly beat the child not because he *intended* death or knew he would cause it, but on impulse and without thinking at all. *Cf. also* 18 RR 151 (Prosecutor: "Does he [injure] this other kid? No. Why? He was anxious about it.").

Because the court's charge error caused Velez egregious harm, denying him a fair trial on the essential element of intent,[67] reversal is required under Texas law.

b. *Federal constitutional error*: This charge error denied Velez due process of law by relieving the State of its essential burden under PENAL CODE § 19.02(b)(1) to prove that Velez intended Angel Moreno's death or knew that the result of his conduct would be the child's death. *See* U.S. Const. amend. XIV.[68]

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[67] This Court found a related charge error harmless in *Hughes*, 897 S.W.2d at 287, for reasons that do not apply here. In *Hughes*, the appellant had been convicted of capital murder of a police officer, which required proof that the appellant knew the person whose death he caused was a police officer. *See* PENAL CODE § 19.03 (a)(1). The trial court correctly defined intent and knowledge with respect to the *result* of the accused's conduct, and correctly defined knowledge with respect to the accused's knowledge of the *circumstances* surrounding his conduct (he knew the victim was a police officer), but erred by providing the jury with an inapposite definition on the accused's intent and knowledge with respect to the *nature* of his conduct. *Hughes*, 897 S.W.2d at 295-96. The Court found error because the case involved "two of the three conduct elements," but the jury charge defined "all three of the conduct elements." *Id.* at 295. The Court found the error harmless because "the facts, as applied to the law in the application paragraph, pointed the jury to the appropriate portion of the definitions." *Id.* at 296. Here, by contrast, the error caused egregious harm for several reasons. First, the charge contained not one but two irrelevant definitions – one on the *nature* of the accused's conduct and another on the *circumstances* surrounding his conduct (under PENAL CODE § 19.03 (a)(8), the State need not prove the accused knew his victim was under six years of age). Second, the charge did not point the jury to the appropriate definitions it was to apply. Unlike the facts recited in *Hughes*, the jury here heard that a "person commits the offense of murder if he intentionally or knowingly causes the death of an individual" *immediately before* hearing the erroneously-supplied definitions on nature and circumstances of the accused's conduct. 18 RR 82-83. Thus, when the jury later heard again that the State must prove that Velez "intentionally or knowingly" caused death, 18 RR 84, it undoubtedly understood "intentionally or knowingly cause[] the death" in the comprehensive – and erroneous – way the court had just defined the concept. 18 RR 82-83. Third, for the reasons set forth in the text, *Hughes* does not apply because it neither involved evidence supporting a conviction on the unlawful theory that the accused merely engaged in intentional acts which happened to cause death nor the prosecution's repeated arguments urging conviction on this improper ground.

[68] *See Flowers v. Blackburn*, 779 F.2d 1115, 1119-21 (5th Cir. 1986); *Sandstrom v. Montana*, 442 U.S. 510, 520-521 (1979) (State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.); *see also In re Winship*, 397 U.S. 358, 361-64 (1970).

The United States Supreme Court has held that, if a charge as a whole is ambiguous with respect to the jury's constitutional obligations, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). Here, for the reasons described in subsection (a) (incorporated herein), there is more than a reasonable likelihood that the jury applied the court's thoroughly confusing instruction in a way that relieved the State of its obligation to prove specific intent to kill beyond a reasonable doubt. Accordingly, this charge error violated Velez's due-process and Eighth Amendment rights,[69] and requires reversal. *See* U.S. Const. amends. VIII, XIV; *see also* Tex. Const. art. I, § 13.

5. By presenting false and highly misleading testimony on a crucial issue at the penalty phase, the State violated Velez's constitutional rights.

TDCJ Policy: (Sept., 2005)	*"[O]ffenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G-3 throughout their incarceration."*[70]
A.P. Merillat: (Oct., 2008)	*You can promote up [from G-3] to better classification if you behave.* 20 RR 16.

Seeking to bolster its extremely weak case that Velez would be a future danger, the State presented A.P. Merillat as its lead sentencing witness. 20 RR 13. Merillat testified that a prisoner sentenced to life imprisonment without parole "can promote up [from the G-3 classification] to [a] better [i.e., less restrictive]

[69] *See* note 65, *supra* (discussing *Brown*, 546 U.S. at 217-18).
[70] TDCJ Unit Classification Procedure 2.0, Effective Sept. 1, 2005. *See* Appendix B at 2.

classification, if you behave." 20 RR 16. In *Estrada*, 313 S.W.3d at 288, this Court reversed appellant's death sentence because it was predicated on Merillat's false testimony that a "sentenced-to-life-without parole capital murderer could achieve a lower (and less restrictive) G classification than a G-3 status." *Id.*[71] Because Velez's death sentence was also predicated on Merillat's false testimony, this Court should also reverse it in order to vindicate his constitutional rights. *See* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. art. I, § 13.[72]

Velez is entitled to a new sentencing trial because his death sentence is based on materially inaccurate evidence in violation of the Eighth Amendment. *See Johnson*, 486 U.S. at 590. Additionally, he is entitled to a new sentencing trial because the State presented Merillat's false testimony on a material issue while it knew or should have known that testimony to be false, which violated the Fourteenth Amendment. *Napue*, 360 U.S. at 269; U.S. Const. amend. XIV.

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[71] In fact, black-letter TDCJ policy states that a capital murderer serving life without parole can never achieve a less restrictive custody status than G-3. *Estrada,* 313 S.W.3d at 287. In *Estrada*, this Court judicially noticed this TDCJ regulation. *Id.* Here, the Court should also judicially notice the TDCJ regulation, appended to this brief as Appendix B. *See also Watkins v. State*, 245 S.W.3d 444, 456 (Tex.Crim.App. 2008) (stating circumstances under which appellate courts may judicially notice matters outside of the record).

[72] In *Estrada*, this Court found appellant's sentence "constitutionally intolerable," 313 S.W.3d at 287, through reliance on a number of decisions from the United States Supreme Court and this Court. They included: *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (holding death sentence based on "materially inaccurate" evidence violates Eighth Amendment); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (finding due process violation and reversing sentence based on "materially untrue" evidence); *Ex parte Chabot*, 300 S.W.3d 768 (2009) (finding due process violation and granting relief when testimony of accomplice, the only eyewitness, was found to be false after a DNA test); *Ex parte Carmona*, 185 S.W.3d 492, 497 (2006) (same when defendant's community supervision was "revoked solely on the basis of perjured testimony"); *Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (finding due process violation where jury was "denied a straight answer about [defendant's] parole eligibility when it was requested" in a jury note). In a later passage, this Court cited *Napue v. Illinois*, 360 U.S. 264 (1959) (finding due process violation where conviction was obtained through presentation of false testimony by State's witness, which the State allowed to go uncorrected). Velez's request for relief relies on these decisions as well as the *Estrada* decision itself.

Prejudicial error/material issue: In *Estrada*, this Court ordered relief because there was a "fair probability" that appellant's death sentence was based on Merillat's false testimony. *Estrada*, 313 S.W.3d at 287.[73] Here, there is similarly a "fair probability" that appellant's death sentence – and in particular the jury's finding of future danger – was based on Merillat's false testimony. The State's evidence supporting the underlying capital conviction was "circumstantial" and far from "overwhelming,"[74] and its evidence of future danger was alarmingly thin. *See* Point 28, *infra*. In addition to Merillat, the State presented only two sentencing witnesses, both of whom discussed Velez's low-level and non-violent past crimes and a remote 17-year-old misdemeanor battery conviction – evidence that said next to nothing about Velez's character today. *See Ex parte Miller*, No. AP-76167, 2009 WL 3446468, at * 6 & n.26 (Tex.Crim.App. Oct. 28, 2009) (not yet released for publication).

In sharp contrast, the record powerfully shows that Velez would *not* pose a threat of future danger. *See* Point 28, *infra*. First, he had a clean disciplinary record during incarceration. Def. Ex. 6 at 6; 20 RR 101-02. Second, even under the State's apparent theory, this capital murder was neither calculated nor committed with forethought or deliberateness – two other important predictors of future danger. *See Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App. 1987)

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[73] In *Johnson*, 486 U.S. at 590, the Supreme Court vacated a death sentence based on "materially inaccurate" testimony. The prejudice standard for a *Napue* violation requires the State to prove beyond a reasonable doubt that the false testimony did not contribute to the verdict. *Ex parte Adams*, 768 S.W.2d at 292-93. Regardless of the prejudice standard applied, Velez prevails.

[74] *Ward v. Hall*, 592 F.3d 1144, 1181 (11th Cir. 2010) (finding capital sentencing error prejudicial in case where evidence of underlying offense was circumstantial and not overwhelming).

(citing these two factors). As the prosecutor argued to the jury, if guilty, Velez acted out of impulse and anxiety. 18 RR 139-40, 151. Third, the State presented no psychiatric evidence that Velez is a future danger. Fourth, the only character evidence showed that Velez was peaceable and that this crime was unlike him: Maria Hernandez, having lived with Velez for six years, testified that he was peaceful, good to her, good to her own children,[75] and good to their children. 20 RR 109-114.

In light of Velez's compelling evidence that he would not be a future danger and the State's thin evidence that he would be, there is more than a fair probability that the jury found future danger based on Merillat's testimony that if he behaved Velez could be promoted up from G-3 custody status to a less restrictive status. The significance of Merillat's testimony could not have been lost on the jury, which no doubt understood it to mean that, if sentenced to life without parole, Velez would have more opportunities to commit violence than he truly would have had.[76] Coupled with his extensive testimony that inmates in TDCJ routinely commit significant acts of violence, 20 RR 18-24, Merillat told the jury that the "classification system determines how an inmate will spend the rest of his time whatever it is inside the penitentiary. It's the *very heart of a prison inmate's sentence* or his time prison." 20 RR 16 (emphasis added).

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[75] Hernandez, whose testimony the State did not rebut, thus refuted the State's theory that Velez "pick[ed] on Angel" because Angel was not "his child." 18 RR 140.

[76] G-3 status imposes significant restrictions on prisoners, including the requirement of "direct armed supervision on job assignments and activities outside the security perimeter . . ." Appendix B at 5 (classification boundaries at (3)).

Merillat further explained that an inmate in G-3 custody status *already* enjoys the "same privileges and opportunities to go to school, go to church, go to visitation, interact with other inmates, be housed with other inmates, come and go from his cell without shackles or without supervision, go to work" as other inmates. 20 RR 17. *See also* 20 RR 18 (stating that a capital murderer in G-3 has "all the privileges and all the things that a normal inmate does"). In comparison, he explained, G-1 status "is very light, like a trustee type status." 20 RR 16. G-2 status comes between G-1 and G-3. Merillat's testimony that an inmate could "promote up to better classification" falsely conveyed that Velez, if not sentenced to death, could promote to G-2 or even G-1 status, where "light" supervision would substantially increase the probability that he would commit the kinds of violence Merillat claimed occurred in Texas prisons. 20 RR 18-26.

The jury likely gave great weight to Merillat's testimony given his cloak of expertise. He professed to have lectured on this topic in colleges, and to have written five books, numerous articles and the "curriculum for criminal investigations at Texas A&M University." 20 RR 15.

In addition to bolstering the State's thin case, Merillat's false testimony significantly damaged Velez's case that he would not be a future danger. Proof that Velez could *never* receive a less restrictive status than G-3 and would *never* become eligible for a better status for good behavior would certainly have strengthened his sentencing phase defense that he was not a future danger.

This is a close case. The State's evidence of future danger consisted only of an

out-of-character (and circumstantially proven) capital murder immediately after which Velez sought to revive the victim, and a 17-year-old misdemeanor bar fight. There is more than a fair probability that Merillat's false testimony unconstitutionally tipped the scales toward death.

By sponsoring Merillat's testimony that in the future Velez could be given greater freedom in prison and thus have a greater opportunity to be dangerous, the State corrupted the truth-seeking function of the trial forum, blindfolded the jury, and obtained a death sentence predicated on false testimony. For these reasons, Merillat's false testimony was material under the Eighth Amendment, *Johnson*, 486 U.S. at 590, material under the *Napue* line of cases, *Agurs*, 427 U.S. at 103, and material under the "fair-probability" test this Court employed in *Estrada*, 313 S.W.3d at 287. As in *Estrada*, Velez is entitled to a new trial on sentencing, where a jury can decide the future-danger special issue based on a truthful factual record. *See also* Tex. Const. art. 1, § 13.

6. Velez's counsel provided constitutionally deficient representation at the culpability and sentencing phases of trial.

Where a preponderance of the evidence in the record demonstrates that there "is … no plausible professional reason for [counsel's] specific act or omission," a claim of ineffective assistance of counsel may be raised on direct appeal and sustained if there is sufficient prejudice.[77] Here, there was no plausible

[77] *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). *See also*, *Andrews v. State*, 159 S.W.3d 98, 102-03 (Tex.Crim.App. 2005) (finding ineffectiveness on direct appeal where counsel failed to object to the prosecutor's incorrect sentencing-phase argument that the defendant's sentences could not be made consecutive, leading the jury to impose harsh sentences, which the trial court subsequently cumulated).

professional reason for counsel's failures: (1) to correct Moreno's false testimony that she did not injure Angel Moreno but only failed to report Velez's supposed abuse; (2) to request three correct jury instructions that could only have helped Velez win an acquittal;[78] (3) to correct Merillat's false testimony concerning G-3 custody status and to object to his irrelevant testimony about acts of violence committed by other prisoners. As demonstrated below, but for counsel's unprofessional failures, there is far more than a reasonable probability that the jury would have acquitted Velez of capital murder or at least sentenced him to life without parole.[79] His conviction must therefore be reversed. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); U.S. Const. amends. VI, XIV.

a. Failure to correct Moreno's false testimony: As set forth in detail in Point 1, *supra*, incorporated herein by reference, Moreno hid from the jury the fact that she had hit Angel Moreno on the head and injured him on the very day he sustained his fatal injuries. 16 RR 84-92. Further, she falsely told the jury that she had pled guilty to failing to protect her child from Velez, 16 RR 95, when the truth is that she pled guilty to injuring her child by hitting him on the head. 1

Although Velez's trial contained other attorney errors for which there could have been no plausible professional explanation, undersigned counsel raise only the most egregious ineffectiveness claims here in the interests of brevity and in recognition of this Court's holdings that ineffective assistance of counsel claims are "normally" not appropriate for direct appeal. *See, e.g., Bone*, 77 S.W.3d at 833.

[78] As explained in greater detail below, counsel ineffectively failed to request: 1) an accomplice corroboration charge; 2) a charge limiting the jury's consideration of intent to the results of Velez's actions; and 3) a charge affording him the "benefit of the doubt" in deciding if he was guilty of capital murder or one of several lesser included offenses.

[79] The Court should analyze the prejudice flowing from counsel's errors cumulatively. *See Ex parte Aguilar*, No. AP-75526, 2007 WL 3208751, at * 3 & n.7 (Tex.Crim.App. Oct. 31, 2007) (not designated for publication) (citing *Strickland* for proposition that test is cumulative prejudice flowing from counsel's unprofessional errors).

SCR3 6-8 (Indictment); 1 SRR2 State's Ex. 1 at 3-4 (plea papers); 6 SRR 6-12 (guilty plea).

Moreno was the lynchpin of the State's case. *See* Point 1, *supra*. There was no plausible professional reason why a reasonably competent lawyer would have failed to conduct even a minimal investigation of Moreno's guilty plea,[80] failed to turn up the truth as reflected in that guilty plea, and failed to ensure the jury heard what really happened.[81] Counsel could have done so any number of ways, including by: 1) cross examining Moreno on her guilty plea and introducing the plea and plea papers if she denied her prior statements; or 2) asking the prosecutor to correct Moreno's false and misleading testimony, a request that likely would have been granted.[82] Given the crucial nature of Moreno's testimony, and for the

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[80] Defense counsel had a constitutional obligation to investigate. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 381-83 (2005) (finding ineffectiveness based on failure to investigate); *Ex parte Ybarra*, 629 S.W.2d 943, 952 (Tex.Crim.App. 1982) (same). *See also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("ABA Guidelines for Capital Counsel"), 31 Hofstra L. Rev. 913, 1055 (2003) (Guideline 10.7 (A) (requiring independent investigations relating to the issues of both guilt and penalty). Both the Supreme Court and this Court have embraced the ABA Guidelines as "'guides to determining what [attorney practice] is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688); *Ex parte Briggs*, 187 S.W.3d 458, 467-70 n.22 (Tex.Crim.App. 2005) (finding ineffective failure to investigate medical circumstances of death and citing ABA Guidelines requiring such investigation).

Simply looking in the court file in this case, as appellant's counsel did, would have revealed Moreno's plea papers and led to the transcript of the plea itself. *Rompilla*, 545 U.S. at 383 (finding counsel's "failure to examine . . . prior conviction file fell below the level of reasonable performance").

[81] *Ex parte Ybarra*, 629 S.W.2d at 949 (finding counsel's failure to investigate ineffective where it led, *inter alia*, to counsel's failure to impeach witness). *See also Ex parte Hernandez*, No. AP-75445, 2006 WL 1687713, at *1 (Tex.Crim.App. Jan. 21, 2006) (not designated for publication) (finding counsel ineffective for failing to impeach witness and present evidence of another's guilt); *Cargle v. Mullin*, 317 F.3d 1196, 1221-222 (10th Cir. 2003) (finding counsel ineffective based on, *inter alia*, counsel's failure to contradict the state's star witnesses with available evidence); *Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002) (similar); *Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999) (similar); *Driscoll v. Delo*, 71 F.3d 701, 708 (8th Cir. 1995) (similar); *Williams v. Washington*, 59 F.3d 673, 679-82 (7th Cir. 1995) (similar); *Moffett v. Kolb*, 930 F.2d 1156, 1160-63 (7th Cir. 1991) (similar).

[82] Given its obligation to seek truth and justice, rather than "win[s]," the prosecution would have had to agreed to withdraw Moreno's testimony on this point, as it was constitutionally obliged to do even without a request by the defense. *See Berger*, 295 U.S. at 88; *Napue*, 360 U.S. at 269; *see also* TEX. CODE CRIM.

reasons set forth in Point 1, *supra*, counsel's failure to correct her false claims and to expose her testimony as unreliable and untrustworthy was "so serious as to deprive [Velez] of a fair trial, a trial whose result is reliable."[83]

b. Failure to request accomplice-corroboration charge: As established in Point 3, *supra* and incorporated herein for economy, Velez was entitled, as a matter of law, to an accomplice corroboration charge. And his attorneys were ineffective for not securing it. In *Ex parte Zepeda*, 819 S.W.2d at 877, this Court held that "[g]iven the state of the evidence, which depended so heavily on the accomplice testimony, and . . . that [the accomplice witnesses] were accomplices as a matter of law because they had been indicted, counsel should have requested an instruction on accomplice witness testimony. This omission was an error rendering counsel's performance deficient." *Id.* As the Austin Court of Appeals has held, "counsel's failure to . . . to request such an accomplice-witness instruction cannot be characterized as a sound trial strategy that a reasonable defense attorney would advocate." *Howard*, 972 S.W.2d at 129.[84] Here, too, given the key nature of Moreno's testimony, counsel's failure to request this charge was constitutionally deficient performance.

PROC. art. 2.01. *See also* TEX. R. PROF. CONDUCT 3.03 (b) (requiring lawyers to make "a good faith effort . . . to correct or withdraw . . . false evidence").

[83] *Strickland*, 466 U.S. at 687. *See also Williams v. Thaler*, CV No. H-03-1508, 2010 WL 4918972, at *14-15 (S.D. Tex. Nov. 24, 2010) (finding counsel ineffective for failing to have expert test ballistics, the results of which shifted blame to codefendant).

[84] *Cf. Basso v. Texas*, No. 73672, 2003 WL 1702283, at *10-11 (Tex.Crim.App. Jan. 15, 2003) (not designated for publication) (finding counsel's failure to request accomplice corroboration charge deficient performance but finding no prejudice because ample evidence corroborated accomplice's testimony); *Ex parte Hatcher*, No. WR-73606-01, 2010 WL 2113170, at * 1 (Tex.Crim.App. May 26, 2010) (Per Curiam Order) (not designated for publication) (stating that counsel's alleged failure to request accomplice corroboration charge, with other counsel error, if true "might entitle [petitioner] to relief" for ineffective assistance of counsel and remanding for hearing on issue).

Counsel's unprofessional error was clearly prejudicial. Points 3, *supra*, establishes the prejudice Velez suffered as a result of the court's failure to instruct on accomplice corroboration. This argument is incorporated here for economy. In short, without Moreno's uncorroborated accomplice testimony, the State's case against Velez was markedly weaker, if not non-existent, particularly because the jury charge and evidence allowed the jury a very good reason to disregard Velez's statement. No witness but Moreno testified to what happened at the time of the injuries the doctors attributed to Angel Moreno's death. There is far more than a reasonable probability that a jury, properly instructed that Moreno's testimony must be corroborated, would have acquitted Velez of capital murder because corroboration was weak to non-existent.

c. Failure to object to charge expanding intent beyond cause of death: Velez was also entitled as a matter of law to a correct charge that did not expand the jury's consideration of intent and knowledge beyond the *result* of Velez's conduct to "the nature of his conduct." *See* Point 4, *supra* (incorporated herein for reference). Counsel's performance fell below the constitutional norm when he failed to object to this trial court's erroneous charge. In *Banks v. State*, 819 S.W.2d 676, 682 (Tex.App.—San Antonio 1991, *pet. ref'd*), the court found defense counsel constitutionally ineffective where counsel, as here, failed "to have the definitions of culpable mental states limited in the court's charge to that which related to the 'result' of the [result-of-conduct] offense." *Id.* The court rejected any suggestion that the omission "was within the realm of trial strategy. The

failure to object to the court's charge . . . was without any plausible basis." *Id.* Here, too, counsel's failure to object was without any plausible basis and constituted deficient performance.

This error, too, was highly prejudicial. No witness testified to how Angel Moreno sustained his injuries or to the events leading up to his injuries. No evidence spoke to Velez's intent in allegedly harming the child, and the prosecutor repeatedly argued theories that would have allowed the jury to convict if it found that Velez committed intentional acts that resulted in the child's death. 18 RR 98-99, 111. Thus, had the jury not been charged in a way that suggested the State could prove intent merely by showing Velez intended his actions, there is more than a reasonable probability it would have found insufficient evidence of intent to kill and convicted Velez of a lesser included offense, if at all.

d. Failure to request charge affording benefit of doubt between charged offense and lesser included offenses: Because the trial court charged the jury on the lesser included offenses of manslaughter, negligent homicide, and injury to a child, 18 RR 85-88, Velez was entitled, upon request, to a charge that if the jury had a "'a reasonable doubt as to which of [the charged or lesser included] offenses he is guilty, then [it] must resolve that doubt in the defendant's favor and find him guilty of the lesser offense.'" *Barrios v. State*, 283 S.W.3d 348, 350, 352 (Tex.Crim.App. 2009) (quoting instruction from trial court and collecting cases showing this instruction "has long been recognized in Texas law"). There is no conceivable reason but ignorance of the law for counsel's failure to have requested

this beneficial jury instruction.[85] Here, again, counsel's constitutionally deficient performance was highly prejudicial. A reasonable probability exists in this case that, if properly instructed that it had to give Velez the benefit of the doubt between the charged offense and lesser included offenses such as manslaughter or injury to a child, the jury would have convicted on a lesser included offense.

e. Failure to correct the record on G-3 custody status: Defense counsel was ineffective for allowing Merillat to mislead the jury with his demonstrably incorrect claim that inmates sentenced to life without parole can achieve a "better classification" than G-3 by "behav[ing.]" 20 RR 16.[86] Faced with the circumstances here, a reasonably competent defense attorney would have contradicted the State's key expert with the State of Texas's own duly enacted policy. *See* Point 5, *supra*.

Here, there is no plausible professional reason for counsel's omissions: they simply failed to conduct a basic investigation. But for counsel's unprofessional failure, there is far more than a reasonable probability that the jury's verdict would have been life imprisonment without parole. *Strickland*, 466 U.S. at 687. Accordingly, Velez is entitled to a new sentencing hearing.

The written TDCJ policy, mandating lifetime G-3 status (or worse) for capital murderers serving life without parole, is evidence no minimally-competent

[85] *See Ex parte Drinkert*, 821 S.W.2d 953, 956 (Tex.Crim.App. 1991) ("Trial counsel's failure to object to the indictment, jury charge, and jury argument were not the result of a reasonable professional judgment, but rather of ignorance of criminal procedure."). *See also Luchenburg v. Smith*, 79 F.3d 388, 393 (4th Cir. 1996) (finding counsel ineffective for failure to request an expanded jury instruction that more accurately described state law).

[86] Defense counsel had a constitutional obligation to investigate. *See* note 80, *supra*. A basic investigation, like that undertaken by appellate counsel, would have revealed the then extant TDCJ policy.

attorney would have failed to learn about and obtain. As appellate counsel quickly learned through a simple internet search using Google (G3 "life without parole"), a reasonably-competent attorney could not have avoided learning of the policy.[87] A basic open records request of TDCJ would have led to the written policy itself. Undoubtedly, other avenues to this information also existed. Counsel's failure to pursue any of several avenues to the truth, and to guide the jury there, was inexcusable and completely ineffective.[88]

Armed with the written policy, competent counsel could have completely discredited Merillat's testimony, if not had it stricken, using any number of strategies. Counsel could have: 1) introduced the written policy through Merillat, through an appropriate TDCJ witness, or by asking the trial court to take judicial notice of the policy;[89] 2) introduced the written policy through one of the aforementioned methods in rebuttal; 3) cross examined Merillat on the written policy, which flatly contradicts his trial testimony; 4) moved to strike Merillat's false and misleading testimony as outside the scope of his expertise and

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[87] *See Fewer Restrictions Not an Option: Life Without Parole Offenders Face a Lifetime of Tight Supervision*, CRIMINAL JUSTICE CONNECTIONS, Texas Department of Criminal Justice (Jan./Feb. 2006), available at http://www.tdcj.state.tx.us/mediasvc/connections/JanFeb2006/agency2_v13no3.html (last visited January 21, 2011) (disseminating this new classification policy).

[88] As the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) and their Texas counterparts demonstrate, this information constitutes precisely the type which competent counsel is required to investigate and find in a capital case. *See* ABA Guidelines for Capital Counsel, 31 Hofstra L. Rev. at 1055. Guideline 10.11(A); 10.11 Commentary, pp. 1059-1070 ("Counsel is entitled to impress upon the sentencer through evidence, argument, and/or instruction that the client will either never be eligible for parole . . . . In at least some jurisdictions, *counsel may be allowed to present evidence concerning the conditions under which such a sentence would be served.*" (noted omitted)) (emphasis added); Guideline 10.11 (F)(3) ("In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: *Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served.*") (emphasis added). *See also* State Bar of Texas Guidelines and Standards for Texas Capital Counsel (*available at* http://www.uta.edu/pols/moore/indigent/txcapitalguidelines.pdf).

[89] Judicial notice would have been appropriate. *See* note 71, *supra*.

unreliable;[90] 5) or asked the prosecutor to withdraw Merillat's false and misleading testimony on this point. *See note* 82, *supra* (authority showing prosecutor must seek justice, not convictions). In short, competent counsel would have had a variety of opportunities to introduce the true policy into evidence and to destroy (or prevent altogether) Merillat's prejudicially false claims.[91]

Where defense counsels' unprofessional errors have resulted in juries imposing sentence based on unreliable information, Texas courts have not hesitated to correct the injustice and find ineffective assistance of counsel.[92] Here, too, counsel's complete failure to correct this false and misleading testimony was ineffective.[93]

Further, counsel's error in allowing the jury to act upon unreliable sentencing information was not only unreasonable and unprofessional, but also caused more than sufficient prejudice to warrant relief. Had counsel conducted a basic investigation in the first instance, the jury would never have heard Merillat's incorrect and blatantly-prejudicial testimony. For these and the reasons discussed

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[90] Expert testimony must be "reliable," *Russeau v. State*, 171 S.W.3d 871, 881 (Tex.Crim.App. 2005), and within the expert's field of expertise. *Id.* at 883. Whatever other expertise Merillat had, his testimony on current classification policy was obviously unreliable and fell outside his field of expertise.

[91] This argument proceeds on the undoubtedly correct assumption that trial counsel never garnered the current written TDCJ policy. The only other possibility is that counsel *did have* the policy. But if that were so, and counsel failed to use it, counsel was ineffective for failing to use it.

[92] *See Andrews*, 159 S.W.3d at 102-03 (ineffective failure to correct prosecutor's misstatement that consecutive sentences were unavailable, leading jury to impose harsher sentence); *Kucel v. State*, 907 S.W.2d 890, 897 (Tex.App.–Houston 1995, *pet. ref'd*) (ineffective argument to sentencing jury suggested appellant would be eligible for parole earlier than he would, in fact, become eligible, prompting the jury to impose a longer sentence to forestall his possible parole); *Ware v. State*, 875 S.W.2d 432-34, 436-37 (Tex.App.–Waco 1994, *pet. ref'd*) (ineffective to argue for sentence of probation, while failing to introduce evidence that defendant had no prior felony convictions, a mandatory requirement for probation).

[93] *See, e.g., Richey v. Bradshaw*, 498 F.3d 344, 362-64 (6th Cir. 2007) (finding ineffectiveness based on counsel's failure to adequately cross examine state expert); *Thompson v. Commonwealth*, 177 S.W.3d 782, 787 (Ky. 2005) (similar); note 81, *supra* (collecting cases in which counsel was ineffective for failing to impeach key witness).

in Point 5, *supra*, incorporated herein, the prejudice flowing from counsel's ineffectiveness was ample and tangible. Given the weakness of the State's evidence of future dangerousness, there is a reasonable probability that but for counsel's ineffectiveness the outcome would have been a sentence of life without parole. *See Strickland*, 466 U.S. at 687.

f. Failure to object to Merillat's inadmissible testimony concerning violence committed by other inmates: Through Merillat's irrelevant and highly prejudicial testimony, the State painted a vivid picture of a dangerous, uncontrolled, and violent prison system. Merillat gave hyperbolic accounts of the Texas prison system as an "extremely violent place," 20 RR 15, that could conceivably "erupt[] over into our streets." 20 RR 25.[94] He testified that his office had prosecuted a number of prison crimes, including "drugs, arson, theft, extortion, murder, rape, escapes from custody, fraud," and illegal possession of cellular phones in prison, as well as crimes by guards, wardens, and civilian employees. 20 RR 21. Testifying as an expert, 20 RR 15, Merillat thus portrayed Texas prisons as explosively-violent institutions, perpetually threatening to their staff and inhabitants, as well as to the public at large.[95] This picture was not only

[94] *See also* 20 RR 18 (stating that inmates "throw[] feces on the guard or try[] to stab the guard"); 20 RR 18-19 (Merillat claiming: 1) there have been 156 murders inside prison, 2) five murders this year, two of which occurred in high security, "strictest-classification" settings, 3) his office has prosecuted 94 life-sentenced capital murderers for crimes during their incarceration, and two death-sentenced capital murderers); and 4) there have been many guard assaults, stabbings, and other crimes on death row, despite the strict security); 20 RR 25 (stating that guards "just want to get through their shift without being stabbed").

[95] Summarizing his testimony, Merillat stated:

inaccurate but also irrelevant and prejudicial to Velez's capital sentencing.

The rules of evidence permit only introduction of relevant evidence. TEX. R. EVID. 401. Even relevant evidence is inadmissible when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." TEX. R. EVID. 403. When an expert testifies, a similar balancing test excludes the introduction of "unfairly prejudicial" underlying facts. TEX. R. EVID. 705 (d). Furthermore, the foundational principle of the modern death penalty jurisprudence mandates *individualized* sentencing determinations and *heightened* reliability. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). Under these evidentiary and constitutional rules, Merillat's testimony about the misdeeds of other inmates was patently inadmissible.[96]

The criminal acts of unnamed other Texas inmates had no bearing on whether Velez would pose a threat of future danger under article 37.071 §

> I just know that for 19 and a half years I have been working those kind of crimes and I've seen everything that you can possibly do to another human being committed inside the penitentiary. It's a very violent volatile place. It's a wonder that it hasn't just erupted over into our streets, but the guards are doing the best they can. They are very short staffed, it's very hard to maintain control they need to i[n] Texas prisons. There's 157,000 plus convicts locked up in the state of Texas in over a hundred prison units so you can imagine that's just like a whole another city in itself. And it has to be managed and maintained and secured in a very shorthanded. [sic]. Of course, they don't pay a whole lot to do that so it's a very, very violent, very dangerous place . . . .

20 RR 26 (emphasis added).

[96] In a recent decision, the Court denied some claims arguing that Merillat's testimony was inadmissible. *See Coble v. State*, No. AP-76,019, 2010 WL 3984713, at *17-19, __ S.W.3d. __, (Tex.Crim.App. Oct. 13, 2010). The *Coble* decision, however, does not address the arguments set forth above.

(2)(b)(1).[97] Manuel Velez had spent nearly three years in jail before his trial and had spent time in state prison in the 1980's for forgery, and his prison and jail disciplinary records were clean. Def. Ex. 6 at 6; 20 RR 77-82, 102. Whatever Merillat observed or purported to observe with respect to other inmates, it clearly did not apply to Velez's conduct. Further, even if it theoretically did, the prejudice inherent in Merillat's inflammatory testimony vastly outweighed any probative value.

Notwithstanding these bars to Merillat's testimony, counsel sat idly by without objecting as Merillat spouted highly-prejudicial and sometimes inaccurate[98] claims about some of the most notorious incidents of prison violence in Texas history. Merillat's testimony served only to unfairly equate Velez to Texas's most violent and notorious offenders, many of whom had extensive criminal records prior to their arrests on capital

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[97] *Cf. United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366-67 (5th Cir. 2010) ("[T]he district court plainly erred in admitting Agent Crawford's testimony that the majority of people arrested at immigration checkpoints are couriers. This testimony implied that Gonzalez-Rodriguez was a drug courier, and therefore knew he was carrying drugs, *because* he was arrested at a checkpoint. Of course, Gonzalez-Rodriguez is presumed innocent until proven guilty, and it was the Government's burden to prove that Gonzalez-Rodriguez was properly in custody because he was a drug courier. The Government impermissibly put the cart before the horse.") (emphasis added), *cert. denied*, _ U.S.L.W. __, 2011 WL589251 (Feb. 22, 2011) (No. 10-8092).

[98] For example, Merillat misrepresented that Noe Beltran, from Cameron County, was sentenced to death, had his death sentence overturned due to lack of evidence of future dangerousness, killed again, was convicted of a subsequent capital murder, but "wasn't eligible then … for the death penalty because he'd already been reversed from that one, he got a life sentence." 20 RR 20. In fact, when Beltran was convicted for capital murder a second time, based on his murder within prison, he was originally sentenced to death. *See Beltran v. State*, No. 01-97-00105-CR, 2000 WL 356410, at * 1 (Tex.App.-Hous. March 30, 2000, *no pet.*) (not designated for publication). This Court reversed the capital murder conviction itself (not the sentence), holding there was insufficient evidence of remuneration. *Id.* (citing *Beltran v. State*, No. 70,888 (Tex.Crim.App. Apr. 28, 1993) (not designated for publication)). Beltran was retried, convicted of murder rather than capital murder, and sentenced to fifty years imprisonment. *Beltran v. State*, 99 S.W.3d 807, 809 (Tex.App.-Hous. – 2003, *pet. ref'd*). Thus, contrary to Merillat's false testimony, Beltran was not eligible for the death penalty for his second murder because he had not been convicted of capital murder. Additionally, this Court's decision on Beltran's future dangerousness after his first trial could not have had any preclusive effect on the issue of his future dangerousness after he was convicted of the prison killing.

murder charges, had gang affiliations, committed murder against multiple victims, and necessarily would be a greater risk of future danger than Velez.[99] Due only to a lack of objection by ineffective counsel, the State was allowed to present this irrelevant, highly prejudicial, and constitutionally impermissible testimony about the purported misdeeds of *other* inmates. *See Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 303-304; U.S. Const. amends. VI, VIII; XIV; Tex. Const. art. I, § 13. Defense counsel ineffectively failed to object.

Defense counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *Andrews*, 159 S.W.3d at 101. And, for the reasons stated *supra*, in this weak case of future dangerousness, there is far more than a reasonable probability that, had counsel objected and Merillat's testimony been properly excluded, the jury's verdict would have been different. *See Strickland*, 466 U.S. at 687. This is so whether this particular failure by counsel is considered individually or cumulatively with his other failures.

g. *Ineffective failure to object to Merillat's false testimony concerning* Beltran: As explained in note 98, *supra*, Merillat falsely told the jury that Noe Beltran was ineligible for the death penalty for a murder he committed in prison because of this Court's ruling that the evidence of future dangerousness was insufficient in

[99] Merillat's claims regarding violence on death row, *see, e.g.*, 20 RR 19, were particularly inappropriate, and should have been challenged by defense counsel. The jury needed only to evaluate whether Velez will be a continuing threat in prison society *outside of death row*. Juries for death row inmates who committed crimes while in prison necessarily found future dangerousness. Merillat's claims regarding death-row violence were circular and self-serving: he posited that inmates pose a threat of future danger – and therefore should be sent to death row – because death row is a violent place where there are opportunities for inmates to commit violent acts.

Beltran's prior capital murder case. 20 RR 20. Merillat's testimony about Beltran was presented to tell the jury that its failure to sentence Velez to death could well result in his committing more violence, and strongly implied that if the jury found that Velez was not a future danger he would be ineligible for the death penalty if he committed a subsequent prison murder. Merillat's testimony was false. No competent counsel would have missed the opportunity to show that this testimony was false through readily-available court records and judicial decisions (or, indeed, through a basic knowledge of issue preclusion). *See Beltran*, 2000 WL 356410, at * 1. Doing so not only would have corrected the jury's misimpression that if it found that Velez would not be a future danger he would be ineligible for the death penalty if he committed a subsequent prison murder, but also would have further exposed Merillat as inaccurate, unreliable, and not worthy of the jury's trust. Here, again, whether considered individually or cumulatively with counsel's other failures, but for counsel ineffectively allowing this false testimony go uncontested, there is a reasonable probability that the jury's verdict would have been different. *See Strickland*, 466 U.S. at 687.

Conclusion: The probability of a different outcome at Velez's trial but for counsel's failures, both individually and cumulatively, far surpasses the "reasonable" probability required for relief. *Strickland*, 466 U.S. at 688. U.S. Const. amends. VI, XIV. Reversal is required.

ADDITIONAL CULPABILITY-PHASE ISSUES

7. Velez's conviction was not supported by legally sufficient evidence.

The State proved that Angel Moreno died of head trauma. But it did not prove Velez caused his death. Nor did it prove that Velez *intentionally or knowingly* caused his death, as required under Texas law. TEX. PENAL CODE § 19.02 (b)(1). Unsupported by evidence proving Velez's guilt as charged under the statute, the conviction should be reversed for legal insufficiency. *See* U.S. Const. amends. VIII,[100] XIV; *Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979).

Viewed in the light most favorable to the State, *id.* at 319, the State proved that Acela Moreno, Angel Moreno's mother, was in bed at the time Velez discovered him having trouble breathing. 16 RR 87-91. But the State did not present any direct evidence that Velez injured the child while Moreno was in bed[101] – the only time he allegedly had an opportunity to do so. Rather, both Velez's statement (State's Ex. 64) and Moreno's testimony (16 RR 87) established Moreno's opportunity to hurt Angel while Velez was napping, immediately before Moreno went to her bedroom and Velez found Angel injured.

Each of the State's medical experts testified that Angel must have been hit or flung against something with great force. 17 RR 35, 137-38, 141-42. Moreno reported that while she was in bed, she stayed awake and could hear "everything"

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[100] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[101] Because legal sufficiency review looks at the evidence in the light most favorable to the State, this argument assumes the truth of Moreno's self-serving statement that her son was "well" when she, the only adult with Angel Moreno, 16 RR 87, left him on a sofa while she went to another room to take a nap. State's Ex. 49A at 20, 29-30.

in the tiny home. 16 RR 89, 100. She did not hear Angel Moreno cry, she did not hear him being hit, kicked or slammed up against something, and she did not hear any sound or noise like a hit. 16 RR 100-102. In fact, Moreno swore that Velez never threw Angel Moreno against the wall of the home and never broke any of the walls, which were made of sheetrock, 16 RR 107-08, a material that is easily broken.[102] Corroborating this information, police at the scene found no holes in the home's walls or blood on the walls. 16 RR 19; State's Exhibits 35-46. Although Moreno stated in her recorded statement that she heard Velez trying to revive the child with breaths and water, State's Ex. 49A at 34-35, a rational jury could not infer from that evidence alone that Velez caused his death.[103]

The State's experts testified that a contributing cause of death was an *earlier* injury in which the child sustained two skull fractures. 17 RR 33-35, 133-34, 137-38. But the evidence established that only Moreno, not Velez, had an opportunity to have caused this injury. Moreno "never" left Velez alone with any of her children, State's Ex. 49A at 19, and testified that she was home with the children

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[102] *See, e.g., Deleon v. State*, No. 14-03-01314-CR, 2005 WL 2648893, at *1 (Tex. App. – Houst. Oct. 18, 2005, *pet. ref'd*) (not designated for publication) (stating assault victim's head broke through sheet rock).

[103] In his purported statement, Velez admitted to playing very roughly with the child and shaking him, State's Ex. 64 at 2-3, but expert medical testimony for the State established that the child did not suffer "diffuse axonal injury" and the child's death was caused not by shaking, but by being hit or flung against something with great force. 17 RR 35, 137-38, 141-42. Velez also said that he was sleeping immediately before he awoke to find the child struggling to breathe. State's Ex. 64 at 1; Def.'s Ex. 6 at 3. This statement was consistent with: 1) Moreno's testimony revealing her opportunity to have harmed Angel while Velez was napping, 16 RR 87, 2) the State's medical evidence that the child's injuries could have occurred minutes to hours before he was found unconscious, 17 RR 135, and 3) State's medical evidence that the child could have either been immediately knocked unconscious or gone "into a sleepy state." 17 RR 34. *See e.g., Salazar v. State*, 38 S.W.3d 141, 144 (Tex.Crim.App. 2001) (noting victim found "in bed and unconscious, breathing abnormally"); *Zanghetti v. State*, 618 S.W.2d 383, 385 (Tex.Crim.App. 1981) (noting murder victim found "unconscious, breathing heavily"). Additionally, Velez's statement recounted Moreno's history of repeatedly and mercilessly abusing her children, suggesting her possible guilt, but adding nothing to the State's proof against Velez. State's Ex. 64 at 2; Def.'s Ex. 6 at 4.

"all the time," while Velez was often out. 16 RR 81-82. Moreno gave this testimony under questioning by the prosecutor that *failed* to elicit that Velez was "home all the time." 16 RR 81.[104]

The State also sought to rely on testimony by a neighbor, Aparicio, that Velez did not telephone 911, even though the telephone she gave him for the call worked. 14 RR 56-57. But this testimony did not further the State's case. It is undisputed that Velez prompted her to telephone 911 immediately after he discovered the child in distress. 14 RR 57. She did so, irrespective of the reason Velez did not (or could not) make the call himself. *See* note 61, *supra.*[105]

Reversal for legal sufficiency is required because, viewed in the light most favorable to the State, the evidence does not show Velez *caused* the child's death.

In the alternative, the record lacks legally sufficient evidence that Velez *knowingly* or *intentionally* killed the child. There was no evidence that Velez intended to kill or knowingly did so. At trial, the State relied heavily on the breaths and water Moreno said she heard immediately before Velez told her the child was in distress, arguing that Velez tried to revive the child by putting water on him and blowing air as he had allegedly done the first time the child was injured and knocked unconscious. 18 RR 144-45. If the Court were to find

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[104] Further, the State's expert "estimated" this previous injury must have occurred seven to fourteen days earlier. 17 RR 29-30. This was merely an "estimate" because "all of [their] microscopic dating are on old people." 17 RR 28-30. After being out of state for more than a month, Velez did not live with Moreno and her children again until October 18, 2005. 16 RR 80-81.

[105] Additionally, as explained in Point 3, *supra*, whose prejudice analysis is incorporated herein for economy, the State did nothing to establish Velez's guilt of capital murder with its hollow allegation that Velez was "indifferent" at the crime scene, as well as its baseless timeline theory that Velez must have caused Angel Moreno's other non-fatal injuries.

legally sufficient evidence to support this theory that Velez caused the child's death, it should also find that Velez was trying to save the child's life with the water and breathing. Velez's alleged efforts to save the child strongly suggest that he did not intend to kill him. The State's own theory of the evidence defeats the inference that Velez knowingly or intentionally killed. The evidence is legally insufficient to prove intentional murder under PENAL CODE § 19.02.

8. The evidence of accomplice corroboration was insufficient.

To determine the sufficiency of evidence corroborating accomplice testimony,[106] reviewing courts set aside the accomplice testimony and ask whether other inculpatory evidence tends to connect the accused to the commission of the offense, even if it does not do so directly. *See McDuff v. State*, 939 S.W.2d 607, 612 (Tex.Crim.App. 1997). The corroborating evidence is viewed in the light most favorable to the verdict. *Knox v. State*, 934 S.W.2d 678, 686-87 (Tex.Crim.App. 1996). Viewed in the light most favorable to the verdict, the non-accomplice evidence here does not tend to connect Velez to the crime.

For the reasons set forth more fully in Point 3, *supra*, (whose prejudice analysis is incorporated herein by reference for economy), without Moreno's accomplice testimony, there is no evidence to connect Velez to the crime. Without Moreno's accomplice allegations, the following allegations prove insufficient to link Velez to the crime: 1) the allegation that Velez falsely claimed

[106] As established in Point 3, *supra*, Moreno was an accomplice as a matter of law both because she was indicted with Velez for capital murder and because she pleaded guilty to the lesser included offense of injury to a child.

that the neighbor's telephone did not work, but still prompted her to make the call to 911 immediately; 2) the allegation that he was "indifferent" at the crime scene, even though police said he looked on to check on Angel's medical treatment, and was taking care of his and Moreno's children; 3) the State's theory that Angel Moreno was injured only while living alone with Velez, even though the evidence established that Angel Moreno sustained no injuries for months while living alone with Velez and Moreno; and 4) Velez's statement, in which he denied intentionally harming the child even if he did play roughly with him, said he was sleeping immediately before waking up and finding the child struggling to breathe, and said that Moreno repeatedly and mercilessly abused her own children. Because the corroboration evidence was insufficient, and because the trial court failed to follow black-letter Texas law, this Court must reverse. *See Logan*, 455 U.S. at 432-34; U.S. Const. amends. VIII,[107] XIV.

9. Accomplice corroboration must be legally sufficient under the *Jackson v. Virginia* standard.

In *Cathey v. State*, 992 S.W.2d 460, 462-63 (Tex.Crim.App. 1999), this Court held that article 38.14's corroboration requirement plays no role in assessing whether the evidence is legally sufficient under *Jackson*, 443 U.S. at 318-19, 323, because this requirement is purely statutory. As explained by Judge Meyers in his dissent in *Cathey*, however, "[m]ost matters that are subject to or connected to a legal sufficiency review are statutorily imposed, such as culpable mental state [or]

[107] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

elements of an offense . . . . [E]verything the State has to prove is decided by the legislature." *Cathey*, 992 S.W.2d at 468 n.3 (Meyers, J., dissenting). For the reasons set forth in Judge Meyers' dissent, this Court should reverse *Cathey*, hold that accomplice corroboration must be legally sufficient under the federal *Jackson* standard, and apply that rule here.[108] *See also* U.S. Const. amends. VIII,[109] XIV.

As demonstrated in Points 3 and 8, *supra*, incorporated herein by reference for economy, evidence corroborating Moreno's accomplice testimony was legally insufficient under *Jackson* because no witness corroborated her claims as to what occurred leading up to the child's fatal injuries. The only other evidence of what occurred that day – Velez's statement – simply did not corroborate her claims.

10. The trial judge lacked authority to issue findings of fact and conclusions of law under article 38.22 as she did not preside at the suppression hearing.

Where, as here, 8 RR 95, a hearing is held under article 38.22 § 6, the findings and conclusions must be "made by the same judge who conducted the hearing. A different judge, although with general authority to act for or in place of the judge who conducted the hearing, cannot perform this task, because it requires assessments of credibility and demeanor which can only be performed by the judge who conducted the hearing."[110] Below, Judge Elia Lopez, who now presides in the 404th District Court, erred by issuing findings of fact and conclusions of law

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[108] *See also Thurston v. State*, 368 S.E.2d 822, 823 (Ga. Ct. App. 1988) (applying state statutory accomplice corroboration requirement in *Jackson* sufficiency analysis). *Cf. Aby v. Parratt*, 660 F.2d 385, 387 (8th Cir. 1981) (declining to resolve this issue).

[109] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[110] G. Dix & R. Dawson, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 43.478 (2d ed.) (citing *Garcia v. State*, 15 S.W.3d 533, 536 (Tex.Crim.App. 2000) (rescinding findings and conclusions made by trial judge who did not preside at the hearing)).

based on a hearing at which then Judge Abel Limas had presided.[111] 8 RR 1, 82-159. Under *Garcia*, 15 S.W.3d at 536, and article 38.22 § 6, Judge Lopez's findings are a nullity and the remedy is a de novo hearing. *See Garcia v. State,* No. 07-97-0008-CR, 2000 WL 991638, *1 (Tex.App.-Amarillo 2000) (not designated for publication) (on remand from this court, remanding to the trial court for a de novo hearing). *See also* U.S. Const. amends. VIII[112], XIV.[113]

11. Because Velez could not and did not knowingly, voluntarily, and intelligently waive his *Miranda* rights, the trial court erred in admitting his statement taken during custodial interrogation.

Manuel Velez is a native Spanish speaker. 2 SRR2 Def. Ex. 2 (hereinafter in this point Def. Ex. 2) at 6. He is illiterate in both Spanish and English. Def. Ex. 2 at 8, 31. He "functions in the defective or mildly retarded level when tested in English," Def. Ex. 2 at 15, and his oral language ability in English is at the kindergarten level. Def. Ex. 2 at 8. Velez could not have – and thus did not – knowingly and intelligently waive the English-language *Miranda* warnings which then-Sergeant Gosser read to him during custodial interrogation.[114] 8 RR 116.

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[111] Defense counsel requested the findings and conclusions from then Judge Limas, and objected when he failed to issue them. 12 RR 67-68; 3 CR 466. On February 24, 2010, this Court issued an order granting Velez's motion to require the trial court to issue findings and conclusions, without objection by the State. Counsel then argued to Judge Lopez that she had no authority to issue findings of fact and conclusions of law herself and suggested the possibility that former Judge Limas could be appointed for that limited purpose. 7 SCR 3; SCR5 202-03. Up until she abruptly changed course and issued her own findings, Judge Lopez maintained that her only plan was to appoint Judge Limas and that she could not issue her own findings (and the State agreed). *See* Judge Lopez's May 4, 2010, letter to Court of Criminal Appeals; SRR4 9-11. Judge Lopez attempted to rescind her findings in an order dated January 19, 2011, SCR6 1, but this Court nullified that order due to her lack of jurisdiction in an order dated February 16, 2011.

[112] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[113] By failing to follow the Texas statute, the trial court violated Velez's right to due process. *Logan*, 455 U.S. at 432-34.

[114] After arriving at the crime scene, Gosser transported Velez to the Cameron County Sheriff's Office in a patrol car, where he proceeded to interrogate him about Angel Moreno's death. 17 RR 47-52; 8 RR 107-08. The interrogation took place in a ten by ten room and Gosser wore his weapon the entire time. 8 RR

The trial court erred by not suppressing the ensuing statement taken by the police. 12 RR 67; State's Ex. 64 (purported statement of Velez admitted into evidence); *but see* note 15, *supra*. *See Miranda v. Arizona*, 484 U.S. 386, 475 (1966); U.S. Const. amends. V, VIII,[115] XIV.

Standard of review: In the extremely unlikely and unprecedented event that this Court denies Point 10, *supra*, and resolves this appeal without the statutorily-required findings of fact and conclusions of law from the judge *who presided at the suppression hearing*, the Court should review Velez's *Jackson v. Denno* claims de novo because (1) there are no legitimate written findings to which this Court can defer; and (2) Judge Lopez was in no "better position to evaluate [the witnesses'] credibility and demeanor than is" this Court, which "must rely on only a written transcript of the hearing." *Garcia*, 15 S.W.3d at 535. Indeed, this Court's de novo review is essential to the fairness of Velez's appeal because Judge Lopez did not base her findings and conclusions on an independent review of the record, but instead adopted *verbatim* the proposed findings of fact and conclusions of law prepared by the appellate prosecutor in this case.[116] *Compare* SCR8

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108. The trial court's findings of fact and conclusions of law – adopted from the State's proposed findings and conclusions – correctly state that Velez was in custody before he signed the written statement at issue. SCR5 155.

[115] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[116] The State's proposed findings and conclusions were prepared by an appellate prosecutor (Assistant District Attorney Rene Gonzalez) who was not even present at the *Jackson* hearing. *See* 8 RR 2 (listing appearances for State at the hearing, which did not include Mr. Gonzalez).

(State's Proposed Findings of Fact and Conclusions of Law, not yet filed by clerk as of filing of this brief) *with* SCR5 155-159.[117]

Factual background: During custodial interrogation on October 31, 2005, Velez and Gosser spoke in English and Spanish, but Velez received his *Miranda* rights only in English. 8 RR 116. At the suppression hearing, Gosser testified that Velez "appeared to be understanding" the English warnings Gosser read to him, 8 RR 118, and that Velez followed his direction in English to initial each of the English-language *Miranda* waivers contained in two separate documents. *See* 8 RR 118-24; 2 SRR2 State's Exs. 1, 2.

Unrebutted expert testimony, however, established that Velez could not have understood English *Miranda* warnings.[118] Dr. Michael Rabin, a forensic psychologist, conducted an extensive evaluation of Velez's intellectual, cognitive, and educational abilities and deficits. In his report admitted into evidence at the *Jackson v. Denno* hearing, 8 RR 230-31, Dr. Rabin explained the results of his evaluation as well as his reliance on the evaluation and notes of Dr. Kim Arredondo, who had previously evaluated Velez's competency to stand trial. Def. Ex. 2 at 1.[119] Based on his own testing and that of Dr. Arredondo, Dr. Rabin found that Velez exhibited cognitive and educational deficits, intellectual limitations, mild to moderate neurological impairment, memory disturbance,

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[117] The clerk of the trial court is making the State's proposed findings of fact and conclusions of law part of the seventh supplemental clerk's record, which has not yet been filed at the time this brief was filed.
[118] The trial court's findings of facts and conclusions of law – which adopted the State's proposed findings – completely failed to acknowledge this expert testimony, let alone describe why it was not credible or reliable.
[119] Dr. Arredondo evaluated Velez on seven occasions. Def. Ex. 2 at 6.

indications of a verbal learning disability, and "serious deficits in his ability to define words, his general fund of knowledge and his abstract reading skills." Def. Ex. 2 at 30-31. He found Velez's "verbal skills in English" to be "quite limited." Def. Ex. 2 at 31.[120] Similarly, Dr. Arredondo found that Velez "needs to have information explained to him in Spanish. The information should be presented in 'layman's' terms. [He] will require more attention to absorb the information." 1 CR 122. *See also* 8 RR 183 (similar). Based on intelligence testing he conducted in English, Dr. Rabin found that Velez had a verbal intelligence quotient (IQ) of 62, a performance IQ of 75, and a full scale score of 65, placing him in the bottom one percent of the population. Def. Ex. 2 at 15.

Dr. Rabin administered the Grisso Instrument for the Assessing Understanding and Application of *Miranda* Rights (Def. Ex. 2 at 25), and this rigorously validated instrument conclusively demonstrated Velez's inability to comprehend standard *Miranda* warnings. 8 RR 185-90; Def. Ex. 2 at 25-28. Velez scored particularly poorly on the section of the test designed to assess understanding of the right to silence. The test showed that Velez was "unable to comprehend, define or paraphrase his constitutional right to silence." Def. Ex. 2 at 25; *see also* 8 RR 185. When asked to explain the right to silence, Velez responded, "I am not supposed to make a statement?" *Id.* Although aware of how the State could use a confession, he did not understand what the police were supposed to do if he did

[120] Dr. Rabin subjected Velez to tests specifically designed to expose malingering. 8 RR 184; Def. Ex. 2 at 12-13. Dr. Rabin found absolutely no evidence that Velez was malingering. *Id.*

not want to talk. He responded, "I don't know, arrest him, read him his rights, I don't know." Def. Ex. 2 at 27. Dr. Rabin asked Velez what "should happen if he says he won't talk, but the police say that he has to talk; he responded, 'They still make you talk, they threaten you.'" Def. Ex. 2 at 27. Velez said he did not know what a judge would do if he learned that someone did not talk to the police. *Id.*

Further, when Dr. Rabin asked Velez to explain the right to counsel set forth in the *Miranda* warnings attached to his statement, he answered, "I don't know. I can say what you are telling me, I can repeat it but I don't understand it and I cannot say it." Def. Ex. 2 at 26; *see also* 8 RR 186. Asked to define words used in *Miranda* warnings, Velez could not define the words right, consult, appoint, entitled, knowingly, freely, voluntarily, or terminate.[121] Def. Ex. 2 at 26, 27; *see also* 8 RR 185. Concerning the term right, Velez said, "I don't know, I know I got rights, but I don't know what rights are or what it means." Def. Ex. 2 at 26.

On the part of the Grisso test that required Velez to "say if two statements about his rights were the same or different," he scored seven of twelve correctly, placing him in the "lowest ten percent of the adult offender sample scored." Def. Ex. 2 at 26. "This indicates his understanding of the essential nature of his constitutional rights is not commensurate with his ability to repeat them and indicates his problems with verbal comprehension." *Id.* [122]

[121] Velez said terminate meant to fire a person from his job, but did not know that the word means to end or stop. Def. Ex. 2 at 26.

[122] Velez's ability to repeat parts of the warnings he heard, while not understanding their meaning, is a prime example of "concrete thinking," a "term of art in psychology and psychiatry. It means that one's mental processes are characterized by literalness and the tendency to be bound to the most immediate and

Based on his testing and that of Dr. Arredondo, Dr. Rabin concluded that Velez could not understand English-language *Miranda* rights, could not explain the rights and did not understand either the typical vocabulary or the specific vocabulary employed in his warnings. Def. Ex. 2 at 33. Accordingly, there was no way Velez could have competently, knowingly and voluntarily waived his constitutional rights. *Id.*

The State did not rebut Dr. Rabin and Dr. Arredondo's findings with expert testimony,[123] but did call two ex-offenders who testified that they were incarcerated with Velez in December 2006 to mid 2007, 8 RR 231-53, and claimed Velez could speak English adequately and read aloud from the police blotter and horoscope sections of English newspapers. 8 RR 233-254. Their inherently suspect testimony[124] did not establish that Velez understood the *Miranda* rights he purportedly waived.[125] Certainly, this anecdotal testimony did not come close to refuting the findings of two experts who administered a battery

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obvious sense impressions, as well as by a lack of generalization and abstraction. Conversations with someone who is capable only of concrete thinking would consist predominantly of discussions of objects or events, with a distinct absence of concepts or generalizations." *United States v. Davis*, 611 F.Supp.2d 472, 502 (D. Md. 2009).

[123] Indeed, the prosecutor corroborated Dr. Rabin's conclusions in a court proceeding when, in response to defense counsel asking Velez (in English, but with a Spanish interpreter interpreting) if he had any objection to his new attorneys, the prosecutor noted, "I've heard defense counsel inquire of his client as to whether or not he wants to proceed. I've witnessed his expression, I have witnessed how long it took him to explain that to him. Judge, I'm not satisfied that he understands what's going on . . . I'm not satisfied with the exercise that they just went through here." 13 SRR 6-7, 9-10. *See also id.* at 10-14 (prosecutor persisting in asking judge to make sure Velez understands his rights).

[124] *See Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) (collecting authority for well-accepted proposition that jailhouse informants, who trade information for benefits, are inherently unreliable).

[125] *Cf. Davis*, 611 F.Supp.2d at 494 ("The Court finds the defendant's claims that he reads the newspaper and books from the library-at anything beyond a superficial level-simply incredulous given the overwhelming evidence of his lifelong reading and language disabilities. Rather, these conversations are evidence of what the defense experts referred to as the 'cloak of competence,' which is the powerful tendency of mildly mentally retarded people to mask or compensate for their deficits.").

of comprehensive tests, whose results the State could have, but did not, challenge with their own experts. *See Saunders,* 817 S.W.2d at 693 (stating fact finder "may not utterly disregard undisputed evidence without a sensible basis for thinking it unreliable"); *Coday*, 946 So. 2d at 1005 (similar with respect to expert testimony).

Unknowing, involuntary and unintelligent waiver: The State bears the burden of showing a knowing, voluntary and intelligent *Miranda* waiver, and must prove "that the accused understood these rights." *Berghuis v. Thompkins*, 560 U.S. __, 130 S.Ct. 2250, 2256, 2261-62 (2010) (making explicit that suspect read and understood English). *Cf. Torres v. State*, 422 S.W.2d 741, 745 (Tex.Crim.App. 1968) (upholding waiver because officer "carefully went over each word with the appellant to insure that the Spanish he was using [in the warnings] did not differ from the Spanish of appellant's locale").

Here, Velez was limited not only by his kindergarten-level English skills, but also by his significantly low IQ and serious intellectual and cognitive deficits. In these circumstances, the State woefully failed to prove that he knowingly, voluntarily and intelligently surrendered his rights. *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972).[126] Velez did not knowingly, voluntarily and

[126] *See also United States v. Garibay*, 143 F.3d 534, 537-38 (9th Cir. 1998) (finding the State failed to prove that a valid *Miranda* waiver occurred, due to the defendant's borderline retardation, inability to understand English, and the fact that the state never gave him the option of being interrogated in Spanish); *United States v. Short*, 790 F.2d 464, 469 n.7 (6th Cir. 1986) (holding state failed to prove knowing and intelligent waiver obtained in English because of defendant's poor grasp of written and spoken English, and citing words in the written statement clearly not chosen by the defendant because her knowledge of English was not advanced enough to have chosen them); *United States v. Castrillon*, 716 F.2d 1279, 1283 (9th Cir. 1983) (holding that the government did not sufficiently establish that the suspect understood the dialect of Spanish in which the interrogating officer spoke to him); *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355, 359-60 (D. Or. 1993) (invalidating a *Miranda* waiver because of an inaccurate translation of the

intelligently waive his *Miranda* rights because he was mentally, intellectually, and cognitively unable to do so. The State failed to prove otherwise.

The trial court thus erred in denying the motion to suppress his statement. This error requires reversal because the State relied on Velez's statement in an attempt to shore up its weak case during summation, 18 RR 100, 111, and because the jury asked to see the statement during deliberations. 19 RR 4. The State therefore cannot prove the statement's unconstitutional introduction was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

12. The trial violated Velez's constitutional rights by leaving it to the jury to decide if Velez signed the two-page statement or the three-page statement.

At the hearing on the admissibility of Velez's police statement, 8 RR 141, defense counsel pointed out that the three-page statement the State was attributing to Velez differed from the two-page statement defense counsel had previously received from the State. 8 RR 141-149; State's Ex. 64 (three-page statement); Def. Ex. 2 (two-page statement).[127] The three-page statement contained an additional paragraph in which Velez purportedly acknowledged throwing Angel Moreno in the air and forcibly shaking him. *Compare* State's Ex. 64 at 3 *with* Def. Ex. 2 at 2.

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rights into Spanish, and an insufficient showing of consent to interrogation on the part of the defendant); *United States v. Robles-Ramirez*, 93 F. Supp. 2d 762, 767-68 (W.D. Tex. 2000) (holding that the defendant's limited mental capacity and lack of English proficiency invalidated his *Miranda* waiver) (citing *Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981) (holding a 20-year-old mentally retarded defendant could not have knowingly and voluntarily waived his rights, and that the suspect's " markedly limited mental ability" must be factored in to the totality of circumstances evaluation).

[127] At the suppression hearing, the two-page statement was marked as Defense Exhibit 1, but appears not to have been admitted into evidence. 8 RR 142. The three-page was admitted as State's Exhibit 2 at the hearing. *See* 2 SRR2 State's Ex. 2. Both statements were admitted at trial, the two-pager as Defense Exhibit 2, and the three-pager as State's Ex. 64.

Examining the two documents, the court observed that Velez's two purported signatures were "very different," announced, "[W]e are going to have to go deeper into this," and ordered the State to present witnesses on the issue. 8 RR 149-50.[128] The State called Gosser, who stated that the three-page statement was the one taken from Velez, but acknowledged that the two-page statement "appear[ed] to be a statement that we produced in our department, yes." 8 RR 156-58. He also acknowledged that his signature was on the bottom of the two-page statement and that the signature above his appeared to be that of Lieutenant Carlos Garza. *Id.* The court ordered Garza "to appear before this court." 8 RR 150-51. After Garza had arrived, the court noted that it was going into chambers with Garza, Gosser and the attorneys. 8 RR 228. The record does not disclose how the court resolved the issue; it is not mentioned again. At trial, the State objected to defense counsel's introduction of Defense Exhibit 2, the two-page statement, saying in front of the jury that the court had found the exhibit to be "fraudulent" at a "prior hearing." 17 RR 104.[129] The defense objected to State's Exhibit 64 for "lack of a ... proper predicate." 17 RR 74. The court permitted both the two-page statement and the three-page statement to be admitted. 17 RR 74, 104. As discussed in Point 22 *infra*, the State then argued in summation that the defense was trying to defraud the court with the two-page statement, called Velez a fraud, and urged the jury to convict on that basis. 18 RR 100-02; 138-39.

[128] The order of the signatures of the two witnesses to the statement, Rene Gosser and Carlos Garza, are reversed in the two statements.
[129] The trial judge overruled the objection, stating it was an issue for the jury to decide. 17 RR 104.

The court committed reversible error by failing to decide which of the two statements Velez signed. In *Jackson v. Denno*, 378 U.S. 368, 375 (1964), the Supreme Court stated, "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Id.* The Court in *Jackson* held that a reliable determination of whether due process has been honored can only be made by judicial determination of the issue *before* it goes to the jury. *Id.* at 390-91 & n.18. *Jackson* should be read to require the trial court to determine whether a defendant actually made a statement that the State seeks to introduce prior to the statement going to the jury. Further, article 38.22 § 6 plainly requires the hearing judge to decide if a statement was "made" by the accused.

Here, after acknowledging the need to "go deeper," 8 RR 149, the court failed to determine which statement Velez signed. Just as a defendant is entitled to a pretrial ruling on whether his confession was voluntary, Velez was constitutionally entitled to a ruling on how the two different statements came to be and which one he signed. *See* U.S. Const. amends. VI, VIII,[130] XIV.[131] As in *Jackson*, the remedy is a remand to the trial court for a ruling on this issue. 378 U.S. at 393-95.

[130] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[131] Conviction based on a statement the defendant may never have given to the police causes egregious harm and implicates the fundamental right to a fair trial. This right is not relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, even though counsel failed to object below. *See id*; Tex. R. Evid. 103 (d).

13. The trial court violated Velez's rights by admitting a statement that Velez could not possibly have read and adopted.

As established in Point 11, *supra*, the factual discussion of which is incorporated herein by reference, Velez was borderline mentally retarded and functionally illiterate in both English and Spanish. According to Dr. Rabin, he spoke English at a kindergarten level and could read English only at the first or second grade level. 1 CR 120; Def. Ex. 6 at 8. Yet the written statement Gosser claimed Velez read, adopted and signed, 17 RR 72-73, State's Ex. 64, was written at a high-school sophomore reading level. Def. Ex. 6 at 8.[132] The State did not controvert these expert findings. Rather, the prosecutor seemed to conclude from his own observations that Velez struggled to understand court proceedings. 13 SRR 9-10. The State put on the testimony of two jail inmates who claimed that Velez, more than a year after his statement, had read aloud from the newspaper's horoscopes and police blotters. 18 RR 46-49, 54-55. Based on his testing, however, Dr. Rabin stated that Velez could not have read the newspaper. 17 RR 174-75. In any case, newspapers are generally written at a third to fifth grade level, and Velez's statement was written at a sophomore level. *Id.* Thus, even if Velez could have read from these sections of the newspaper, he nevertheless could not have read the statement the State said he read and adopted.

Due process aims "to prevent fundamental unfairness in the use of evidence." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (citation omitted). Thus, the

[132] Defense trial Exhibit 6 is the report of Dr. Rabin, which had been admitted at the suppression hearing as Defense Exhibit 2.

Supreme Court has barred the admission of unreliable identification evidence *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and of an illiterate man's signed statement when the police did not read it to him. *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Here, admission of a patently unreliable statement that Velez could not possibly have read and understood was fundamentally unfair and the trial court violated Velez's due process rights by admitting it.[133] *See* U.S. Const. amends. V, XIV. Admission of the unreliable statement also violated Velez's constitutional rights to a reliable sentencing determination. U.S. Const. amends. VIII, XIV; *Mills*, 486 U.S. at 376; note 65, *supra*; Tex. Const. art. I, § 13.

Because the State relied on Velez's statement to try to shore up its weak case, 18 RR 100, 111, and because the jury asked to see the statement during deliberations, 19 RR 4, the State cannot prove its admission was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Reversal is therefore required.

14. The trial court violated Velez's rights when it denied his request for the contemporaneous notes of the officer who took his statement.

While listening to Velez's oral statement, Gosser took notes. 17 RR 85. The trial court's refusal to grant Velez's request for those notes after Gosser testified on direct examination violated Texas Rule of Evidence 615, and Velez's rights to due process of law, confrontation, and a fair trial.

[133] Velez's fundamental right to a fair trial is certainly implicated by this error and could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 341. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, even though counsel failed to object to admission of the statement on these grounds. *See id*; Tex. R. Evid. 103 (d).

Texas Rule of Evidence 615 (a) requires the State to provide the defense with any written statement of a witness relating to his testimony after the witness has testified on direct examination. Despite the plain language of this rule, the trial court denied Velez's request for Gosser's notes apparently on two grounds. First, the prosecutor did not have the notes. 17 RR 86.[134] Second, the notes were work product. 17 RR 86. The court was wrong on both grounds.

First, the fact that the prosecutor did not personally possess the notes was irrelevant. In *Jenkins v. State*, 912 S.W.2d 793, 819 (Tex.Crim.App. 1993), this Court held that statements possessed by the "prosecutorial arm of the government" must be disclosed pursuant to Texas Rule of Evidence 614, the predecessor to current Rule 615. This Court has also found that police officers investigating a crime are part of the "prosecutorial team."[135] A sergeant heading the Cameron County Sheriff's Department's investigative division, Gosser responded to the scene of the crime, 17 RR 46-47, and then interrogated Velez, one of two principal suspects. There can be no question that he was part of the prosecutorial arm of the government. The prosecutor thus was required to obtain Gosser's notes from the files of the Cameron County Sheriff, 17 RR 85, and turn them over to the defense.

Second, the record is devoid of any evidence that Gosser's notes were work product – *i.e.*, included interpretation of evidence, trial strategy or an assessment

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[134] Gosser did not have his notes because, at the time of trial, he no longer worked at the Cameron County Sheriff's Department. 17 RR 85. The notes remained in the possession of his former employer. *Id.*

[135] *See Ex parte Castellano*, 863 S.W.2d at 484-85; *Ex parte Adams*, 768 S.W.2d at 292 (same); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (rejecting argument that documents in possession of police investigators are not in possession of State).

of the strength of evidence. *See Washington v. State*, 856 S.W.2d 184, 188 (Tex.Crim.App. 1993) (describing attorney work product in these terms). Tellingly, the State did not even claim the work-product privilege.

The trial court erred in relying on this doctrine to deny Velez access to Gosser's notes. And by failing to follow Texas's statutory procedure, the trial court violated Velez's right to due process of law, *Logan*, 455 U.S. at 432-34, to confrontation, and to a reliable sentencing determination. *See* U.S. Const. amends. V, VI, VIII,[136] XIV; Tex. Const. art. I, § 13. Further, having Gosser's notes for cross examination undoubtedly would have helped Velez defend himself, and thus this error was not harmless under any standard.

15. The trial court violated Velez's rights, and deprived the jury of critical information it needed to determine his guilt or innocence, when it failed to provide the jury with a key exhibit it had requested – the largely exculpatory police statement of the State's main witness.

During its guilt-innocence deliberations, the jury requested various pieces of evidence for review, including "Acela[] [Moreno's] video and transcript." 3 CR 399; 19 RR 4-5. Moreno's video and its English translation, which were both admitted into evidence, were largely exculpatory because Moreno stated that Velez was only playing with Angel Moreno when he hurt him, and "never" acted "with malice." State's Exs. 49, 49A. The video also vividly demonstrated that the police pursued Velez on a theory that he killed the child by shaking him, *id.*, a theory later completely disproven by the state's medical testimony. 17 RR 142.

[136] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

Nonetheless, the trial court failed to furnish the video to the jury prior to its reaching a guilty verdict. The court's failure was reversible error. Article 36.25 requires a trial court to "furnish[] to the jury upon its request any exhibits admitted as evidence in the case." In opening statements, Velez's lawyer said he would introduce the exhibit if the State did not. 14 RR 34. And in defense counsel's summation, he argued the video exhibit established that Velez never intended to kill and implored the jury to review it during deliberations. 18 RR 127, 134. But when the jury did exactly what counsel had suggested and requested the video exhibit on its second day of deliberations, the trial court failed to provide it. 19 RR 4-6. This ruling, at the State's urging and over Velez's objection, 19 RR 5-6, caused reversible error under article 36.25.

Facts: At 9:50 a.m. on the jury's second day of deliberations, the court received the jury note requesting Moreno's video and transcript as well as various other items.[137] 3 CR 399; 19 RR 4-5. Agreeing with the prosecutor's argument, the court held that the jury could not have the video exhibit but had to ask for the "specific portion" they wanted. 19 RR 6-7, 9. Defense counsel objected, correctly arguing that because "the entire video was introduced into evidence by the State

[137] In addition to Moreno's video exhibit, the jury note requested "Dr. Rabin's report and transcript," Moreno's "transcript, all the statements of Manuel Velez, [the] transcript of Dr. [DiMaio], and [the] transcript of Dr. Farley." 3 CR 399; 19 RR 4. The court and parties all apparently understood the jury's use of the term "transcript" to mean witness testimony. Although the State had admitted the English transcript of Moreno's video exhibit as State's Exhibit 49A, 16 RR 45, there were no "transcripts" of Dr. DiMaio or Dr. Farley's testimony. Thus, regarding these requests for witness testimony using the term "transcript," the court and both parties agreed that the jury could not have transcripts, but had to specify the portion of the testimony they wanted. 19 RR 5, 9. *See* Art. 36.28 (addressing witness testimony).

. . . [t]hey are entitled to see all the evidence that was introduced." *Id.*[138] The court overruled this objection. *Id.* In an extended colloquy, the court repeatedly disagreed with defense counsel and held that the law required the jury to identify the specific portion of the exhibit they wanted. 19 RR 6-11. Treating the video like the witness testimony the jury had also requested in its note, the court then instructed the jury that it was required to be specific about the part of the video it was requesting. 19 RR 13.[139]

The court took a recess. When it returned, it stated that it had received a jury note time-stamped at 11:36 a.m., stating that the jury wanted the part of Moreno's "transcript . . . acknowledging that Manuel had harmed her child. I believe the last 5-10 minutes." 3 CR 400. The court also announced at this time that it had reviewed "the transcript, the court reporter, as to what this court admitted and did not admit as far as evidence . . . ." 19 RR 16. The court quoted from article 36.25 and acknowledged that the law required the court to provide the jury with the entire video exhibit as well as the English translation because both were admitted into evidence. 19 RR 16-17. The judge then revised his earlier reason for not providing the jury with the exhibit and said that he had not provided the jury with the exhibit because "it's in Spanish and there's no reference, there wasn't any documentation." 19 RR 16. The judge stated to the attorneys that he would tell the jury that, "if [it] so desires, I'm going to bring them in here and we're going to

[138] Initially, defense counsel was under the misimpression that the English transcript of the video, State's Ex. 49A, was "not introduced." 19 RR 6. Defense counsel later recognized their error. 19 RR 18-19.
[139] Without citing Article 36.28 by name, the court appears to have been applying that statute, which says that a jury must specify the particular part of "witness testimony" it wants read.

set up, we're going to give them copies of the transcripts and they're just going to look at the tape if that's what they want." 19 RR 17.

The prosecutor suggested the jury could take State's Exhibit 49A, the English transcript, to the jury room. 19 RR 17-18. Defense counsel had no objection to the jury having this transcript *with* the video equipment in the jury room. 19 RR 18-19. The court then suggested that the jury could watch the video in the courtroom, aided by the transcript, so long as it did not deliberate. 19 RR 19. But the court added, "I just want to clear that and clean that up which I think might be more effective if . . . it gets to a higher court . . . . [S]imply because the video is in Spanish." 19 RR 19. The court stated that they should "set it up right now" and asked where the prosecutor's "video guy" was. 19 RR 20.

The jury then returned to the courtroom, 19 R 21,[140] and the court gave the following confusing charge: "This is what we are going to do. I want you to go back and think about what I said as a jury then you send me a note on what you want to do, all right?" 19 RR 21. It is not clear what the court meant by this.

At 2:50 p.m. – having never viewed the exculpatory video exhibit it had requested five hours earlier, or even the limited portions it had requested three hours earlier when the judge said to be more specific – the jurors sent another note: they had "reached a [guilty] verdict." 3 CR 401; 19 RR 23.

[140] Up until this point, throughout these entire colloquies and communications with the jury, Velez had not been present. *See* Point 16, *infra*.

Law: Texas law could not be clearer: "There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case." Art. 36.25. Texas courts have uniformly applied this statute to exhibits with recordings of witness statements, and rejected the argument that the jury must specify the part of the recording it wants, as would be required under Art. 36.28 for witness *testimony*.[141]

The court thus erred when it ruled that the jury could not receive the video exhibit in evidence. 19 RR 5-6. And rather than correcting the error, the court bungled the case further – over a course of five hours – when it asked the jury which portion of the video it wanted to see,[142] failed to provide the jury with the particular part it then requested, and then incoherently charged the jury.[143]

This prejudicial error requires reversal. In *Weatherred*, 833 S.W.2d at 356-57, the court found prejudicial error in the trial court's failure to provide the jury with a recording it requested in which a police officer's statement would have

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[141] *See Liggins v. State*, 979 S.W.2d 56, 65 (Tex.App.– Waco 1998, *pet. ref'd*); *Weatherred v. State*, 833 S.W.2d 341, 355-56 (Tex.App.--Beaumont 1992, *pet. ref'd*); *Parker v. State*, 745 S.W.2d 934, 936-37 (Tex.App.— Houston 1988, *pet. ref'd*); *Chennault v. State*, 667 S.W.2d 299, 302 (Tex.App.– Dallas 1984, *pet. ref'd*) (citing *Bigham v. State*, 148 S.W.2d 835, 838-39 (Tex.Crim.App. 1941) (finding under precursor statute no error in allowing jury to take to jury room entire transcription of out-of-court conversation)).

[142] The court bungled the issue even after the prosecutor and defense counsel answered the concern the court belatedly raised – that the video was in Spanish. When the court raised that concern, both the prosecutor and defense counsel agreed the jury could have the English transcript admitted as State's Exhibit 49A. 19 RR 18-19.

[143] That the jury did not respond to the court's confusing charge and instead returned a verdict in no way cured the error. *Parker*, 745 S.W.2d at 937 (holding that jury foreman's statement "that he thought that the jury could agree that they did not need the video tape specifically" was not "a withdrawal of the request to view the videotape, but rather, as an attempt to accommodate the judge's desire to not permit further viewing of the videotape" and finding reversible error).

supported appellant's defense that he was not the triggerman, noting that the case was close and circumstantial. *Id.*[144]

Here, too, the case was close and weakly circumstantial. *See* Points 1, 3, 7, 8, *supra*. The jury was charged with the lesser included offenses of manslaughter and injury to a child, 18 RR 85-87, and the prosecutor argued a theory suggesting Velez did not intend to kill. 18 RR 100. Defense counsel argued that the video of Moreno's interrogation showed that Velez did not intend to kill and that Moreno had testified differently at trial only for leniency, 18 RR 126-27, 133-34, and that the police pursued Velez based on a factually impossible theory that he shook the child to death. 18 R 117, 127. The video amply supported counsel's arguments. Whereas at trial Moreno claimed that Velez was harming her child and was not merely playing, 16 RR 82, 94, 103, in her video statement she said that Velez never acted with malice, State's Ex. 49A at 4, and repeatedly said that Velez was merely playing when he hurt the child. State's Ex. 49A at 4, 6, 9, 11, 26, 27, 36. Whereas at trial Moreno said she saw burn marks on her son and blamed them on Velez, 16 RR 82, in her video statement she said Velez never burned the child, not even playing, but she herself had done so. State's Ex. 49A at 12-14, 41-42, 45. And whereas the video statement focused on Velez's alleged shaking of the child at police urging, State's Ex. 49A at 9, 10, 11, 16, 17, 18, 25, 26, 27, 28, 42-43, 44, 46, Moreno said nothing about this alleged shaking at trial. Notably, too, one of

[144] *See also Parker*, 745 S.W.2d at 937 (finding judge's failure to allow the jury to "view properly admitted evidence upon request . . . was harmful error . . . because it denied a fair and impartial trial in accordance with the rules and form of law").

the jury's other requests was for Dr. DiMaio's testimony, 19 RR 4, which established that the death of the child was not caused by shaking. 17 RR 142. The trial court's error prevented the jury from reviewing evidence it needed – and specifically requested – in contemplating Velez's defense.[145]

The portions of Moreno's video requested by the jury in response to the court's first charge also supported Velez's defense. The jury asked for the portions where Moreno acknowledged Velez hurt the child – possibly in the last five to ten minutes. 3 CR 400. This could well have been referring to when, late in the video, Moreno stated, "I did not see what it was that happened to him. I didn't see if Manuel did anything to him. But yes, I'm sure that indeed he did something to my child . . . . [I]n order for my son to be the way he is, it is because Manuel did something to him." State's Ex. 49A at 37. Moreno's assumption that Velez harmed the child says nothing as to whether he intended to do so. And, although in this portion of the video Moreno discussed what she heard in that small home, State's Ex. 49A at 35, she heard nothing consistent with the cause of death found by medical examiners – that Angel Moreno was hit or flung against a hard surface. 17 RR 137-38.

The trial court's statutory error was highly prejudicial, denied Velez his "substantial rights," Tex. R. App. P. 44.2 (b), and requires reversal. The error, moreover, denied Velez his constitutional rights to due process of law, to a fair

[145] Further, defense counsel's credibility was undoubtedly damaged when the jurors learned they could not have the exhibit counsel had promised they could take in the jury room. 18 RR 127, 134.

jury trial, assistance of counsel, and to be free from cruel and unusual punishment. *See* U.S. Const. amends. V, VI, VIII,[146] XIV; Tex. Const. art. I, § 13. And by failing to follow Texas's statutory law, the trial court violated Velez's due-process rights. *Logan*, 455 U.S. at 424, 432-34.

16. The trial court violated Velez's right to presence when it both answered a key jury note and resolved an important factual issue in his absence.

Velez was absent from two critical stages of his trial: first, the court's in-chambers proceeding regarding whether he signed the two-page or three-page statement; second, the proceedings surrounding the jury's request for various evidentiary items. *See* Point 15, *supra*. The trial court violated Velez's constitutional rights to presence by conducting these critical stages of his trial in his absence. *See* U.S. Const. amends. VI, VIII,[147] XIV; *Snyder v. Massachusetts*, 291 U.S. 97, 105-08 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

Two-page versus three-page statement: As set forth in Point 12, *supra*, the trial court went "into chambers" with Garza, Gosser and the attorneys to address whether Velez signed the two-page or three-page statement. 8 RR 228. The record does not specifically mention this issue again and does not disclose how the court resolved the issue, but the State was permitted to introduce the three-page statement at trial. State's Ex. 64. Velez had a right to be at this in-chambers discussion because it was a critical stage of his trial. *State v. Meyer,* 481 S.E.2d

[146] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).
[147] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

649, 651 (N.C. 1997) (finding in-chambers conference during voir dire a critical stage at which defendant had a right to be present).

Answers to jury notes: Even though the prosecutor suggested Velez should be present for the reading of the jury's note requesting the evidence, the trial court and defense counsel announced Velez was "waiving" his appearance. 19 RR 4. Nor was Velez present when the trial court erroneously told the jury it had to decide which part of the exhibit it wanted to see. 19 RR 12. The court did not have Velez brought to the courtroom until after several colloquies with the lawyers on this issue and after the jury was brought in a second time – 17 pages into the 19 transcript pages about this issue. 19 RR 21.

With respect to the jury notes, counsel's purported waiver of Velez's right to presence during this critical stage is a nullity. 19 RR 4. The Supreme Court has held that, due to the severity of the punishment at stake, the accused may not waive his right to be present in a capital trial. *Diaz v. United States*, 223 U.S. 442, 455 (1912).[148] Even if a capital defendant (like other defendants) *could* waive this right to presence, however, it is one of those "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the [defendant.]" *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988). Thus, both because this was a capital trial and because Velez made no valid in-court waiver,

[148] *Cf. Drope v. Missouri*, 420 U.S. 162, 182 (1975) (finding it "unnecessary to decide whether, as [petitioner] contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence from a self-inflicted wound.") (citing *Diaz*, 223 U.S. at 455). *Drope* left *Diaz* intact, and *Diaz* remains good law.

neither the purported waiver nor counsel's failure to object precludes appellate review. *See also* TEX. R. EVID. 103 (d) (fundamental error review).[149]

Both proceedings at which Velez was absent bore a "substantial" relationship to his "opportunity to defend against the charge." *Snyder*, 291 U.S. at 105-06; *see also Meyer*, 481 S.E.2d at 651. The three-page statement was more prejudicial than the two-pager because in it Velez purportedly acknowledged throwing Angel Moreno in the air and shaking him with force. And Velez's defense depended heavily on Moreno's video statement, which contradicted critical parts of her trial testimony. State's Ex. 49A at 3, 4, 6, 9, 11, 26, 27, 36.

Structural and non-harmless error: The court decided in Velez's absence that the jury could hear an inculpatory statement he may not have uttered (the three-page statement) and that the jury could not view Moreno's largely exculpatory video statement. Because Velez's defense depended heavily on the video statement and the State depended heavily on Velez's statement, 18 RR 100, 111, Velez's absence from these critical stages "so fundamentally undermine[d] the fairness or the validity of the trial" that it is properly characterized as a "structural" error, subject to automatic reversal.[150] In the alternative, reversal is required

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[149] *But see Routier v. State*, 112 S.W.3d 554, 577 (Tex.Crim.App. 2003) (finding counsel waived appellant's constitutional rights to presence without addressing the Supreme Court cases cited in preceding note establishing that a defendant facing the death penalty may not waive this right and that any waiver must be knowingly made on the record).

[150] *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), and holding that while some violations of constitutional right to presence are subject to harmless-error review, others are not). *See also Holsey v. State*, 524 S.E.2d 473, 478 (Ga. 1999) (Georgia courts have consistently considered the defendant's absence from a critical part of the trial as a defect not subject to harmless error analysis); *but see Routier*, 112 S.W.3d at 577 (applying constitutional harmless error analysis to assumed denial of constitutional right to presence when court answered jury question).

because the State cannot prove beyond a reasonable doubt that Velez's absence was harmless in this weakly circumstantial case. *Chapman*, 386 U.S. at 24.

17. The trial court committed reversible error by excluding extraneous evidence of a witness's prior inconsistent statement.

In attempting to establish Velez's consciousness of guilt, the State urged the jury to credit the testimony of Veronica Aparicio who said that Velez *pretended* to try to call 911 and *claimed* her phone did not work when in fact it *did work*. 18 RR 147. During cross examination, however, Aparicio was confronted with a signed statement she made to the police on October 31, 2005, and was told that in the statement she said that Velez was "too nervous" to use the phone. Aparicio was then given an opportunity to explain her prior inconsistent statement: she acknowledged *signing* the police statement, but *denied* ever telling the officer that Velez was too nervous to call. 14 RR 86-88.

The trial court erred in overruling Velez's attempt to admit this statement on the grounds that it was "hearsay." 14 RR 89, 91-92; Def. Ex. 1 (proffered police statement of Aparicio). A prior inconsistent statement used to impeach is not offered for the truth of the matter asserted and is not hearsay. *Compare* TEX. R. EVID. 613 (a) (describing impeachment by prior inconsistent statement) *with* TEX. R. EVID. 801 (d) (defining hearsay). A court must admit evidence of a prior inconsistent statement if the following predicate is met: the witness is told the contents of the statement, and the time, place and person to whom it was made; is afforded an opportunity to explain or deny such a statement; and denies having

made it. *See Huff v. State*, 576 S.W.2d 645, 647-48 (Tex.Crim.App. 1979) (reversing conviction where procedure was not followed). The defense plainly established this predicate. 14 RR 86-88.

The court committed prejudicial error in preventing the jury from hearing this impeachment of damaging testimony upon which the State relied to convict. The court's ruling also violated Velez's constitutional rights to rebut the State's evidence, *Simmons*, 512 U.S. at 164-65, to present a defense, *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006), and to a trial in which Texas rules are followed. *Logan*, 455 U.S. at 432-34. *See* U.S. Const. amends. V, VI, VIII,[151] XIV. Reversal is required.

18. The trial court erred by charging the jury that it could convict upon an unknown manner and means of causing death, when the manner and means were *not* unknown.

This Court recently held that when the "evidence present[s] a choice of several options to prove manner and means" of causing death, or the instrumentality responsible for death, the court's charge must "give the jury a choice to find one or several of the possible causes-or, of course, to find that the evidence was insufficient to prove the cause of death." *Sanchez v. State*, __ S.W.3d __, No. PD-0961-07, 2010 WL 3894640, at *7-8 (Tex.Crim.App. Oct. 6, 2010).[152] Here, the

[151] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[152] In *Sanchez*, this Court drew a distinction between manner and means that are "unknown," and manner and means that are "unknowable." *Sanchez*, 2010 WL 3894640, at *8. It defined "unknown" evidence as "evidence that cannot be or has not yet been ascertained, such as a murder weapon or perhaps even the cause of death." *Id.* at *7. It defined "unknowable" evidence as "a known choice of several options as opposed to no evidence and no options." *Id.* at *8. As in *Sanchez*, the evidence here was unknowable – not unknown. The medical expert did not testify that the surface against which the child's head was struck was

trial court erred by charging the jury it could convict Velez of capital murder upon finding that he intentionally or knowingly caused death by "striking the victim's head against a surface unknown to the Grand Jury, or by striking the victim's head with an object unknown to the Grand Jury." 18 RR 84-85. Dr. Di Maio testified that the child's head was struck against a floor, wall, or furniture. 17 RR 127, 138, 142. And the trial court should have charged the jury that it could convict only upon sufficient proof of one or several of the options presented by the evidence. The trial court's failure to do so was error.

Because counsel preserved this error below, 18 RR 144-47, this Court must reverse if the error caused Velez "some harm." *Sanchez*, 2010 WL 3894640, at *9. As established elsewhere in this brief, the evidence of guilt in this case, unlike that in *Sanchez*, was far from "overwhelming[]." *Id.* at *10. *See* Points 1, 3, 7, 8, *supra*. The error undoubtedly caused Velez some harm because, had the jury been charged to limit its consideration to whether Velez hit the child's head against a wall, floor, or furniture, it would have been far less likely to find Velez guilty beyond a reasonable doubt. No one saw the surface or object against which Velez allegedly hit the child's head. The crime-scene evidence revealed nothing in disarray, no damage to the floors, furniture, or walls (which were constructed of sheetrock), and no blood. 16 RR 19; State's Exhibits 35-46. On these facts, this charge error caused Velez at least some harm and his conviction must be reversed.

"unknown." Rather, again, he testified that the child's head was struck against a floor, wall, or furniture. 17 RR 127, 138, 142.

Further, the court failed to follow Texas law, denying Velez due process. *Logan*, 455 U.S. at 432-34; *see also* U.S. Const. amends. V, VI, VIII,[153] XIV. And because Texas law under *Sanchez* requires the jury to be submitted the possible causes of death (and to find one beyond a reasonable doubt or find the evidence insufficient), 2010 WL 3894640, at *5-6, the court's charge error denied Velez his constitutional rights to a jury trial on this issue. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); U.S. Const. amends. VI, XIV. Reversal is required.

19. The trial court violated Velez's constitutional rights by forcing him to trial in visible shackles.

In a pretrial motion and as jury selection began, Velez objected to being shackled in front of the jury. *See* 3 RR 5-6; SCR5 113-15. The trial court overruled the objection and forced Velez to trial with "ankle bracelets on." 3 RR 6. The trial court's ruling violated Velez's constitutional rights to due process of law and to be free from cruel and unusual punishment. *See* U.S. Const. amends. VIII, XIV; Tex. Const. art. I, § 13.[154] Before a trial court may force the accused to trial before a jury in shackles, it must articulate "a particular reason to do so." *Deck*, 544 U.S. at 627. Here, the trial court did not offer any such reason. Thus, the trial court violated Velez's constitutional rights. This error is inherently prejudicial because shackling during trial undermines the dignity of the

[153] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).
[154] *See also Deck v. Missouri*, 544 U.S. 622, 632, 635 (2005) (finding violation of Eighth and Fourteenth Amendments in trial court's forcing accused to capital sentencing trial in shackles); *Wiseman v. State*, 223 S.W.3d 45, 50-53 (Tex.App.-Houston 2006, *pet. ref'd*) (finding prejudicial constitutional error in forced shackling).

proceedings, impedes communication with counsel, and embarrasses the accused – with no justification. *Id.* at 631. Because the State cannot prove this constitutional error harmless beyond a reasonable doubt, this Court must reverse. *Chapman*, 386 U.S. at 24.

20. The court's failure to recuse the special prosecutor because of his bias violated Velez's constitutional rights.

Texas law is clear that "a private attorney appointed to prosecute should be as disinterested as a public prosecutor."[155] Here, the State violated Velez's constitutional rights by employing special prosecutor Saenz to prosecute him because he could not be "rigorously disinterested." *Young,* 481 U.S. at 810. *See also* U.S. Const. amends. VIII, [156] XIV; Tex. Const. art. I, § 13.

Saenz's testimony at a pretrial hearing demonstrated his constitutionally intolerable bias:

> [A]s soon as I heard there was a baby involved I decided I did not want the case, Your Honor. I defended a case involving a baby case, a death situation 10 years ago . . . . I never felt the same after doing that. I didn't feel good about it as a defense attorney defending that kind of case so I told myself I was never going to do that again. So the minute she said it's a baby case, I said [to myself] I don't want this case.[157]

7 SRR 21-22.

Personal bias is disqualifying when it "creates an opportunity for conflict or other improper influence on professional judgment." *State v. Gonzales*, 119 P.3d

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[155] *In re Guerra*, 235 S.W.3d 392, 427-29 (Tex.App.-Corpus Christi 2007, *pet. ref'd*). *See also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) ("the state [must] wield its formidable criminal enforcement powers in a rigorously disinterested fashion").

[156] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[157] It is clear that Saenz meant that he made this comment to himself, because he told Marisol Velez that he would take the case for $30,000, a fee he thought would keep her from coming back. 7 SRR 22.

151, 161 (N.M. 2005) (upholding recusal of prosecutor who had personal animosity against defendant). Saenz's bias clearly created an opportunity for conflict or other improper influence on his professional judgment, and thus disqualified him from prosecuting this case. Due process also required Saenz to be recused because of his bias. U.S. Const. amends. V, XIV. And his bias unconstitutionally injected an arbitrary factor into the sentencing proceeding. *See* U.S. Const. amend. VIII; XIV; *Zant v. Stephens*, 462 U.S. 862, 879 (1983). The court thus erred in denying the defendant's motion to remove Saenz.[158]

21. The court violated Tex. R. Evid. 705 and Velez's right to a fair trial when it excluded hearsay offered as underlying support for an expert opinion.

During his testimony, Dr. Rabin sought to explain that one important piece of evidence he relied on in reaching his opinions were statements of Velez's family members, who knew his educational level and abilities. 17 RR 172. The State objected to this testimony as hearsay. 17 RR 172-73. Defense counsel argued that the expert could tell the jury the information he relied on reaching his opinion. 17 RR 173. The court stated that the family members were "not parties to the proceeding" and that there was "no relationship between the parties," and sustained the State's objection. 17 RR 173.

The trial court committed error in excluding this important testimony, which was admissible under Texas Rule of Evidence 705(a): "The expert may testify in

[158] Velez's fundamental right to be prosecuted by a disinterested and impartial prosecutor could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 341-42. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error even if he failed to object on this ground below. *See id*; Tex. R. Evid. 103 (d).

terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. *The expert may in any event disclose on direct examination*, or be required to disclose on cross-examination, *the underlying facts or data.*" (emphasis added). And the court's error was harmful. The State relied heavily on Velez's statement in its argument for conviction. 18 RR 97, 98, 100, 105, 111, 113-14, 146, 148, 150. The defense in turn relied heavily on Dr. Rabin's testimony to convince the jury to disregard the statement on the grounds that Velez could not have adopted it because he could not read English and that Velez could not have knowingly and intelligently waived his *Miranda* rights. 17 RR 172, 174-75, 177, 180-81; 18 RR 131, 134-35. The court's ruling violated Velez's rights under Texas law and his constitutional rights to rebut the State's evidence, *Simmons*, 512 U.S. at 164-65, to present a defense, *Holmes*, 547 U.S. at 324-25, to a reliable sentencing determination, and to a trial in which Texas rules were followed. *Logan*, 455 U.S. at 432-34; U.S. Const. amends. V, VI, VIII,[159] XIV. Reversal is required

22. The prosecution deprived Velez of a fair trial through repeated misconduct in closing statements at the guilt-innocence phase.

The State's culpability phase summation repeatedly strayed far from permissible bounds into a mine field of inflammatory arguments.[160] The State distracted the jury and aroused its passion and prejudices by: relying upon false testimony and misstating a critical fact; name calling; baseless assertions that

[159] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).
[160] *See Gallo v. State*, 239 S.W.3d 757, 767 (Tex.Crim.App. 2007) (noting permissible types of argument).

defense counsel and/or the defendant manufactured evidence; improper comments on Velez's exercise of his constitutional rights; improper and irrelevant victim impact argument; burden shifting and burden dilution; and misstatements of the law. Both singularly and combined, the State's tactics "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974). *See also* U.S. Const. amends. V, VI, VIII,[161] XIV. Because the State's proof was weak, its improper summation likely made the difference between a conviction and an acquittal.[162]

Relying upon false testimony and misstating a critical fact: Rather than correcting Moreno's false and misleading testimony, *see* Point 1, *supra*, the prosecution emphasized it. Even though Moreno had pled guilty to injuring Angel Moreno's head on October 31, 2005, *id.*, the prosecutor argued her only crime that day was to fail to call the police: "[Moreno] made bad choices and because of those choices that she made, she is doing her time. She accepted responsibility for

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[161] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[162] The defense objected to and obtained an adverse ruling on several of the prosecutor's improper arguments. With respect to the other improper arguments, they violated Velez's right to a fair trial and, thus Texas Rule of Appellate Procedure 33.1 (a) does not foreclose this Court 's review; the rule does not foreclose review of constitutional errors invoking "waivable-only right[s] that [appellant] did not waive" and Velez never waived his "fundamental" right to a "fair trial." *Mendez*, 138 S.W.3d at 342; *see also Strickland*, 466 U.S. at 684 (acknowledging fundamental right to a fair trial); U.S. Const. amends. VI, XIV. Systemic rights fall in this category – that is, rights which the system must implement "unless expressly waived." *Mendez*, 138 S.W.3d at 340 (quoting *Marin,* 851 S.W.2d at 279). "Systemic rights include those that are statutorily or constitutionally mandated, or are otherwise not optional with the parties." *Cockrell v. State*, 933 S.W.2d 73, 95 (1996) (Mansfield, J., concurring). Absent an express waiver by the accused of his fundamental constitutional right to a fair trial, and the statutory right to a prosecutor seeking only "justice," Art. 2.01, a prosecutor's violation of these rights in summation is preserved as a matter of law. *See also* Tex. R. Evid. 103 (d). To the extent that this Court suggested otherwise in *Cockrell*, 933 S.W.2d at 89 – when it addressed not a constitutional claim but one that the prosecutor's "arguments exceeded the permissible bounds of jury argument" – the precedent should be modified for the reasons stated by the dissent: "Neither rule 52(a) [now rule 33.1] nor *Marin* modify the basic principles that guarantee a defendant a fair trial." *Cockrell*, 933 S.W.2d at 100 (Baird, J., dissenting).

her inaction." 18 RR 112; *see also* 18 RR 113 (Moreno "admitted to you that she has taken responsibility for not protecting her child from the defendant."); 18 RR 148-49 ("What she did was not advise people, not call the police and for that you get 10 years maximum and that's what she got."). The State's continual reliance on false testimony violated Velez's due-process rights and rights to a fair trial.[163]

The State misstated a critical fact when it argued that Angel Moreno's non-fatal injuries occurred after October 18, 2005, which corresponded to *the first time* that Velez and Moreno ever lived alone with the children. 14 RR 19; 18 RR 143. There was no evidence to support this factual assertion and the testimony of both Moreno and her sister flatly contradict it. 16 RR 78 (Moreno stating she and Velez lived in their "own apartment" from June or July of 2005 until September 30, 2005); 14 RR 42 (testimony of Moreno's sister confirming this fact). The prosecution's misstatement of this critical fact – which it knew or should have known were false[164] – denied Velez due process of law and a fair trial.[165]

Name calling. The first prosecutor opened and closed his portion of the

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[163] *See Miller v. Pate*, 386 U.S. 1, 4-7 (1967) (finding due process violation where State presented false testimony and emphasized false testimony in summation); *State v. Bass*, 465 S.E.2d 334, 338 (N.C. 1996) (reversing conviction where prosecutor misleadingly argued to the jury that the child sex victim would not have known about sexual activity but for defendant's alleged abuse, when the prosecutor was aware that "the contrary [was] true"); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (noting that prejudice to fair trial created when prosecutor "argue[s] false evidence"). *Cf. Napue*, 360 U.S. at 272 (finding due process violation where State allowed false testimony to go uncorrected); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (condemning prosecutor's summation "falsely suggesting the absence of a deal between [witness] and the prosecution," but finding it unnecessary to resolve whether it alone warranted relief).

[164] *See* note 163, *supra.*

[165] *See* U.S. Const. amends. VI, XIV; *Borjan v. State*, 787 S.W.2d 53,57 (Tex.Crim.App. 1990) (stating that because arguments outside of the evidence are often "designed to arouse the [jury's] passion and prejudices," they are highly inappropriate); *Rodriquez v. State*, 520 S.W.2d 778, 780 (Tex.Crim.App. 1975) (finding prosecutor's improper argument not harmless as it put "new and harmful facts" to the jury that were not in evidence).

summation by calling Velez a "coward." 18 RR 97, 103. Defense counsel objected the second time; the court sustained the objection and struck the comment. 18 RR 103. Defense counsel moved for a mistrial, which the court denied. 19 RR 104. This denial was reversible error because the comment in this weak case was "so prejudicial that its harmful effect could not be removed by the court's instruction to disregard." *Blansett v. State*, 556 S.W.2d 322, 328 (Tex.Crim.App. 1977).[166]

Allegations of defense-manufactured evidence. As an officer of the court, defense counsel informed the prosecutor and judge long before trial that the State had provided the defense with a two-page statement signed by Velez, not the three-page statement that the State sought to admit at trial. 8 RR 142-43; Def. Ex. 2. *See* Point 12, *supra*. The State argued that the two-page statement "is a document that somebody with a copy machine can come back and just a little b[i]t of effort can go back and try to forge a document." 18 RR 101-02. Later, the State continued to argue the statement was a fraud; the court then sustained defense counsel's objection. 18 RR 138. Undeterred, the prosecutor repeated that the statement was a "fraud." 18 RR 139. Defense counsel objected, saying the State should be required to prove its allegations in a grand jury. *Id.* But the court brushed off the objection, saying, "All right. I'll let [the jury] decide." *Id.*

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[166] *See* U.S. Const. amends. VI, XIV; *Maynard v. State*, 265 S.W. 167, 168 (Tex.Crim.App. 1924) (reversing for prejudicial error in State's summation in which State called accused "vile" names, including coward); *Cf. Hill v. State*, 447 S.W.2d 420, 422 (Tex.Crim.App. 1969) (finding no reversible error where prosecutor called accused coward in summation because court gave curative instruction and accused requested no further relief).

The State denied Velez's due process and fair-trial rights by suggesting "defense counsel might manufacture evidence." *Orona v. State*, 791 S.W.2d 125, 128 (Tex.Crim.App. 1990). *See also* U.S. Const. amends. VI, XIV. There was not a shred of evidence to support the State's highly prejudicial argument. *Borjan*, 787 S.W.2d at 57 (forbidding argument outside the record). If the State's arguments were meant to suggest Velez created the two-page statement, they were equally baseless and prejudicial. The State's arguments were reversible error.[167]

Improper comments on Velez's constitutional rights. "'The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.'"[168] Thus, it is error for the State to comment on the defendant's exercise of his constitutional rights.[169]

Here, the State violated Velez's Fifth Amendment post-*Miranda* right to silence when it argued, "The only thing that the defendant didn't want to talk about in his statement . . . ." 18 RR 105. Defense counsel objected and moved for

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[167] *See, e.g., Gomez v. State*, 704 S.W.2d 770, 772 (Tex.Crim.App. 1985) (reversing conviction based on similar argument alleging counsel manufactured evidence).

[168] *State v. Ladd*, 302 S.E.2d 164, 172 (N.C. 1983) (quoting *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring)). *See also Griffin v. California*, 380 U.S. 609, 614-15 (1965) (similar).

[169] *See, e.g., People v. Mulero*, 680 N.E.2d 1329, 1337-38 (Ill. 1997) (finding prosecutor's comment that the defendant's filing of a motion to suppress statements reflected her lack of remorse for the crime was fundamentally unfair because it penalized the defendant for exercising her constitutional rights) (citing *Griffin*); *Whitten*, 610 F.3d at 194-96 (finding prosecutor's comment that appellant was trying to "have it both ways" by having a trial and stating his remorse in allocution violated appellant's Sixth Amendment right to fair trial). *Cf. Witt v. State*, 745 S.W.2d 472, 475 (Tex.App.- Houston 1988, *pet. ref'd*) (finding prosecutor's comment that appellant had requested a lesser included offense charge "improper" but harmless where three eyewitnesses identified appellant as the offender); Art. 36.15 (forbidding court from advising jury which party requested "[a]ny special requested charge"); *but see Roach v. State*, 440 S.W.2d 72, 74 (Tex.Crim.App. 1968) (finding this statute not violated by State summation comments that defense requested lesser included offense).

a mistrial, but the court overruled the motion and failed to strike the improper comment. 18 RR 105-110. The court's actions were reversible error.[170]

The State also improperly commented on Velez's exercise of his due-process right to a lesser-included offense jury charge. *Beck v. Alabama*, 447 U.S. 625, 643-44 (1980).[171] The State argued, "Now, the defendant wants you to give him a break. I didn't do it. But if I did do it, I didn't mean to do it." 18 RR 104.[172] Defense counsel objected; the court stated that the charge was "within the law" and instructed that the prosecutor should "stay within the law and within the record." 18 RR 104. Undeterred, the State repeated this improper argument.[173] The State's comments denied Velez due process and a fair trial, requiring reversal.

Further, the State's violated Velez's constitutional rights to confront adverse witnesses, to be present, and to a fair trial by commenting on Velez "put[ting] earphones on and act[ing] like he doesn't understand." 18 RR 102. Velez used the earphones to hear the Spanish translation of the trial because the trial court had

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[170] *Doyle v. Ohio*, 426 U.S. 610, 620 (1976) (holding State violated Fourteenth Amendment by impeaching accused for telling different story in trial testimony than in his post-*Miranda* statement to the police); *United States v. Laury*, 985 F.2d 1293, 1304 n.10 (5th Cir. 1993) (holding that although the defendant "did not remain completely silent following his arrest" the prosecutor did not have "unbridled freedom to impeach [him] by commenting on what he did *not* say following his arrest") (emphasis in original); *United States v. Rodriguez*, 260 F.3d 416, 420-21 (5th Cir. 2001) (finding improper commentary on accused's exercise of right to silence, which he exercised after making a brief statement to the police); *United States v. Whitten*, 610 F.3d 168, 198 (2d Cir. 2010) (finding improper commentary on accused exercise of right to silence where prosecutor told jury that the "path for that witness stand has never been blocked," despite that appellant had partially waived his right to silence through unsworn allocution of remorse).

[171] *See also* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13; *Holmes*, 547 U.S. at 324-25 (protecting constitutional right to present a defense).

[172] When the shoe was on the other foot, the State recognized that the legal motions of the parties should not be brought before the jury: the State requested in its pretrial motion in limine that defense counsel be barred from making "[a]ny reference to the filing of this Motion in Limine or to any ruling by the Court in response to this motion." 2 CR 323.

[173] 18 RR 137-38 ("He wants to make a deal with you. He wants you to consider lesser includeds. He is saying I'm not guilty, but if you find me guilty find me guilty of this. Kind of like the O.J. thing, I didn't do anything but if I had done it then find me guilty of this. That's inconsistent.").

found he needed a Spanish translation, 1 CR 117, 122; 3 RR 9; 8 RR 130, and in order to vindicate the aforementioned constitutional rights.[174] The prosecutor's comments violated those rights.

The prosecution also improperly commented on Velez's constitutional right to require the State to prove his guilt beyond a reasonable doubt when it stated: "[I]t's a difficult decision but don't use the reasonable doubt as an excuse." 18 RR 149. *See In re Winship*, 397 U.S. 358, 361-64 (1970).

The prosecutor improperly disparaged Velez's constitutional rights to a fair trial, due process of law and an individualized sentencing determination – and made an improper victim impact argument at the guilt phase[175] – when he asked the jury to compare Velez's rights with those of the victim. *See* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13. The prosecution argued that it was "sick and tired" of hearing about Velez's rights and asked, "How about talking about baby Angel's right[?] How about talking about baby Angel's right to live, to be happy, to grow up[?] He took that right from him." 18 R 141.[176]

The prosecutor also improperly commented on Velez's right to a fair trial

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[174] *See Garcia v. State*,149 S.W.3d 135 (Tex.Crim.App. 2004) (reaffirming Sixth Amendment right to foreign-language interpreter); Art. 38.30 (a) (providing statutory right to interpreter upon court's finding of need). *See also* U.S. Const. amends. VI, XIV; *cf. Drope*, 420 U.S. at 171 ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

[175] *See Miller-El v. State,* 782 S.W.2d 892, 895 (Tex.Crim.App. 1990) (forbidding victim impact evidence at guilt-innocence phase as irrelevant). *See also Brooks v. Kemp*, 762 F.2d 1383, 1411 (11th Cir. 1985) (holding it impermissible "to imply that the system coddles criminals by providing them with more procedural protections than their victims").

[176] *See also* 18 RR 113 (arguing it was "awful" for Angel Moreno not to have reached his first birthday, to have suffered "the injuries that you see before you" before turning one year old); 18 RR 149 ("This is 13 days of hell. Thirteen days of hell in the hands of this man until finally, till, finally God stepped in and said you know what, no more. No more. You don't want my child, I'll take him. I'll take him back.").

when, after calling Velez a coward, he added that Velez failed "to take responsibility for his actions," but the jury had provided him with a fair trial. 18 RR 97. *See Johns v. State*, 832 So. 2d 959 (Fla. Dist. Ct. App. 2002) (reversal due to prosecutor's disparagement of defendant for exercising his right to trial).

Burden shifting and dilution. Reversal also is required because the State impermissibly shifted the burden of proof to Velez and diluted its own burden of proving its case beyond a reasonable doubt. The State argued that the jury had to identify the real killer in order to acquit: "[I]t can't make any sense to think otherwise. If you say not guilty, well then who killed him? If you say not guilty, then who did this to this baby? Then who did it? Doesn't make sense. If you say he is not guilty, well then who did it? Who killed the baby then? How can you say not guilty?" 18 RR 150. *See* U.S. Const. amends. VI, XIV.[177] The State also diluted its burden of proof when it argued: "[I]t's a difficult decision but don't use the reasonable doubt as an excuse." 18 RR 149.

Misstatements of the law. The prosecutors misstated the law when they repeatedly argued that the abuse Angel Moreno suffered was intentional, rather than addressing whether Velez knowingly or intentionally caused the child's

[177] *See also Sandstrom*, 442 U.S. at 521; *State v. Brinklow*, 200 P.3d 1225, 1233 (Kan. 2009) (If, as this court has held "a jury cannot convict because common sense tells it the defendant is guilty and cannot convict because it is simply reasonable to believe the defendant did it, then it is likewise improper to convict because the jury just knows that the defendant did it. Such a suggestion is contrary to the concept of proof beyond a reasonable doubt and approaches, if not reaches, the level of gross and flagrant argument.") (citing, *inter alia*, *State v. Sappington*, 169 P.3d 1107, 1117 (Kan. 2007) (similar)); *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 2008) (finding constitutional error in state argument suggesting defendant must put on evidence).

death.[178] Due to the court's error in its charge on intent, *see* Point 4, *supra*, and its permitting of this unlawful argument, "the only reasonable conclusion the jury could draw" was that the prosecutor was stating the proper law. *Kincaid v. State*, 534 S.W.2d 340, 342 (Tex.Crim.App. 1976) (reversing due to State's misstatement of law). Because the issue of intent was hotly disputed, because the State's proof of intent was weak at best, and because the trial court charged the jury incorrectly on intent, this error was prejudicial and requires reversal.[179]

The prosecution's improper summation comments were far too extensive to be harmless. Under any standard of harmless error review, reversal is required.[180]

23. The State committed prosecutorial misconduct by ignoring the trial court's ruling excluding a prejudicial photograph.

When the State sought to introduce an unduly prejudicial photograph of the victim's injuries, the trial court correctly sustained the objection. 15 RR 28 (sustaining objection to State's proffered exhibit 17). Ignoring the court's order, however, the prosecutor used the excluded exhibit in its examination of a medical witness. 15 RR 29 (Question: "Okay. We'll just through each picture. Picture No. 17, State's Exhibit 17 what is it showing there?"). The witness described the photograph as showing "small lesions here on the ear." 15 RR 29. The State's

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[178] *See* 18 RR 98-99 (cataloguing child's non-fatal injuries which prosecutor argued must have been intentional); 18 RR 111 (Prosecutor: "We all know that when you bite a baby, when you throw a baby up in the air, we know that that can harm a baby. We also know that if you grab a baby and slam him, that will hurt a baby. There is nothing reckless and nothing negligent about what the defendant did. He knew exactly what he was doing. He wanted to hurt that baby."). *See* Point 4, *supra* (establishing that the law required the jury to limit its consideration to whether Velez knowingly or intentionally caused death).

[179] *See Whiting v. State*, 797 S.W.2d 45, 48-49 (Tex.Crim.App. 1990) (reversing conviction obtained through prosecutor's misstatement of the law in summation).

[180] *Chapman*, 386 U.S. at 24; *Anderson v. State*, 182 S.W.3d 914, 918-19 (Tex.Crim.App. 2006).

prosecutorial misconduct in ignoring the court's ruling excluding this photograph was prejudicial error requiring reversal. *Cf. Grant v. State*, 738 S.W.2d 309, 311 (Tex.App.-Houston 1987, *pet. ref'd*) (reversing conviction where, *inter alia*, "prosecutorial argument ignored the trial court's rulings" and citing *Cook v. State*, 537 S.W.2d 258, 261 (Tex.Crim.App. 1976) (similar)). The error denied Velez his constitutional right to a fair trial.[181] U.S. Const. amends. VI, VIII,[182] XIV.

24. The trial court erred by admitting a highly prejudicial and irrelevant autopsy photograph showing the victim's shaved and bruised scalp.

The trial court erred when it overruled Velez's objection and introduced into evidence a highly prejudicial autopsy photograph of Angel Moreno's shaved head covered with grotesque bruises. State's Ex. 58; 17 RR 36-37. To be admitted, a photograph must be "probative of some *disputed* fact concerning the murder victim's death."[183] Further, when the sole discernible purpose for its introduction is to arouse the jury's emotions, the photograph is inadmissible.[184] This prejudicial and inflammatory photograph was irrelevant: it had no probative value concerning any disputed fact because no one contested the manner and cause of child's injuries or the manner or cause of his death and, in any event, it did not

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[181] Velez's fundamental right to a fair trial could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 341-42. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, even though counsel failed to object when the prosecutor ignored the trial court's ruling. *See id*; Tex. R. Evid. 103 (d).

[182] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).

[183] *Prible v. State*, 175 S.W.3d 724, 736 n.25 (Tex.Crim.App. 2005) (emphasis in original); *Johnson v. State*, 226 S.W.3d 439, 451-52 (Tex.Crim.App. 2007) (Johnson, J., concurring) (finding that trial court erred in permitting introduction of crime-scene photographs, which were not "probative of the critical issue" at trial).

[184] *See Reimer v. State*, 657 S.W.2d 894, 896 (Tex.App.-Corpus Christi 1983, *no pet.*) ("[T]he admission of evidence which is inflammatory, prejudicial and harmful, and which at the same time has little or no relevance to any issue in the case, requires reversal of the judgment.").

relate to the manner or cause of death, 17 RR 125-27; 133-35.[185] *See also* TEX. R. EVID. 401. Moreover, the photograph's prejudicial effects substantially outweighed any probative value, and no doubt aroused the jury's emotions. *Erazo v. State,* 144 S.W.3d 487, 496 (Tex.Crim.App. 2004) (reversing due to introduction of evidence "substantially more prejudicial than probative"); TEX. R. EVID. 403. Its admission denied Velez's rights to due process and under the Texas rules of evidence and case law. U.S. Const. amend. XIV; *Logan*, 455 U.S. at 432-34. Because the photograph was also part of the sentencing evidence, 20 RR 93, it undoubtedly distracted the "jury's attention" from "the character of the [defendant] and the circumstances of the crime," violating the Eighth Amendment and mandating reversal. *Mann v. Oklahoma*, 488 U.S. 877, 877 (1988) (Marshall, J., dissenting from denial of cert.) (internal quotation marks and citation omitted).

25. Velez was denied his right to confrontation, to due process and to a fair trial by the State's injection into the trial of highly-prejudicial and non-confronted hearsay.

No authority allows a testifying doctor to state the findings another person entered in his patient's chart. Such testimony is hearsay, an out-of-court statement offered for the truth of the matter asserted. TEX. R. EVID. 801 (d). The rules of evidence bar hearsay. TEX. R. EVID. 802. The trial court ignored these rules and violated Velez's constitutional rights, including his Sixth Amendment right to confrontation, *Crawford v. Washington*, 541 U.S. 36, 59 (2004), when it

[185] *See Fuller v. State,* 829 S.W.2d 191, 206-07 (Tex.Crim.App. 1992) (finding low probative value of photographs of fatal injuries because a State's witnesses testified to the cause of death and the defendant did not contest the cause of death), *overruled on other grounds by Castillo v. State*, 913 S.W.2d 529, 534 n.2 (Tex.Crim.App. 1995).

permitted Dr. Zamir to testify that his nurse practitioner found Angel Moreno to be in good condition when she examined him on October 18, 2005. 15 RR 78-79. This error was highly prejudicial because the prosecutor used this testimony to argue that Angel began having medical problems only after he moved into a home with Velez and his mother. 18 RR 143. The court's failure to follow Texas law denied Velez a fair trial and due process of law. *Logan*, 455 U.S. at 432-34; U.S. Const. amends. V, VI, VIII,[186] XIV. Relief is therefore required.[187]

26. The trial court violated Velez's confrontation rights by admitting several testimonial hearsay statements by a witness who did not appear at trial.

The trial court violated Velez's Sixth Amendment right to confrontation when it admitted numerous prejudicial testimonial hearsay statements by Javier Reyna, a high-ranking officer in the Cameron County Sheriff's Office, contained in the video-taped interrogation of Moreno.[188] 16 RR 48 (playing of State's Ex. 49 to the jury). The Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless he is unavailable to testify and the defendant has had a prior opportunity to cross-examine him. *Crawford*, 541 U.S. at 59. A statement is testimonial if it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (quotation omitted). Here, there can be no doubt that Reyna (as would any reasonable witness) knew that the

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[186] *See* note 65, *supra* (citing *Brown*, 546 U.S. at 217-18).
[187] Velez's fundamental right to a fair trial cannot be relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error even if he failed to object on this ground below. *See id.*; Tex. R. Evid. 103 (d).
[188] Reyna was Lieutenant Garza's supervisor. 16 RR 37.

statements he was making in this recorded police interrogation would be made available for later use at trial. Further, Reyna did not testify at trial and was not shown to be unavailable.

In his interrogation, Reyna stated authoritatively:

> "[Children] heal, are very quick to heal more than you and me." State's Ex. 49A at 7.
>
> "I feel, and I feel it as an experienced investigator, and with my partner here, an experienced detective, that you somehow are covering Manuel." *Id.* at 19.
>
> "Rosalba [Moreno], I know that, that in these types of relationships with an abusive man the woman protects him." *Id.* at 25.
>
> "You saw something else that day . . . . Don't cover for him . . . . Yes, you did see. You saw something else." *Id.* at 33.
>
> "[Angel Moreno]'s been suffering till this moment, one year long, due to this man [Velez]. *Id.* at 35.
>
> "Manuel did something else to him. I know it, but I need you to tell me. . . . Up to this date, you are protecting him. Every time that you say that he was playing, you are protecting him." *Id.* at 36.

Acela Moreno was the only witness to testify in any form about who might have caused her son's injuries; her allegations against Velez were largely equivocal. Reyna's testimonial hearsay assertions that Velez abused the child and must have caused his death, however, injected a highly prejudicial and non-confronted witness into the trial.

Admission of Reyna's non-confronted testimonial hearsay statements, within an otherwise admissible exhibit, violated Velez's constitutional rights, including

his right to confrontation.[189] Because the allegations involved key disputed facts – whether Velez abused Angel Moreno and caused his death – their admission was not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Reversal is required.[190]

27. The State violated Velez's rights by convicting him and sentencing him to death based on a factual theory diametrically opposed to the theory it used to convict his codefendant.

As detailed in Point 1, *supra*, Saenz obtained a conviction against Moreno for hitting Angel Moreno on the head or hitting his head against something, thereby causing bodily injury, on October 31, 2005, the day of his fatal head injuries.[191] At Velez's trial, the same special prosecutor adduced testimony from Moreno about what transpired on October 31, 2005, and she never admitted to injuring the child's head that day. 16 RR 84-92. She also testified that she had been sentenced for failing to protect her child, 16 RR 95, a sworn assertion that contradicted her sworn assertion during her guilty plea that she was pleading to injuring her child's head because she was guilty and that the special prosecutor and his team repeated in summation. 18 RR 112, 113, 148-49. The State's "use of inherently factually contradictory theories" to convict Moreno and Velez "violate[d]" Velez's rights to due process, *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000), the doctrine of

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[189] *See Russeau*, 171 S.W.3d at 880-81 (finding confrontation clause violation where State introduced prison disciplinary reports containing testimonial hearsay statements of prison guards who did not testify at trial); U.S. Const. amends. VI, VIII, XIV. With respect to Eighth Amendment violation, *see* note 65, *supra*.

[190] Velez's fundamental right to a fair trial could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, even though counsel failed to object. *See id*; Tex. R. Evid. 103 (d).

[191] *See also* 6 SRR 5 (prosecutor stating Moreno participated in acts hurting her child); 6 SRR 6-8 (plea proceeding); 1 SCR3 at 6-8 (indictment to which she pled); 1 SRR2 State's Ex. 1 at 3-4 (plea papers).

judicial estoppel, and the right to be free from cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Tex. Const. art. I, § 13.

Due process: The inconsistencies in the Moreno and Velez cases are as inherently factually contradictory as those mandating relief under the due process clause in *Smith.*[192] When pleading guilty, Moreno admitted and the prosecutor formally agreed that she hit Angel Moreno on his head or hit his head against something, causing him bodily injury, on the very same day as his fatal injuries. 1 SRR2 State's Ex. 1 at 3-4.[193] *See also* 6 SRR1 5 (Prosecutor: "We do have evidence that she participated in acts that led to injuries to the baby but not the actual death of the child."). In Velez's trial, Moreno changed her story dramatically. Under questioning by the special prosecutor, she described the entirety of what transpired that day without ever admitting having struck the child's head. Moreno alleged that the child became injured only after he was alone with Velez in the home while she was in a bedroom with another child for twenty minutes. 16 RR 89-92. At no point did Moreno admit that she hit Angel Moreno on the head or hit his head against a surface on October 31, 2005.

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[192] In *Smith*, a key witness told the police two different versions of a burglary-murder: in one, he stated that an accomplice of Smith killed the home's occupant, making Smith guilty of felony murder. In the other, he stated that the murder had already been committed by another man, Cunningham, before the youths unknowingly entered the home to commit the burglary. 205 F.3d at 1047-48. The prosecutor "chose" to use the former to convict Smith of murder and the latter to convict Cunningham. *Id.* at 1051. Noting that the State's positions were diametrically opposed and that the same prosecutor handled both trials, the Court of Appeals found a due process violation and ordered federal habeas relief. *Id.* at 1050, 1052.

[193] As noted in Point 1, *supra*, the explanation for Moreno's plea to these allegations cannot be chalked up to inattention to the particulars of the indictment. The parties amended the charges in the plea papers, showing their attention to the precise allegations against Moreno. 1 SRR2 State's Ex. 1 at 3.

As in *Smith*, the inconsistency in the State's theories "exist[ed] at the core of the prosecutor's cases against defendants for the same crime," and were prosecuted by a single prosecutor who relied in each case on the contradictory accounts of a single witness. *Id.* at 1050, 1052. Thus, as in *Smith*, the State violated Velez's rights to due process. *See id.*[194]

Judicial Estoppel: Judicial estoppel also barred the State from prosecuting Velez on a factual theory inherently inconsistent with the one it agreed to in Moreno's guilty plea. A "party may be estopped from asserting a claim that is inconsistent with that party's prior conduct." *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex.Crim.App. 2003) (applying judicial estoppel against State) (citing *State v. Yount,* 853 S.W.2d 6, 9 (Tex.Crim.App. 1993) (applying judicial estoppel against defendant)). "The purpose of [this] doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (internal quotation and citation omitted). Courts typically require that "the prior inconsistent position must have been accepted by the court" in which it was asserted. *Id.* at 224. Under this doctrine, a party successfully asserting a position

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[194] *See also Thompson v. Calderon*, 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc) (providing habeas relief where prosecutor relied on inconsistent theories at two trials, arguing different motives, different theories, and different facts for each defendant and securing convictions of both), *vacated on other grounds*, 523 U.S. 538 (1998); *Drake v. Kemp,* 762 F.2d 1449, 1479 (11th Cir. 1985) (en banc) (Clark, J., specially concurring) (recounting State's use of inconsistent theories of same crime and concluding that "[t]he state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth."). *Cf. Bradshaw v. Stumpf*, 545 U.S. 175, 187-88 (2005) (remanding case to circuit court for determination whether prosecutor's use of inconsistent theories violated petitioner's due-process rights at capital sentencing).

in one case is estopped from taking a contrary position in a different case even though the parties are different. *Id.*

Again, Moreno pled guilty to the third count of the indictment, which alleged that she caused Angel Moreno physical injury by hitting him on the head or hitting his head against something on October 31, 2005. 1 SCR3 at 6-8. The special prosecutor prosecuted Moreno, attended her plea, and signed Moreno's plea papers, under the words "agreed" and "approved." 1 SRR2 State's Ex. 1 at 3-4. The trial court accepted the plea and found Moreno guilty. 6 SRR 12. The State therefore was judicially estopped from prosecuting Velez on a theory inherently factually inconsistent with its position against Moreno. *Lowery*, 92 F.3d at 224.[195]

Eighth Amendment: The core inconsistencies between the State's cases against Moreno and Velez also violated Velez's right to be free from cruel and unusual punishment.[196] *See also* Tex. Const. art. I, § 13. Even if this Court somehow finds this point of error does not warrant vacating Velez's conviction, it certainly should reverse his death sentence because of the State's use of inherently inconsistent factual theories. The State's meager proof of future dangerousness, relying nearly exclusively on Velez's conviction in this case, *see* Point 28, *infra*, wilts under the

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[195] *See also Lichon v. American Universal Ins. Co.*, 459 N.W.2d 288, 293 (Mich. 1990) (finding that if a plea of *nolo contendere* constituted an admission of guilt then the defendant would be judicially estopped in civil proceeding from asserting he was innocent of the charge to which he pled *nolo contendere*); *United States v. Mathews*, 833 F.2d 161, 165 (9th Cir. 1987) (judicially estopping defendant from challenging sentence on basis that it was not supported by evidence of an essential element to the crime because he had pleaded guilty). *Cf. Hall v. State*, 283 S.W.3d 137, 154-56 (Tex.App.-Austin 2009, *no pet.*) (holding "that there is no inconsistency between the State's theories at each trial that would implicate either due process or judicial estoppel").

[196] *See Jacobs v. Scott*, 513 U.S. 1067, 1067 (1995) (Stevens, J., dissenting from denial of certiorari) (arguing that State should not be permitted to execute a person upon evidence it disavowed in a later trial against codefendant and citing "heightened need for reliability" in capital cases (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985)).

weight of the State's prior inconsistent position in Moreno's plea agreement. Under the Eighth Amendment, a death sentence cannot stand when based on the State's use of inherently factually inconsistent theories against different defendants.[197] *See* U.S. Const. amend. VIII, XIV.

ADDITIONAL SENTENCING PHASE ERRORS:

28. The State's showing of future dangerousness was legally insufficient; at best, the State proved that Velez was a danger to only one person – the victim in this case.

Even as viewed in the light most favorable to the State,[198] neither the State's sentencing-phase nor culpability-phase evidence came close to establishing Velez's future dangerousness. Manual Velez was 44 years old at the time of his 2008 trial. *See*, *e.g.*, State's Ex. 66c (listing date of birth in 1964). Other than his conviction in this case, he had one violent conviction – a then 17-year-old misdemeanor battery. The State's entire case at sentencing was Velez's prior record of low-level offenses and the testimony of an "expert" who had never met Velez and said absolutely nothing individual to him or his circumstances. At best, the prosecution proved only that Velez posed a threat of danger to Angel Moreno, the victim in this case. If evidence existed that Velez would ever again commit

[197] Velez's fundamental right to a fair trial is certainly implicated by these errors and could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, even though counsel failed to object to the State's use of inconsistent theories. *See id.*; Tex. R. Evid. 103 (d).

[198] When it reviews legal sufficiency of this special issue, this Court "view[s] the evidence in the light most favorable to the jury's finding and determine[s] whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society." *Berry v. State*, 233 S.W.3d 847, 860-61 (Tex.Crim.App. 2007). If, given all the record evidence, a rational jury would have necessarily entertained a reasonable doubt about Appellant's future dangerousness, the evidence is legally insufficient. *Id.*

"criminal acts of violence," Art. 37.071 § 2 (b)(1), against anyone else – any man, woman, or child – the State would have presented it. It did not. If evidence existed that Velez ever committed "criminal acts of violence" during his three-year pretrial incarceration in this case, or during past prison time for low-level offenses, the State would have presented it. It did not. If any expert believed Velez posed a threat of future danger, the State would have presented that testimony. It did not. In these circumstances, the State's proof of future dangerousness falls far short of legal sufficiency. *See* U.S. Const. amend. XIV. [199]

State's insufficient proof: The State showed that Velez had previously been convicted of writing three "hot checks" (2007), evading arrest (2004), driving while intoxicated (2004), a Wisconsin bar-fight misdemeanor battery in which he allegedly used a bat or axe handles (1992), a criminal mischief (1988), and forgery (1984). 20 RR 46, 64, 75-84; State's Exs. 66, 69c, 70, 71, 71A, 72, 73, 74, 75.[200] This record consists of only one, 17-year-old minor violent offense – the misdemeanor battery.[201] It falls far short of proving beyond a reasonable doubt

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[199] *See also Jackson v. Virginia*, 443 U.S. 307, 322-23 (1979). This and other sentencing points of error assume, for the sake of argument, that Velez's conviction will be upheld, but in no way does Appellant concede his guilt or that his conviction is proper.

[200] Although the State offered no testimony in support of other offenses Velez had allegedly committed in Wisconsin, one of its exhibits refers to other low-level allegations (which the State had not noticed, *see* Point 32, *infra*), including driving while intoxicated, possessing an open intoxicant, and shoplifting. *See* State's Ex. 66c. But State's Ex. 66c does not disclose their dispositions: the disposition section is completed in indecipherable handwriting. *Id.* State's Ex. 67, however, confirms that, with respect to two charges of 1989 misdemeanor driving-while-intoxicated, Velez pled no contest and was convicted. Other evidence the State introduced at sentencing which adds nothing to its proof of future danger includes a 1986 probation violation and 1988 parole violation, 20 RR 77-78, his tattoos, 20 RR 91-92, and his use of aliases. 20 RR 84-87. *See* Point 30, *infra* (showing reversible error in introduction of aliases and tattoos).

[201] Although this conviction counts as a "violent" crime, this Court has previously found insufficient evidence of future dangerousness even when the appellant had previously been convicted of similar low-level violent offenses (and sometimes more serious ones). *See* note 202, *infra* (collecting cases). Moreover, the State failed to prove that this crime was anything more than a remote and isolated incident.

any probability that he would pose a threat of future criminal harm. In fact, it is similar to, if not less severe, than the records of most of the defendants for whom this Court has found legally insufficient evidence of future dangerousness.[202]

The State's lead sentencing witness, A.P. Merillat, added nothing to the State's proof of future dangerousness. 20 RR 13-43. Even assuming what Merillat said about other inmates and classification was true, *but see* Points 5, 6, *infra*, Merillat neither knew nor asserted anything about Velez's *individual* circumstances, much less whether he would pose a threat of future danger if sentenced to life without parole. Merillat's testimony thus provides no permissible basis for upholding Velez's death sentence. *See Woodson*, 428 U.S. at 303-04 (requiring *individualized* sentencing under Eighth Amendment, rather than treating inmate as indistinguishable from other convicted murderers); U.S. Const. amend. VIII.

It therefore says nothing about whether Velez will pose a future threat of criminal violence. Indeed, this Court has seriously questioned the admissibility of an 18-year-old conviction to rebut a claim of good character because such a remote conviction "is a poor indication of the accused's present character." *Ex parte Miller*, 2009 WL 3446468, at * 6 & n.26 (collecting cases and other authorities). Similarly, Velez's 17-year-old misdemeanor was a poor indication of his character: he had never been accused of anything like it again prior to his arrest for this offense.

[202] *Berry*, 233 S.W.3d at 864 (finding legally insufficient evidence of future dangerousness despite appellant's having previously secretly abandoned a newborn on a rural roadside on a hill of fire ants); *Ellason v. State*, 815 S.W.2d 656, 660 (Tex.Crim.App. 1991) (same despite evidence of appellant's 8-10 unadjudicated burglaries, assaults on his father-in-law, reputation for not being peaceable or law-abiding in jail, and domestic violence); *Huffman v. State,* 746 S.W.2d 212, 224-25 (Tex.Crim.App. 1988) (same despite appellant's prior conviction for burglary, parole violation, physical fights with his girlfriend when he became intoxicated, and his bragging about knowing how to kill people); *Marras v. State,* 741 S.W.2d 395, 400, 407-08 (Tex.Crim.App. 1987) (same despite appellant's nine previous felony convictions, including two robberies by assault, an escape, and a burglary of a building with intent to commit aggravated robbery and kidnapping, and that two police officers testified that his reputation was bad to rebut officer testimony that "he was a peaceable and trusted inmate") *overruled on other grounds*, *Garrett v. State*, 851 S.W.2d 853 (Tex.Crim.App. 1993); *Roney v. State*, 632 S.W.2d 598, 601-03 (Tex.Crim.App. 1982) (same despite prior armed robbery the same day as the capital murder and that appellant laughed about the murder and encouraged friends to watch news coverage of the incident); *Wallace v. State*, 618 S.W.2d 67, 68-69 (Tex.Crim.App. 1981) (same despite prior robbery attempt).

The State also failed to show that the capital offense itself sufficiently proved future dangerousness. *See Keeton*, 724 S.W.2d at 61. While every capital murder involves the unnecessary, unjustified, and senseless killing of another, *cf. Keeton*, 724 S.W.2d at 64, the killing here was not particularly brutal relative to other capital murders: the State convicted Velez on a theory that he threw or slammed a one-year-old child against a wall, but then immediately sought to revive him and summon aid. 14 RR 57; 16 RR 92-93; 18 RR 144-45. The prosecutor attributed the crime to impulse and anxiety. 18 RR 139-40, 151. Velez did not flee.[203] Rather, he remained at the scene taking care of his and Moreno's children, watching Angel Moreno's emergency medical treatment, and talking with the police. *See* 14 RR 103; 16 RR 11-12, 15; 17 RR 49.[204]

Factors weighing against future dangerousness: Not only does the evidence above fall far short of legal sufficiency, but other important factors weigh against a finding of future dangerousness.

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[203] *Compare with, e.g., Smith v. State*, 74 S.W.3d 868, 872 (Tex.Crim.App. 2002) (citing flight in support of legally-sufficient finding of future dangerousness); *Baker v. State*, 956 S.W.2d 19, 21 (Tex.Crim.App. 1997) (same). *Cf. Ex parte Henderson*, 246 S.W.3d at 697 (Keasler, J., dissenting) (stating that an innocent person who has caused a child harm by accident calls for help, not flees).

[204] These facts represent a far less brutal crime than capital murders in cases in which this Court has found legally insufficient evidence of future dangerousness. *Huffman*, 746 S.W.2d at 214, 217 (finding legally insufficient evidence of future dangerousness where victim was "brutally beaten" and where pathologist found "multiple contusions on her face and head and tennis shoe sole imprints on both sides of her face . . . [,] a laceration of the right ventricle produced by pressure applied over the heart causing pressure between the spine and the heart . . . [, and concluded that] the cause of death was asphyxia due to manual strangulation of the neck"); *Marras*, 741 S.W.2d at 399 (same where appellant hit assault victim "twice in the face, and knocked him to the ground . . . [and then] kicked him in the head with his western boots[,]" after which he shot the man coming to his aid in the chest after that man "raised his hands"); *Brasfield v. State*, 600 S.W.2d 288, 292 (Tex.Crim.App. 1980) (same where 6-year old victim "had died of asphyxiation," was stabbed numerous times and bruised on the head and face), *overruled on other grounds by Janecka v. State*, 739 S.W.2d 813 (Tex.Crim.App. 1987).

First, Velez had a clean disciplinary record during his periods of incarceration. Def. Ex. 6 at 6; 20 RR 101-02.[205] Good behavior in prison is a critically important predictor of future danger. *See Marras*, 741 S.W.2d at 407-08 (finding insufficient evidence of future dangerousness where an officer testified he "was a peaceable and trusted inmate"). Velez's record of good behavior in prison and jail strongly weighs against a finding of future dangerousness, particularly given that he would never be released from prison if not executed. PENAL CODE § 12.31.

Second, this capital murder was neither calculated nor committed with forethought or deliberateness – two other important predictors. *See Keeton*, 724 S.W.2d at 61 (citing these two factors). As the prosecutor argued to the jury, if guilty, Velez acted out of impulse and due to anxiety. 18 RR 139-40, 151.

Third, the State presented no psychiatric evidence that Velez would pose a threat of future danger. Further weakening an already insufficient case, the State thus failed to present evidence of another key predictor of future dangerousness.[206]

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[205] Velez had been incarcerated on various occasions over the past twenty years, including three years of pretrial incarceration in this case. He has no record of escape attempts. In fact, "[h]is prison records do not indicate any misconduct or disciplinary actions." Def. Ex. 6 at 6. *See also* 20 RR 102. The State investigated Velez during his time in jail, *see* 18 RR 34-58, but did not even allege minor misconduct. If Velez had ever misbehaved during any of the time he had spent in prison or jail, the State would certainly have presented evidence of it at sentencing. It did not.

[206] *Compare Keeton*, 724 S.W.2d at 61-64 (finding evidence of future danger legally insufficient where although "murder was clearly senseless, unnecessary and cold-blooded . . . [t]here was no psychiatric evidence . . ., no character evidence . . . nor was there any evidence showing that appellant had committed violent acts in the past"); *Wallace v. State*, 618 S.W.2d 67, 69 (Tex.Crim.App. 1981) (same because "[t]here was no other evidence presented that could be considered relevant to the issue of future violent conduct[, including] no evidence of prior convictions, no prior acts of violence, no character evidence, [and] no psychiatric evidence"); *Brasfield*, 600 S.W.2d at 293-94 (same where the state failed to present evidence of other criminal acts, character evidence or psychiatric testimony); *Warren v. State*, 562 S.W.2d 474, 476-77 (Tex.Crim.App. 1978) (finding insufficient evidence where there "was no qualified psychiatric testimony as to appellant's psychiatric makeup, which has . . . probative value as to" future dangerousness), *with Russeau v. State*, 291 S.W.3d 426, 433 (Tex.Crim.App. 2009) (relying in part on testimony of psychiatrists and psychologist to find legally sufficient evidence of future dangerousness); *Moore v. State*,

Fourth, the evidence established that Velez's character was peaceable and that this crime was unlike him. *See Keeton*, 724 S.W.2d at 61 (citing character evidence as one factor). Velez's sister Leticia had known him his whole life and said that Velez was always a peaceful person. 20 RR 101-04. Maria Hernandez, who had lived with Velez for six years, testified that he was peaceful, good to her, her own children and their children together. 20 RR 109-114. Velez's positive character evidence opened the door wide enough for the State to truck in all manner of prior bad acts, *Sims v. State*, 273 S.W.3d 291, 294 n.5 (Tex.Crim.App. 2008), but the State offered nothing to rebut it, which further eroded its empty allegation of future dangerousness.

Errors contributing to wrongful verdict: When finding legal insufficiency of future dangerousness, this Court has taken special note of errors during the sentencing phase that may have led a jury to a death sentence *despite* the insufficiency in the state's proof. *See, e.g., Berry*, 233 S.W.3d at 863. Such errors exist here. First, State expert Merillat falsely testified that appellant would become eligible for a less restrictive custody status. *See* Point 5, *infra*. Second, the State violated Velez's constitutional right to present mitigating evidence when it called him a "coward" for the decision to have his son testify at sentencing. *See* Point 34, *infra*. The false evidence and inflammatory arguments undoubtedly induced the jury to return a death verdict not supported by the evidence.

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935 S.W.2d 124, 127 (Tex.Crim.App. 1996) (same); *Lane v. State*, 933 S.W.2d 504, 508 (Tex.Crim.App. 1996) (same).

Berry v. State, *Estrada v. State, and Coble v. State*: The State additionally failed to prove that, if not executed, Velez would ever pose the threat of criminal violence he posed in this case – danger to a child. *Berry*, 233 S.W.3d at 864 (finding evidence of future danger legally insufficient because of "very low probability that, if sentenced to life in prison," with a minimum parole eligibility of forty years, appellant, who killed her newborn child and had previously abandoned another newborn, "will have any more children, and that therefore it is unlikely that she would be a danger in the future"). Similarly, here, at best, the State proved that Velez killed a child and presented evidence that Velez may have previously abused the same child.[207] Unlike in *Berry*, however, the State established no pattern of Velez harming other children; instead, the evidence established the opposite – that he was never violent with any other child. 18 RR 11-16. Most critically, aside from the crime against Angel Moreno, the State "did not prove that any other stimulus led [Velez] to a violent or dangerous act in any other context." *Berry*, 233 S.W.3d at 864.

Further, if allowed to live, Velez will spend the rest of his life in prison. PENAL CODE § 12.31. Even if he were dangerous to children other than Angel Moreno – a notion unsupported by the facts – he could never again hurt a child.

In *Estrada*, 313 S.W.3d at 281, this Court held that the future danger inquiry was not whether the appellant would pose a threat of future danger if spared execution, but whether he "would" constitute a threat of future violence "whether

[207] This evidence is weak at best. *See* Points 1, 7, supra, incorporated here by reference.

in or out of prison." *Id.* Capital murderers who, like Appellant, are convicted of murders occurring after September 1, 2005, are never eligible for release on parole. PENAL CODE § 12.31. The *Estrada* construction of the statutory future danger test, therefore, permits consideration of *hypothetical* predictions that could never factually occur. This reasoning was furthered in *Coble*, 2010 WL 3984713:

> The special issue focuses upon the *character for violence of the particular individual*, not merely the quantity or quality of the institutional restraints put on that person. As we recently stated in *Estrada v. State*, "This Court's case law has construed the future-dangerousness special issue to ask whether a defendant would constitute a continuing threat 'whether in or out of prison' without regard to how long the defendant would actually spend in prison if sentenced to life." That is, this special issue focuses upon the internal restraints of the individual, not merely the external restraints of incarceration. It is theoretically possible to devise a prison environment so confining, isolated, and highly structured that virtually no one could have the opportunity to commit an act of violence, but incapacitation is not the sole focus of the Legislature or of our death penalty precedents.

Id. at *6 (notes omitted). Initially, the *Estrada* and *Coble* tests do not apply here because they were based largely on this Court's observation that "the Legislature[] use[d] . . . the word 'would' instead of 'will' in this special issue." *Estrada*, 313 S.W.3d at 281 & n.5 (describing import of "would").[208] Here, by contrast, the court *twice* charged the jury to consider whether "there is a probability that the defendant *will* commit criminal acts of violence that would constitution a continuing threat to society." 20 RR 136, 140 (emphasis added). *But see* 3 CR 434, 439 (using would). Thus, *Estrada* and *Coble* should not apply here at all.

[208] Additionally, the most natural meaning of "would" in the special issue does not ask what *would* a capital murderer do if "left to [his] own devices," *Estrada*, 313 S.W.3d at 281 n.5 (which capital murderers are not), but what *would* he do if spared execution. After all, the jury is deciding between life and death.

But in any case, contrary to *Coble*, 2010 WL 3984713 at *6, when the Supreme Court rejected a challenge to the "future danger" special issue as vague in *Jurek v. Texas*, 428 U.S. 262 (1976), it interpreted the statute as requiring a *literal* prediction of future criminal conduct made to further the goal of incapacitation.[209] It did so based on the Texas Attorney General's brief, which described the inquiry as "concerning events which are likely to occur." Texas Attorney General's Brief in *Jurek*, at 30.[210] Indeed, contrary to *Coble*, Texas's brief repeatedly states that the Legislature designed the future-dangerousness special issue with "incapacitation" as its sole purpose. *Id.* at 5, 26, 29, 30, 31.

Keeping faith with *Jurek*, this Court should here apply the future-danger test of *Berry*, which considers the restraints inherent in the alternative sentence to death. 233 S.W.3d at 864. If this Court were instead to apply a counterfactual hypothetical or "future-in-the-past" test, *Estrada*, 313 S.W.3d at 282 n.5, focusing on Velez's purported "character for violence," *Coble*, 2010 WL 3984713, at *6, it would violate his constitutional rights for several reasons.

First, the test violates the Fourteenth Amendment by sentencing based on a "false choice" between whether a defendant will be executed or will be freed.

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[209] *Id.* at 274-76 (Stevens, J., concurring) (upholding statute because *"any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"*) (emphasis added). *See also Barefoot v. Estelle*, 463 U.S. 880, 897, 898 (1983) ("In *Jurek*, seven Justices rejected the claim that it was impossible to predict future behavior and that dangerousness was therefore an invalid consideration in imposing the death penalty. . . . Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made."). *See also Skipper v. South Carolina*, 476 U.S 1, 5 (1986); *Simmons*, 512 U.S. at 162.

[210] The Texas Attorney General's brief in *Jurek*, filed with the Court on March 25, 1976, is available at the Tarlton Law Library, at the University of Texas, and on westlaw. Should the Court or the State desire a copy, counsel will provide it. This Court may take judicial notice of the brief. *Watkins*, 245 S.W.3d at 456.

Simmons, 512 U.S. at 161. *Cf. Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring) (condemning prosecutor's argument as "inaccurate and misleading").

Second, it violates the Eighth Amendment's requirement of individualized sentencing by untethering the future danger inquiry from the reality of a defendant's lifetime imprisonment. *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (collecting Supreme Court precedents). A capital sentencing decision based on predictions of what the defendant *would do* under a hypothetical scenario that factually can never occur contravenes this core requirement.

Third, the test is unconstitutionally unreliable under the Eighth Amendment. *See, e.g., Beck*, 447 U.S. at 637. Neither jurors nor this Court in appellate review can be expected to use this test to reliably distinguish between those convicted murderers who will be a future danger and those who will not, particularly due to what appear to be ongoing changes in the law.[211] The *Coble-Estrada* test, unlike that approved in *Jurek*, conveys no core, common-sense meaning. *Jurek*, 428 U.S. at 278-79 (White, J., concurring). Hence, the test is unconstitutionally vague. *Tuilaepa v. California,* 512 U.S. 967, 973 (1994). In addition, the test conceivably applies to all Texas capital murderers who, by definition, have a "character for violence" and "internal restraints" insufficient to prevent them from acting violent. It thus fails to genuinely narrow the class of offenders eligible for a death sentence. *See Arave v. Creech*, 507 U.S. 463, 474 (1993); *Zant*, 462 U.S. at 877.

[211] Velez was tried in 2008. *Coble* and *Estrada* were decided in 2010. The literal future-dangerousness test of *Berry*, 233 S.W.3d at 864, which considered the external restraints of the alternative sentence to death, *id.*, was the law at the time of Velez's trial. Thus, Velez raises these arguments concerning *Coble* and *Estrada* at his "earliest opportunity." *Penry v. State*, 903 S.W.2d 715, 763 (Tex.Crim.App. 1995).

Fourth, rather than providing Velez with the "prompt judicial review" the *Jurek* Court thought was a basis for upholding the statute, 428 U.S. at 276, the tests employed in *Coble* and *Estrada* would review Velez's death sentences based on a violent-character/"future-in-the-past" test far different from the special issue charged to his jury: "Whether there is a probability that the defendant will commit criminal acts of violence that would constitution a continuing threat to society." 20 RR 136. This would violate due process. *See* U.S. Const. amend. XIV.[212]

Finally, given that the Supreme Court in *Jurek* approved Texas's capital sentencing scheme based upon the incapacitation rational and literal future dangerousness test the Attorney General described in his merits brief as the design of the Legislature, it would violate Velez's constitutional rights to review his death sentence under the new and never-approved future-danger tests of *Coble* and *Estrada*. *See* U.S. Const. amends. VIII, XIV; Tex. Const. art. I, § 13.

Conclusion: The State's case of future dangerousness was patently insufficient and stands worlds apart from the cases in which this Court has affirmed future dangerousness findings. To allow the death penalty for Velez when he does not pose a genuine threat of future danger is to allow a death penalty of one. This unjust sentence of death must be reversed. *See also* Tex. Const. art. I, § 13.

29. Manuel Velez's death sentence is disproportionate, arbitrary and capricious, and no rational trier of fact could have imposed it.

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[212] *See Cole v. Arkansas,* 333 U.S. 196, 202 (1948) (relying on Due Process Clause to hold "convictions [must be] appraised on consideration of the case as it was tried and as the issues were determined in the trial court"). The test is far different even if the comparison is to the trial court's written charge and verdict sheet, which use the word "would" commit, rather than will commit. 3 CR 434, 439.

Velez is by no means among the "worst of the worst,"[213] and his death sentence must be set aside. It violates the Eighth Amendment and Article 1, § 13 of the Texas Constitution, which provides greater protection than its federal counterpart,[214] because it is disproportionate, arbitrary and capricious, and because no rational trier of fact could have imposed it. His death sentence cannot stand.

Passion, Prejudice, and Arbitrary Considerations:[215] Velez's death sentence was an arbitrary and freakish decision, and was obviously the result of the passion, prejudice and other arbitrary factors set forth throughout this brief, including but not limited to, the State's reliance on patently inaccurate testimony concerning the role Moreno played in the death of her child and on patently false information in sentencing. *See* Points 1, 5, *supra*.

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[213] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568 (2005).

[214] *See* note 34, *supra*. *Cf. Hughes,* 897 S.W.2d at 294 (declining to decide "whether or not this Court should conduct a proportionality review under the Texas Constitution" because even with the broader interpretation, appellant's claim would fail); *Francis v. State*, 877 S.W.2d 441, 444 (Tex.App.-Austin 1994, *pet. ref'd*) (assuming, without deciding, "that proportionality review is required by the Texas Constitution").

The decision in *Pulley v. Harris,* 465 U.S. 37, 43 (1984) does not obviate the constitutional need for appellate review of this death sentence. In *Pulley*, the Court rejected the argument that the Eighth Amendment contains an "invariable rule in every case" that an appellate court compare the death sentence in the case before it with the penalties imposed in similar cases. *Id.* at 43-44. Here, Velez seeks only a determination whether *his* death sentence is disproportionate and/or the product of passion, prejudice, or other arbitrary factors. *But see Hughes*, 897 S.W.2d at 294 (relying on *Pulley* to reject claim under Eighth and Fourteenth Amendments).

In any event, despite *Pulley*, the Eighth and Fourteenth Amendments require proportionality review because Texas jurors enjoy standardless discretion to determine the sufficiency of mitigating circumstances to warrant a life sentence and because the prosecution's ability to introduce aggravating evidence at the penalty phase is virtually unlimited. *See* Art. 37.071, § 2 (a)(1); *Gentry v. State,* 770 S.W.2d 780, 792-93 (Tex.Crim.App. 1988) *See United States v. Sampson*, 275 F. Supp. 2d 49, 96-97 (D. Mass. 2003). The *Sampson* court noted that, despite *Pulley*, proportionality review might be required for the federal death penalty statute because it allows for the consideration of non-statutory aggravators and standardless discretion. 275 F. Supp. 2d at 96-97. *See also Ford v. State*, 919 S.W.2d 107, 120, n.1 (Tex.Crim.App. 1996) (Clinton, J., dissenting) (similar).

Certainly, nothing in Texas's capital statue *precludes* proportionality review. *Cf. Sampson*, 275 F. Supp. 2d at 96-97; *Sinclair v. State*, 657 So. 2d 1138, 1142 (Fla. 1995).

[215] *See Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*) (holding that arbitrary and capricious death sentences violate the Eighth Amendment).

Disproportionate Death Sentence: Appellant's death sentence is also unconstitutional because it is disproportionate in relation to his codefendant's sentence. Initially, both Moreno and Velez were charged with capital murder for Angel's death. Moreno eventually accepted a plea to a 10-year sentence for injury to a child. *See* Point 1, *supra*. At her plea hearing, she admitted to striking Angel in a manner consistent with his cause of death on the day of his death. In contrast, the evidence at Velez's trial, largely based on Moreno's false testimony, established, at best, that Velez, had a very brief opportunity to harm Angel. Given these circumstances, Velez's death sentence is unconstitutionally disproportionate to Moreno's ten years.

Velez's death sentence is also disproportionate when compared with similar cases of murdered children. The Texas defendants who have been sentenced to death for murder made capital because the victim was under the age of six have committed significantly more aggravated crimes, and their culpability for the child's death was not in doubt.[216] Only two defendants have been executed in

[216] *See, e.g., Vasquez v. Thaler*, 389 Fed. Appx. 419 (5th Cir. 2010) (in a drug-fueled rage, petitioner sexually abused and beat to death his girlfriend's 4-year-old daughter while the girlfriend was at work); *Gallo v. State*, 239 S.W.3d 757, 762-63 (Tex.Crim.App. 2007) (defendant brutally raped and beat to death child in his sole care, based in part on confession); *Ex parte Henderson*, 246 S.W.3d 690 (Tex.Crim.App. 2007) (defendant kidnapped and killed child in her sole possession); *Avila v. State*, No. 74142, 2003 WL 21513440, at *1 (Tex.Crim.App. July 2, 2003) (defendant kicked 19-month infant in the abdomen thereby killing him); *Roberson v. State*, No. AP-74671, 2002 WL 34217382, at *1-5 (Tex.Crim.App. June 20, 2002) (not designated for publication) (defendant well known for hitting his child when in a rage, where child then died of massive head injuries while in his sole care); *Hernandez v. State*, No. 74401, 2004 WL 3093221, at *1, 4 (Tex.Crim.App. May 26, 2004) (not designated for publication) (defendant confessed to striking child-victim and other injured child with flashlight and admitted he "just exploded and hit them with the back of my hand"); *Allen v. State*, 108 S.W.3d 281, 284 (Tex.Crim.App. 2003) (child victim "was beaten over an hour or two and ultimately beaten to death. And in the course of that she was anally raped, and that contributed to her demise.").

Texas for the capital murder of a child that resulted from the kind of abuse alleged here and, again, both cases were more aggravated.[217]

Moreover, across Texas, in numerous cases with very similar – if not more aggravating – facts to those here, prosecutors charged a defendant capitally but did not seek death, resulting in a sentence of life[218] or less.[219] On some occasions, prosecutors did not even charge similar child-homicides capitally.[220]

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[217] *Salazar v. State*, 38 S.W.3d 141 (Tex.Crim.App. 2001) (affirming death sentence of defendant who sexually abused and murdered the child of his girlfriend by beating her "with repeated blows of severe force" and by shaking her, resulting in numerous life-threatening injuries); *Styron v. Johnson*, 262 F.3d 438, 442 (5th Cir. 2001) (upholding death sentence of petitioner who murdered his son, who had sustained at least three blows to his head, where petitioner admitted striking his son; the autopsy also revealed evidence of other abuse, including hemorrhaging consistent with repeated episodes of shaken-baby trauma and multiple rib fractures); *See also* TDCJ, Executed Offenders, *available at* http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited January 22, 2011).

[218] *See, e.g., Stevens v. State*, 234 S.W.3d 748 (Tex.App.- Fort Worth 2007, *no pet.*); *Badia v. State*, No. 13-05-267-CR, 2006 WL 2382773, at *1 (Tex.App.-Corpus Christi Aug. 17, 2006, *pet. ref'd*); *Logan-Gates v. State*, No. 05-02-1624-CR, 2005 WL 159627, at *1 (Tex.App.-Dallas Jan. 6, 2005, *pet. ref'd*) (not designated for publication); *Qualley v. State*, 206 S.W.3d 624 (Tex.Crim.App. 2006); *Cansino v. State*, No. 11-02-155-CR, 2003 WL 21299605, at *1 (Tex.App.-Eastland June 5, 2003, no pet.) (not designated for publication); *Duren v. State*, 87 S.W.3d 719 (Tex.App.-Texarkana 2002, *pet. stricken*); *Medrano v. State*, No. 01-07-408-CR, 2008 WL 4837473, at *1 (Tex.App.-Houston Nov. 6, 2008, *no pet.*); *Guerrero v. State*, No. 13-05-709-CR, 2008 WL 5179740, at *1 (Tex.App.-Corpus Christi Mar. 13, 2008, *no pet.*), *cert. denied*, 129 S. Ct. 2740 (2009) (not designated for publication); *Martin v. State*, 246 S.W.3d 246 (Tex.App.-Houston 2007, *no pet.*); *Cornelius v. State*, No. 05-06-830-CR, 2007 WL 4341048, at *1 (Tex.App.-Dallas Dec. 13, 2007, *no pet.*) (not designated for publication); *Pumphrey v. State*, No. 05-06-726-CR, 2007 WL 2052159, at *1 (Tex.App.-Dallas July 19, 2007, *pet. ref'd*) (not designated for publication); *Lewis v. State*, No. 11-05-301-CR, 2007 WL 866636, at *1 (Tex.App.-Eastland Sept. 12, 2007, *pet. ref'd*) (not designated for publication); *Montgomery v. State*, 198 S.W.3d 67 (Tex.App.-Fort Worth 2006, *pet. ref'd*); *Marin v. State*, No. 01-08-517-CR, 2009 WL 2526434, at *1 (Tex.App.-Houston Aug. 20, 2009, *pet. stricken*) (not designated for publication); *Munoz v. State*, No. 08-07-325-CR, 2009 WL 2517664, at *1 (Tex.App.-El Paso Aug. 19, 2009, *no pet.*) (not designated for publication); *Latimer v. State*, 319 S.W.3d 128 (Tex.App.-Waco 2010, *reh'g overruled*); *Andrus v. State*, No. 01-08-738-CR, 2009 WL 4856202, at *1 (Tex.App.-Houston Dec. 17, 2009, *no pet.*) (not designated for publication); *Moore v. State*, 265 S.W.3d 73 (Tex.App.-Houston 2008, *pet. dismissed as improvidently granted*); *Torrez v. State*, No. 03-05-157-CR, 2006 WL 2309637, at *1 (Tex.App.-Austin Aug. 11, 2006, *pet. ref'd*); *Lozano v. State*, No. 13-03-290-CR, 2006 WL 3095353, at *1 (Tex.App.-Corpus Christi Oct. 26, 2006) (not designated for publication); *Black v. State*, 26 S.W.3d 895 (Tex.Crim.App. 2000); *Dismuke v. State*, No. 05-04-1856, 2006 WL 3200113, at *1 (Tex.App.–Dallas June 6, 2006, *pet. ref'd*) (not designated for publication); *Felder v. State*, No. 07-03-260-CR, 2005 WL 1742928, at *1 (Tex.App.–Amarillo July 25, 2005, *pet. ref'd*); *Chapman v. State*, No. 01-00-110-CR, 2001 WL 754812, at *1 (Tex.App.-Houston July 5, 2001, *pet. ref'd*) (not designated for publication); *Rios v. State*, No. 08-06-211-CR, 2008 WL 4351133, at *1 (Tex.App.-El Paso Sept. 24, 2008, *no pet.*) (not designated for publication); *Williams v. State*, 294 S.W.3d 674, 678 (Tex.App.-Houston 2009, *pet. ref'd*); *Webb v. State*, No. 03-00-228-CR, 2001 WL 725663, at *1 (Tex.App.-Austin June 29, 2001, *no pet.*) (not designated for publication); *Giddens v. State*, 256 S.W.3d 426 (Tex.App.-Waco 2008, *pet. ref'd*); *Villegas v. State*, No. 13-05-371-CR, 2008 WL 2515879, at *1

Legally insufficient evidence: Velez's death sentence must also be overturned because no rational trier of fact could have possibly found beyond a reasonable doubt that he would be a future danger, and the State adduced insufficient evidence to support this finding. *See* Point 28, *infra*. Furthermore, no rational trier of fact could have possibly found there was not "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[221] Art. 37.071.[222]

For these reasons, Velez's death sentence must be set aside.

(Tex.App.-Corpus Christi Mar. 13, 2008, *pet. ref'd*) (not designated for publication); *Alexander v. State*, 229 S.W.3d 731, 735 (Tex.App.-San Antonio 2007, pet. stricken); *McAfee v. State*, No. 01-00-470-CR, 2001 WL 619543, at *1 (Tex.App.-Houston June 7, 2001, *pet. ref'd*) (not designated for publication); *Paz v. State*, 44 S.W.3d 98 (Tex.App.-Houston 2001, *pet. dismissed*).

[219] *See, e.g., Otting v. State*, 8 S.W.3d 681 (Tex.App.-Austin 1999, *pet. ref'd*) (20-year sentence for reckless injury to a child); *Luna v. State*, 264 S.W.3d 821 (Tex.App.- Eastland 2008, *no pet.*) (99-year sentence for serious bodily injury to child); *Vasquez v. State*, 272 S.W.3d 667 (Tex.App.-Eastland 2008, reh'g overruled) (same); *Contreras v. State*, No. 08-06-205-CR, 2009 WL 50601, at *1 (Tex.App.-El Paso Jan. 8, 2009, *pet. granted*) (not designated for publication) (99-year sentence for felony-murder); *McCollister v. State*, 933 S.W.2d 170, 171 (Tex.App.-Eastland 1996, *no pet.*); *Chase v. State*, 968 S.W.2d 943, 944 (Tex.App.-Eastland 1998, *pet. ref'd*) (10-year sentence for reckless injury to a child).

[220] *See, e.g., Scott v. State*, No. 2-04-139-CR, 2007 WL 2460354, at *1 (Tex.App.-Fort Worth Aug. 31, 2007, *pet. ref'd*) (not designated for publication) (defendant received an 11-year sentence, when child died of a closed head injury due to blunt force trauma in his sole care; the State presented no direct evidence that Scott had caused the death, only that he had handled the child roughly earlier in the day and in the past); *Zuliani v. State*, No. 03-00-538-CR, 2001 WL 725692, at *1 (Tex.App.-Austin June 29, 2001, *pet. ref'd*) (not designated for publication) (defendant received 10-year sentence for involuntary manslaughter of child who died of a closed head injury and had bruises all over his body, including on his penis); *Jefferson v. State*, 189 S.W.3d 305, 306 -307 (Tex.Crim.App. 2006) (child died after two years of abuse culminating in serious head injury for which defendant and the child's mother did not seek medical attention; they disposed of the body in a ditch and fled to Louisiana).

[221] For economy, the mitigation evidence set forth in the Statement of Facts is incorporated here by reference.

[222] This Court has previously refused to review a jury's finding that there were insufficient mitigating circumstances to warrant a life sentence. *Russeau*, 171 S.W.3d at 886. Nonetheless, its refusal to do so here would violate Appellant's Eighth Amendment rights, including his right to meaningful appellate review, *see Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (citing, *inter alia*, *Gregg v. Georgia, supra*), and his due process rights as enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *But see Williams v. State*, 273 S.W.3d 200, 221-25 (Tex.Crim.App. 2008) (not designated for publication) (stating mitigation is a defensive issue).

30. The trial court committed reversible error by admitting irrelevant and unduly prejudicial evidence at the sentencing proceeding.

The trial court violated the Eighth Amendment and Texas law by admitting a onslaught of irrelevant, unduly prejudicial evidence at the sentencing proceeding,[223] including: 1) a remote 17-year-old crime with no bearing on the special issues; 2) irrelevant evidence of Velez's tattoos and alleged aliases; 3) irrelevant evidence that Velez had, twenty years before trial, been convicted of the misdemeanor offense of criminal mischief; 3) evidence that Velez was merely charged with crimes for which he was never convicted.

a. *Remote conviction from 1991:* Over Velez's objection, 20 RR 45, the State introduced evidence that he had been convicted seventeen years earlier of misdemeanor battery. State's Ex. 66. This conviction – Velez's only conviction for violence before his conviction in this case – was a "poor indication of [his] present character." *Ex parte Miller*, 2009 WL 3446468, at *6 & n.26 (observing that remote convictions are a "'poor indication'" of present character) (internal quotation marks and citation omitted).[224] It had no "tendency" to make "more

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[223] In a Texas capital sentencing proceeding, "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems *relevant* to sentence, including evidence of the defendant's background or character . . ." Art. 37.071 § 2 (emphasis added). This Court employs the Texas Rules of Evidence in determining relevance (and answering other questions of admissibility) under the capital sentencing statute. *See, e.g., Young v. State*, 283 S.W.3d 854, 876-77 (Tex.Crim.App. 2009) (applying Texas Rule of Evidence 403 to evidence admitted under capital statute); *Cantu v. State*, 939 S.W.2d 627, 635-37 (Tex.Crim.App. 1996) (finding evidence irrelevant under Texas Rule of Evidence 401). Under the Eighth Amendment, the sentencing decision must be made based on "the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879.

[224] *Ex parte Miller*, 2009 WL 3446468, * 6 & n.26 (finding that trial judge "certainly could have" applied Rule 403 to prevent cross examination of witness to victim's peaceable character with victim's 18-year-old conviction because the conviction was too remote to be a good indication of present character) (quoting *Sinegal v. State*, 789 S.W.2d 383, 387 (Tex.App.—Houston 1990, *no pet.*) and collecting other cases and authorities).

probable," TEX. R. EVID. 401, "that [Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2 (b)(1). Further, for the reasons this Court recognized in *Ex parte Miller*, even if the conviction had some minimal probative value, that value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." TEX. R. EVID. 403.

A poor indication of Velez's present character, the evidence could only have misled the jury to believe that it could sentence Velez to death because of his prior criminal record rather than adherence to the special issues. At a minimum, the jury would have been confused as to what use to put this evidence. The risk of the jury sentencing Velez to death based on his prior record or otherwise improperly considering this evidence was too great to permit the admission of evidence so tenuously connected to the special issues. Moreover, because this evidence did not relate to Velez's character or the crime, its introduction violated the Eighth Amendment. *See Zant*, 462 U.S. at 879.

b. *Irrelevant and inflammatory evidence of Velez's tattoos:* Over Velez's objection, the trial court admitted evidence at sentencing that he had what was described as "like a low rider tattoo," which apparently depicted a "playboy bunny" head atop a human form, and another that said, "El meme." 20 RR 91-92.[225] Unlike tattoos reflecting a defendant's violent character, *see, e.g., Conner v.*

[225] "El meme" is a Spanish colloquial phrase with a variety of possible meanings, none relevant to the issue of future dangerousness.

State, 67 S.W.3d 192, 201 (Tex.Crim.App. 2001), the tattoos were neither connected to the special issues,[226] nor to Velez's character or the crime. *Zant*, 462 U.S. at 879. The evidence was inadmissible prior bad act evidence and served only to inflame the jury by suggesting he was a playboy or "low rider." *See* TEX. R. EVID. 404(b). Therefore, the trial court erred in admitting it under Texas law and the Eighth Amendment.

c. *Irrelevant and inflammatory evidence of alias use:* Over Velez's objection, the trial court admitted evidence that Velez had previously used an alias numerous times, and that people use aliases to "avoid detection or identification." 20 RR 84-87. The evidence had absolutely nothing to do with the special issues the jury was to decide. That Velez used an alias has absolutely no "tendency to make . . . more probable," TEX. R. EVID. 401, "that [Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2 (b)(1). Rather, as with low-level non-violent offenses, admission of this alias evidence "injected an arbitrary factor into the hearing," *State v. Jackson*, 608 So.2d 949, 954-55 (La. 1992), and violated Velez's rights under Texas law and the Eighth Amendment. *Zant*, 462 U.S. at 879.[227]

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[226] *See Robles v. State*, No. AP-74726, 2006 WL 1096971, at *7-8 (Tex.Crim.App. April 26, 2006) (not designated for publication) (assuming without deciding that admission of tattoo at capital sentencing trial was error where appellant argued that, as here, "there was no connection or nexus between the type of tattoo and the nature of the crime or the motive behind the crime").

[227] Because Art. 37.071 states that the introduction of "extraneous conduct" is governed by the notice requirements of Section 3 (g) of Article 37.07, it is clear that the admission of extraneous conduct is contemplated by Article 37.071. But this provision is silent on the requirements for its admission.

d. *Remote and otherwise irrelevant criminal mischief conviction:*[228] After admitting the 17-year-old battery conviction over Velez's remoteness objection, the State admitted a 20-year-old criminal mischief conviction. 20 RR 78; State's Ex. 70. For the reasons stated above, incorporated herein, this remote conviction was irrelevant, whatever probative value it possessed was vastly outweighed by the danger of prejudice and jury confusion, and its admission violated the Eighth Amendment. In addition, even if the conviction had not been two decades old, it was irrelevant and should not have been admitted. The conviction is for Velez having "unlawfully, intentionally and knowingly damage[d] and destroy[ed]" a vehicle, causing between $200 and $750 in damage. State's Ex. 70. It is simply inconceivable that this misdemeanor could have had any "tendency to make . . . more probable," TEX. R. EVID. 401, "that [Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2 (b)(1). And whatever probative value the offense possessed was certainly "substantially outweighed by the danger of unfair prejudice, confusion . . . , or misleading the jury." TEX. R. EVID. 403. Because this two-decades–old, low-level misdemeanor failed to relate to Velez's character or the crime, its

[228] To the extent that defense counsel did not sufficiently object to the inadmissible evidence outlined in subsections (d) through (e), Velez's fundamental right to a fair trial could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise these issues as fundamental error, even if counsel failed to object sufficiently. *Id. See also* Tex. R. Evid. 103 (d).

introduction violated the Eighth Amendment. *See Zant*, 462 U.S. at 879. The trial court thus erred in admitting it.[229]

e. *Bald allegations of past criminal charges:* Louise Crisman, a former peace officer in the Sauk County Sheriff's Department, testified that she arrested Velez in 1991 and charged him with aggravated battery, dangerous use of a weapon, and disorderly conduct. 20 RR 55. *See also* Exhibit 66c (listing original non-proven charges). But the State presented neither evidence that Velez was guilty of these offenses nor that he was convicted of them: Velez's conviction was solely for battery (unadorned). State's Ex. 66.[230] Additionally, Crisman's bald recitation of the charges against Velez does not constitute any proof of the allegations. The court thus erred in allowing the introduction of these unnoticed and bald allegations. This evidence injected into the capital sentencing process arbitrary considerations not bearing on whether Velez should be executed under the Eighth Amendment or article 37.071. *Zant*, 462 U.S. at 879; *Jackson*, 608 So.2d at 954.

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[229] *See Jackson*, 608 So.2d at 954-55 (observing that admitting "evidence of every conviction, no matter how minor the crime, may tend to inject an arbitrary factor into the hearing" and "limit[ting] the convictions on which the prosecutor may introduce evidence during the case-in-chief to crimes classified as felonies"). *But see East v. State,* 702 S.W.2d 606, 615 (Tex.Crim.App. 1985) (rejecting claim that non-violent theft offense was erroneously admitted at capital sentencing phase because prior precedents did not exclude non-violent crimes) (citing *Jurek v. State*, 522 S.W.2d 934, 939 (Tex.Crim.App. 1975)). Because neither *East* nor *Jurek* nor any precedent of this Court explain how low-level misdemeanor, non-violent offense are relevant to the special issues and because admitting them injects arbitrariness into the sentencing trial, these precedents should be overruled under the Eighth Amendment.

[230] Although this Court has held that unadjudicated prior offenses are admissible at a capital sentencing hearing, *Gentry*, 770 S.W.2d at 792-93, that line of cases does not apply here because these charges *were* adjudicated and the result was that Velez was convicted only of battery. State's Ex. 66. *See Jackson*, 608 So.2d at 954-55 (seeking to avoid injection of arbitrary factors into capital sentencing proceedings, prohibiting "evidence of the original charge when the conviction is for a lesser offense"). *Cf. Johnson v. Mississippi*, 486 U.S. 578 (1988) (finding admission of vacated conviction to violate the Eighth Amendment).

Moreover, the *Gentry* line of cases should be overruled for the reasons stated by Justice Marshall in *Williams v. Lynaugh*, 484 U.S. 935, 937-40 (1987) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari) (arguing that practice of admitting unadjudicated extraneous offenses at capital sentencing proceeding "presents a serious constitutional issue").

Harm: Because the State's proof of future dangerousness was so thin, the erroneous introduction of this evidence, whether considered singularly or cumulatively, could well have made the difference between a sentence of life or death. Therefore, these errors were not harmless under any standard.

31. The trial court erred in allowing the State to elicit from mitigation witnesses that they did not know where the victim was buried.

At sentencing, Velez presented the testimony of two adult witnesses – Leticia Velez and Maria Hernandez. On cross examination, the special prosecutor elicited from each of them that they did not know where the victim was buried. 20 RR 108, 114. This information had absolutely no relevance to the special issues, did not relate to Velez's character or the crime, *Zant*, 462 U.S. at 879, and wrongly suggested to the jury that the mitigating testimony the witnesses offered was somehow discredited due to the specter that they did not care sufficiently for the victim. This evidence "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[231] Because the evidence also created a constitutionally intolerable risk of the jury failing to give effect to mitigation evidence in violation of Velez's Eighth Amendment rights, *Tennard v. Dretke*, 542 U.S. 274, 283-85 (2004),[232] it was structural error requiring reversal. *Nelson v. Quarterman*, 472 F.3d 287, 314-

[231] *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987), *overruled on other grounds by Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

[232] Even though Velez's counsel did not object to this improper questioning, his fundamental right to a fair sentencing trial could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 342. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, despite counsel's failure to object. *See id*; Tex. R. Evid. 103 (d).

15 (5th Cir. 2006). Additionally, the State cannot prove the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

32. The trial court erred at sentencing by admitting a prior crime for which the State had provided no notice.

Defense counsel objected to the introduction of State's Exhibit 66 because it alleged a prior crime by Velez which the State had not included in its notice. 20 RR 55-57. Defense counsel was correct. State's Exhibit 66 is a judgment of conviction establishing Velez's conviction for a Wisconsin battery committed on July 26, 1991. State's Ex. 66. Additionally, in her testimony, Crisman stated that Velez had initially been charged with aggravated battery, dangerous use of a weapon, and disorderly conduct. 20 RR 55. By contrast, in its notice, the State alleged that Velez was convicted for a Wisconsin battery occurring on July 27, 1991, and stated nothing about his initial charges. 2 CR 307.[233] Because the State's notice was materially different from the evidence it introduced at trial – including that the notice and trial evidence referred to crimes occurring on different dates and the notice made no mention of the original charges – the State failed to give Velez the required notice under Texas Rule of Evidence 404 (b).[234] Therefore, the trial court erred in allowing the introduction of this evidence over Velez's objection. 20 RR 55-57.

[233] Moreover, while State's Exhibit 66 states that Velez's sentence was 90 days jail time plus twelve months of probation, the State's notice states merely that Velez was sentenced to 90 days jail time.
[234] Article 37.071, Section 2 incorporates the notice requirements of Article 37.07 (3)(g), which in turn incorporates the notice requirements of Rule 404 (b). *See also Gentry*, 770 S.W.2d at 792-93 (requiring notice of unadjudicated offenses as prerequisite to admission).

By failing to follow Texas law, the trial court violated Velez's right to due process of law. *Logan*, 455 U.S. at 432-34; U.S. Const. amend. XIV. Moreover, the court violated Velez's Eighth Amendment right to a fair and reliable capital sentencing procedure. *Gardner*, 430 U.S. at 362. Because the State's proof of future dangerousness was thin, the erroneous introduction of this conviction could well have made the difference between a sentence of life or death. The error thus was not harmless under any standard.

33. The trial court erred by admitting into evidence non-authenticated records purporting to establish Velez's prior criminal history.

State's Exhibit 66C is a list of minor Wisconsin offenses from 1988 to 1991 which the State attributed to Velez. State's Exhibit 66D is a Wisconsin fingerprint card, which the State attributed to Velez but on which someone apparently penned the name Joe Angler before crossing out that name and replacing it with Manuel Velez. Over Velez's objection, 20 RR 58-62, the State introduced these records through Crisman, 20 RR 43, who had been involved in an arrest of Velez for battery in 1991. 20 RR 53-54. She testified that she worked in the Sauk County jail for four years, that exhibits 66C and 66D had come from that jail, and that she was familiar with their booking procedures and had seen documents like these. 20 RR 58-59. But she did not purport to have taken any part in creating them. 20 RR 65.[235]

[235] Later, after the court had admitted these exhibits, Crisman testified that State's Exhibit 66C "appears to be" a jail card from the jail, that she "believe[d]" that it fairly and accurately depicted what it purports to be, and that it did not appear as though someone tampered with it. 20 RR 62. For the reasons stated below, this testimony would not have established the admissibility of these documents.

As Velez correctly argued below, Crisman was not a competent witness to introduce these records and the records were not properly authenticated. 20 RR 59-62, 63. The State failed to establish the admissibility of these documents under the Texas Rules of Evidence for the following reasons:

First, the State failed to establish, as required under Texas Rule of Evidence 803 (6), that: a) the documents reflected observations "made at or near the time by, or from information transmitted by, a person with knowledge;" b) that the documents were "kept in the course of a regularly conducted business activity;" and c) that "it was the regular practice of [the Sauk County Sheriff's Department] to make" these records. TEX. R. EVID. 803 (6); *see also* TEX. R. EVID. 902 (10) (a) (incorporating requirement of Rule 803 (6) for document authentication). Second, Crisman's testimony failed to establish "evidence sufficient to support a finding" that the documents were what the State "claim[ed]" them to be. TEX. R. EVID. 901 (a).[236] Crisman testified that she had never seen these documents and took no part in creating them. Third, given that State's Exhibit 66D was apparently altered when the name was changed from Angler to Velez, calling into question its authenticity, the State was required to introduce its original version. Tex. R. Evid. 1003 (stating that a duplicate is admissible to the same extent as an original "*unless* . . . a question is raised as to the authenticity of the original") (emphasis

[236] *See Ronk v. Parking Concepts of Texas*, Inc., 711 S.W.2d 409, 416 (Tex.App. – Fort Worth 1986, *pet. ref'd*) (finding police documents inadmissible because sponsoring witness testified the documents "appear to be copies that are on file in our division, but I have not seen them before," and stated he "could not testify that the documents in this exhibit are true and accurate copies of documents on file in the Fort Worth Police Department"); *Hope v. State*, No. 05-91-245-CR, 1991 WL 290548, at *2 (Tex.App. – Dallas Dec. 19 1991, *pet. ref'd*) (not designated for publication) (finding error in admission of jail record because State failed to show that it was "made by a person with knowledge of the acts or events recorded").

added). Fourth, the non-confronted testimonial hearsay assertions in these documents, prepared in anticipation of litigation, were inadmissible under the Confrontation Clause of the Sixth Amendment. *See Melendez-Diaz,* 129 S. Ct. at 2532 (applying *Crawford*, 541 U.S. at 54). *See also Smith v. State*, 297 S.W.3d 260, 276 (Tex.Crim.App. 2009) (finding admission of non-confronted testimonial hearsay in jail record to violate Confrontation Clause), *cert. denied*, 130 S. Ct. 1689 (2010).[237]

Additionally, the trial court violated Velez's right to due process of law by failing to follow black-letter Texas procedure. *Logan*, 455 U.S. at 432-34; U.S. Const. amends. V, XIV. Moreover, the court violated Velez's Eighth Amendment right to a fair and reliable capital sentencing procedure. *Gardner*, 430 U.S. at 362. Because the State's proof of future dangerousness was thin, the erroneous introduction of these convictions could well have made the difference between a sentence of life or death. The error thus was not harmless under any standard.

34. Prosecutorial misconduct in the sentencing-phase summation denied Velez his fundamental rights to a fair trial and his right to a reliable sentencing determination.

The State denied Velez his constitutional rights to a fair trial and to a reliable sentencing determination through repeated misconduct in the sentencing phase, including inflammatory comments on Velez's use of his Eighth Amendment right to present mitigation evidence. These errors require reversal of Velez's death

[237] Even if counsel's objection did not cite this ground, Velez's fundamental right to a fair sentencing trial could not be relinquished without express waiver. *Mendez*, 138 S.W.3d at 341. Because Velez did not make such a waiver, he is entitled to raise this issue as fundamental error, despite any failure to object. *See id*; Tex. R. Evid. 103 (d).

sentence. *See* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13.

Velez had an Eighth Amendment right to present mitigation evidence at this capital trial. *See, e.g., Tennard*, 542 U.S. at 285. Velez's son Jose, age nine, offered classic mitigation testimony that Velez was a good father whom Jose missed since he went away to jail. 20 R 118-124.[238] Jose also testified that Velez was not violent, evidence introduced under Velez's constitutional right to rebut the State's argument that he was a future danger. *Kelly*, 534 U.S. at 248, 252.

The State improperly penalized Velez for exercising these important constitutional rights when it argued, "Big guy that he is and yet he breaks [sic] bring his child to speak on his behalf. The epitome of a coward." 20 RR 155. On defense counsel's objection, the court told the jury to disregard "that term used by prosecution please," but did not instruct the jury to disregard the prosecution's comment on Velez's exercise of his constitutional rights. 20 RR 156. The State then argued, "To bring a 10 year old to speak for him." *Id.* Defense counsel then moved for a mistrial, which the trial court denied. *Id.* With these arguments attacking Velez for exercising his constitutional rights, the State "'largely destroyed'" the protections the Constitution provides. *Ladd*, 302 S.E.2d at 172 (quoting *Grunewald*, 353 U.S. at 425 (Black, J., concurring)).[239] These inflammatory arguments blatantly violated Velez's rights to a fair trial and to be

[238] *See, e.g., Schriro v. Landrigan*, 550 U.S. 465, 470 (2007) (noting finding of mitigator of family love); *Connor v. State*, 979 So. 2d 852, 857 (Fla. 2007) (noting mitigating factor that appellant was good father).
[239] *See also Griffin*, 380 U.S. at 614-15 (comments about a defendant's exercise of a constitutional right are improper because they penalize a defendant for exercising his or her right, and chill the exercise of constitutional rights); *People v. Mulero*, 680 N.E.2d 1329, 1337-38 (Ill. 1997) (same).

free from cruel and unusual punishment. *See also* Point 22, *supra* (demonstrating State calling accused "coward" is reversible error). By itself, these improper arguments caused reversible error. But there were many more.

The prosecutor committed misconduct when he compared Angel Moreno's lack of legal protections to the protections Velez received, including a jury, a judge, and jury determinations of the special issues. 20 RR 153.[240] *See Brooks*, 762 F.2d at 1411 (impermissible "to imply that the system coddles criminals by providing them with more procedural protections than their victims").

The State further violated Velez's Eighth Amendment rights by repeatedly misstating the law concerning the special issues (future danger and mitigation) in summation. *See Whiting*, 797 S.W.2d at 48 (reversing due to State's misstatement of law concerning burden of proof). First, the State repeatedly urged the jury to find future dangerousness based on a wildly overbroad definition: Because Velez had been convicted of killing a child, it was "common sense" that he "crossed that line" showing he necessarily would pose a threat of danger to others in the future. 20 RR 157. Because Velez had been convicted of misdemeanors and violated his probation and parole, he must be a future danger because he does not want to "fit in" or "follow [the] laws." 20 RR 143-45.

[240] Counsel did not object to this comment or those that follow in this Point of Error. For the reasons stated in note 162, *supra*, however, these errors are preserved as a matter of law because they effectively denied Velez his fundamental right to a fair trial, and his Eighth Amendment right to a reliable sentencing determination.

The Eighth Amendment permits the death penalty only for "the worst of the worst."[241] Texas's future dangerousness requirement is supposed to narrow the class of murders eligible for the death penalty.[242] *But see* Point 44, *infra*. The State's arguments, however, would render eligible for the death penalty virtually all capital murderers. Moreover, the State's argument that any person who kills a child will necessarily be a future danger violates the Eighth Amendment's requirement of individualized sentencing because it "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson*, 428 U.S. at 304. In sum, these arguments violated Velez's Eighth Amendment rights.

Violating Velez's right to have "each juror … to consider and give effect to [his] mitigating evidence," *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990), the State also repeatedly misrepresented the definition of mitigating evidence and the jury's role in weighing it. First, the prosecutor wrongly told the jury that, to find sufficient mitigation under Special Issue 2, it must find that the mitigation "justif[ies] … killing a baby." 20 RR 158.[243] Courts have criticized the

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[241] *See, e.g., Roper*, 543 U.S. at 568 (limiting capital punishment to those "'most deserving of execution.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

[242] *See, e.g., Kennedy v. Louisiana,* 554 U.S. 407, 440 (2008) (citing "future dangerousness" inquiry as narrowing function).

[243] *See Spivey v. Zant,* 661 F.2d 464, 471 n.8 (5th Cir. 1981) (holding instruction to jury must "clearly communicate[] that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment) (citing *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977)).

prosecution's diminishing of mitigating circumstances in this way.[244] Further, this argument "creates a *super-aggravator* applicable in every [child-killing] case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." *Le v. Mullin*, 311 F.3d 1002, 1015 (10th Cir. 2002) (citations omitted) (emphasis in original).

Arguing in a similar vein, the State rhetorically asked: "So he's not morally blamed for that because he's had a poor life?" 20 RR 158. Just as a capital sentencing jury does not consider the issue of justification, it does not consider whether a convicted capital murderer can be morally blamed. Such a person *is* morally blamed: he faces a minimum punishment of life imprisonment without parole and a possible punishment of death. The State's arguments misstated the law on mitigation, misstated the special issue, and prevented Velez's jury from "giv[ing] effect to [his] mitigating evidence," *McKoy*, 494 U.S. at 442-43.

The prosecution also misstated the law when it urged the jury to refuse to consider as mitigation the defendant's difficult, fatherless and impoverished upbringing. 20 RR 158-59. The United States Supreme Court has held that a defendant's difficult and impoverished upbringing is constitutionally-relevant mitigation that a jury must consider under the Eighth Amendment.[245]

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[244] *See State v. Kleypas*, 40 P.3d 139, 281 (Kan. 2001) (finding that a prosecutor misstates the law by claiming that "certain circumstances should not be considered as mitigating circumstances because they do not excuse or justify the crime"); *State v. Bey*, 610 A.2d 814, 846 (N.J. 1992) ("prosecutor improperly characterized a possible mitigating factor as an excuse"); *State v. Rizzo*, 833 A.2d 363, 422 n.49 (Conn. 2003) (description of mitigating circumstances as "excuses" was a "blatant misrepresentation" of their definition under state statute).

[245] *See Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (sentencer unconstitutionally refused to consider defendant's troubled family history); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (sentencer

The State similarly violated the Eighth Amendment and denied Velez a fair sentencing trial when it falsely argued that the jury had "no choice" but to find insufficient mitigation – insisting that "it's what the evidence tells you to do, and it's what that oath that you took to render a true verdict based on the evidence and the law that you took that's going to require that you" find. 20 RR 158-59. On the contrary, the jury did have a choice: indeed, it had a duty to give a "reasoned moral response" to the defendant's mitigating evidence. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007). And that "reasoned moral response" was one each juror was entitled to make individually. *McKoy*, 494 U.S. at 442-43.

Furthermore, as numerous courts have held, insisting that a jury has a duty to decide a case a certain way, as the prosecutor did here, is an egregious attempt to stir passions and, in effect, intimidate the jurors into returning a particular verdict. Such prosecutorial misconduct requires reversal.[246]

The State's inflammatory jury argument for death violated Velez's rights to a fair trial and a reliable sentencing determination and were not harmless under any standard. *See* note 180, *supra*. This death sentence cannot stand.

35. The trial court erred by granting the State's cause challenges to three jurors who could apply Texas capital sentencing law as instructed.

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unconstitutionally refused to consider "the difficult circumstances of his upbringing," including facts that "petitioner had been one of seven children in a poor family that earned its living by picking cotton [and] that his father had died of cancer").

[246] *See United States v. Young*, 470 U.S. 1, 18-19 (1985) (finding that "the prosecutor was also in error to try to exhort the jury to 'do its job'; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice"); *id.* at 30 (Brennan, J., concurring in part and dissenting in part) (noting that "[m]any courts historically have viewed such warnings about not 'doing your job' as among the most egregious forms of prosecutorial misconduct" and citing 85 A.L.R.2d 1132 (1962 and Supp. 1979)); *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) (similar); *State v. Rose*, 548 A.2d 1058, 1094 (N.J. 1988) (similar).

The trial court committed reversible error by granting the State's challenges for cause of Delia Martinez (6 RR 31-33), Gilbert Echavarria (6 RR 64-68), and Jesse Garza (12 RR 95-96). Under the Sixth, Eighth and Fourteenth Amendments, this Court must either reverse Velez's conviction or vacate his death sentence. *Gray v. Mississippi*, 481 U.S. 648, 660-61 (1987); U.S. Const. amends. VI, VIII, XIV.

Prospective jurors can be excused for cause based on their death penalty views only if those views will "prevent or substantially impair" the jurors from following the applicable state laws governing the bifurcated capital proceeding. *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). A prospective juror may be challenged as biased against Texas's death penalty law only if he would always answer the mitigating circumstances issue in favor of the defendant or never answer the future dangerousness issue in favor of the State. *See Wolfe v. State*, 917 S.W.2d 270, 276 (Tex.Crim.App. 1996). Under this legal standard, which is to be reviewed *de novo*, *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004), Martinez, Echavarria, and Garza were not challengeable for cause.

(a) Gilbert Echavarria. The State stated that in his questionnaire Echavarria said that he did not believe in the death penalty and that he could not "return a verdict which assessed the death penalty." 6 RR 39. When the State asked if he could follow the law, Echavarria said he could follow the law but it would be "real hard" for him if it had to do with the death penalty. 6 RR 42.

When the defense clarified what Texas capital sentencing law was, Mr. Echavarria stated that he could answer yes or no to the first statutory question. 6 RR 59. He further said that he could weigh the mitigating factors and answer the second question. 6 RR 57. Mr. Echavarria indicated that he understood that the answers he gave would determine the sentence the court imposed. 6 RR 63. He also said that he could follow the law regardless of his feelings.[247] *Id.*

Echavarria's answers showed that he could answer both statutory issues fairly. He insisted that he could set aside any personal feelings about the death penalty and apply the law. Because he was not substantially impaired, the court erred by dismissing him for cause.

(b) Delia Martinez. Martinez said on her questionnaire that she was not sure how she felt about the death penalty and was not sure if she could impose it.[248] 6 RR 11-12. When the State asked her if she did not think she could participate in the proceeding because of her opposition to the death penalty, it did not explain the statutory special issues she would be asked to apply. Without knowing what she was being asked to do, Martinez answered that she did not think she could. 6 RR 13.[249]

However, when defense counsel asked Martinez about the statutory issues, her answers showed that she was not substantially impaired. She stated that she could

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[247] Although Mr. Echavarria said he did not want to have a part in anything having to do with the death penalty if he had a choice, he immediately agreed that he could answer the statutory questions even though they would determine how the court sentenced. 6 RR 59.

[248] When asked by defense counsel if she still agreed with these answers, she said she did. 6 RR 18-19.

[249] When later asked if she could vote for the death penalty if she had to, Martinez answered, "No." 6 RR 13.

decide whether a defendant was a continued threat to society based on the evidence that she heard. 6 RR 26. Ms. Martinez said that she could also listen to mitigation evidence and answer the second issue. 6 RR 27-28. Finally, when asked if asked if could follow the law and answer yes or no to both of the special issues, she answered, "If the judge says." 6 RR 29.

The court erred by dismissing Martinez for cause, 6 RR 33, because she was not substantially impaired under Texas law and federal law.

(c) Jesse Garza. During its initial questioning of Garza, the State never explained Texas's capital sentencing procedure, and, so uninformed, he went back and forth on whether he could participate in a capital sentencing trial. *See generally* 12 RR 76-78, 86-88, 89-91. In response to defense counsel's questions explaining the statutory issues, however, Garza said unequivocally that he could set aside his personal views and apply this law. 6 RR 92-94. In granting the State's cause challenge, the trial court made no explicit finding about Garza's ability to participate. 6 RR 95-96. Garza was not substantially impaired under Texas and federal law and the court therefore erred by dismissing him for cause.

36. The trial court erred by refusing to charge the jury that it had to find beyond a reasonable doubt the extraneous offenses offered by the State to prove the special issues.

The trial court committed reversible error by denying defense counsel's request to charge the jury that, before it relied on extraneous offenses in its deliberating on the special issues, it had to find those offenses proven beyond a reasonable doubt. 20 RR 125-26. This Court has repeatedly held that such an instruction is not

constitutionally or statutorily required,[250] but it should overrule its prior precedent and reverse Velez's death sentence for three reasons. First, section 3(a)(1) of article 37.07 of the Texas Code of Criminal Procedure requires that extraneous offenses introduced in the punishment phase of a non-capital trial be proven beyond a reasonable doubt. Requiring less proof in a capital sentencing proceeding is invidious discrimination, violating the right to life because the procedure is not narrowly tailored to meet a compelling state interest. *Compare* Arts. 37.07 § 3(a)(1) *and* 37.071; *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942). Further, this procedure violates the fundamental right to life because, by arbitrary and disparate treatment, it values differently the lives of two similarly-situated groups of people. *Bush*, 531 U.S. at 104-06; U.S. Const. amend. XIV.[251] Second, permitting the jury to rely upon extraneous offenses that the State did not have to prove by any burden, much less beyond a reasonable doubt, violated the Eighth Amendment's requirement of heightened reliability in death penalty cases.[252] Third, the alleged extraneous offenses, 2 CR 304, effectively exposed Velez to a greater punishment (death) than he would be exposed to without the allegations, and, thus, the Sixth Amendment required that these offenses be

[250] *See, e.g., Garcia v. State*, 57 S.W.3d 436, 442 (Tex.Crim.App. 2001).
[251] *See also Williams v. Lynaugh,* 484 U.S. 935, 940 (1987) (Marshall, J., dissenting from denial of cert.) (finding constitutional problems with this disparate treatment).
[252] *See Gardner*, 430 U.S. at 364 ((plurality opinion) (White, J., concurring); *id.* at 362 (overturning death sentence resulting from trial judge's reliance on potentially unreliable secret information not disclosed to defense); *Williams*, 484 U.S. at 937-38 (Marshall, J., dissenting).

submitted to the jury and proven by the State beyond a reasonable doubt.[253] *See* U.S. Const. amends. VI, XIV. Reversal for a new penalty phase is required.

37. The trial court committed reversible error by charging the jurors that a "yes" vote to Special Issue Two required ten votes.

As appellant objected pretrial, 1 CR 128, 129,[254] the trial court's charge that at least ten jurors had to agree that the answer to the mitigation special issue was "yes" before the jury could find this issue, *see* 3 CR 436, 440, violated his rights under the Sixth, Eighth, and Fourteenth Amendments, which require that "each juror . . . be allowed to consider all mitigating evidence . . .[and that] such consideration . . . may not be foreclosed by one or more jurors' failure to find a mitigating circumstance." *McKoy*, 494 U.S. at 443 (*citing Mills*, 486 U.S. at 384). *See also* Tex. Const. art. I, § 13. *But see Rousseau v. State*, 855 S.W.2d 666, 687 n.26 (Tex.Crim.App. 1993) (rejecting this claim).

This structural error requires reversal irrespective of prejudice. *See Nelson*, 472 F.3d at 314-15.[255] In any case, the error caused Velez egregious harm in this

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[253] *United States v. O'Brien*, __U.S. __, 130 S.Ct. 2169, 2182-84 (May 24, 2010) (Stevens, J., concurring); (Thomas, J., concurring) (each opinion applying *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

[254] In a pretrial motion, Velez asserted numerous constitutional objections to the Texas capital sentencing scheme under article 37.071. 1 CR 123-37. Although this Court has held that these types of objections do not preserve charge errors, *DeBlanc*, 799 S.W.2d at 709, it should abandon that precedent and fairly hold that pretrial motions raising constitutional objections to the capital sentencing scheme may serve to preserve those errors. Assuming the errors are preserved, Velez need only show "some harm." *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex.Crim.App. 1994). For the purpose of arguing any unpreserved, non-structural constitutional errors raised in the pretrial motion and this section, however, Velez will show egregious harm and that showing will necessarily meet the "some harm" standard.

[255] Structural error is immune from the ordinary harmless error rules, which depend on whether there was an objection. *See Jimenez v. State*, 32 S.W.3d 233, 237 n.12 (Tex.Crim.App. 2000); *Mendez*, 138 S.W.3d at 340-41 (stating that structural error may be raised for first time on appeal). As established in *Nelson*, 472 F.3d at 314-15, preventing a juror from considering mitigation evidence is structural error. *See also* Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 151-52 (1993). Although this Court has indicated that the preclusion during the sentencing phase of relevant mitigation evidence can be harmless, *Halprin v. State*, 170 S.W.3d

close case (at both the culpability and sentencing phases) and therefore requires reversal. *Abdnor,* 871 S.W.2d at 731-32. *See also Ward*, 592 F.3d at 1180-81.

38. The trial court committed reversible error by charging the jurors that they had discretion to decide whether a circumstance was mitigating.

Consistent with Art. 37.071 § (2)(f)(4), the trial court charged the jury that it "shall consider mitigating evidence to be evidence that a juror *might regard* as reducing the defendant's moral blameworthiness." 3 CR 436 (emphasis added). Both the statute and the court's instruction violate the Eighth Amendment, which permits jurors no such discretion. The United States Supreme Court's "cases have established that the sentencer may not be precluded from considering, *and may not refuse to consider*, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (emphasis added) (citations omitted). Indeed, the Court has held that such mitigating circumstances as a defendant's "good conduct in jail *is . . . by its nature relevant to the sentencing determination.*" *Tennard*, 542 U.S. at 285, 287 (citing *Skipper*, 476 U.S at 7 (emphasis added)). Here, Appellant presented evidence of his good jail conduct as well as such other inherently mitigating, constitutionally relevant factors as low intelligence and problems with school, love and dedication to family, and childhood poverty. 20 RR 99-100, 101, 102, 104, 110, 114, 121-22; 18 RR 102.

Article 37.071 requires trial courts to *misinform* jurors that they can refuse to treat mitigating evidence as mitigating, resulting in structural constitutional error

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111, 116 (Tex.Crim.App. 2005), it did so without any analysis of this question and only as an alternative holding to the primary holding that the preclusion of the evidence was not error. The persuasive authorities cited above, including *Nelson v. Quarterman*, should be followed, not *Halprin*.

requiring reversal. *Nelson*, 472 F.3d at 314-15 (rejecting harmless error analysis where jury precluded from giving full effect to mitigating evidence); *see also* note 255, *supra* (collecting other authorities); U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13. In the alternative, in a close case such as this on both guilt and sentencing issues, *Ward*, 592 F.3d at 1180-81, where the jury may well have returned a life verdict if properly instructed, the error caused Velez egregious harm. *Abdnor,* 871 S.W.2d at 731-32.

39. The trial court committed reversible error by statutorily charging the jury on Special Issue One (i.e., future dangerousness).

As argued below, 1 CR 126-27 (motion), 7 SRR 45 (argument), the trial court erred by charging the jury that the State must prove beyond a reasonable doubt a "probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2 (b)(1). *See* 3 CR 434. *But see* 20 RR 136 (substituting "would" for "will" in written charge). There is a reasonable likelihood[256] that the jury applied this instruction in a manner that diluted the State's burden of proving the special issue beyond a reasonable doubt. *See* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13.[257]

When non-lawyer jurors are faced with an illogical instruction like the one mandated by Article 37.071, they would naturally focus on the more familiar

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[256] *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

[257] The State was constitutionally obligated to prove this special issue beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476-477; *Ring v. Arizona*, 536 U.S. 584, 609 (2002). In *Apprendi*, the Supreme Court interpreted the constitutional due-process and jury-trial guarantees to require 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. *But see Rayford v. State*, 125 S.W.3d 521, 534 (Tex.Crim.App. 2003) (rejecting this claim).

concept of probability, to the detriment of a less familiar, legal term of art like "reasonable doubt." Moreover, non-lawyer jurors (and many lawyers) would find it impossible to figure out how they were to determine if they were persuaded beyond a reasonable doubt that something is more likely than not. Indeed, determining beyond a reasonable doubt that something is more likely than not is an oxymoron. The end result is a reasonable likelihood that jurors would answer yes to the future danger special issue if they were merely persuaded that it was more likely than not that the defendant would be a danger in the future. And that would substantially dilute the State's burden of proof beyond a reasonable doubt.

The court erred by overruling Velez's objections to this statutory instruction. The constitutional error is structural and not subject to any harmless error review.[258] In the alternative, given the lack of evidence of future dangerousness, *see* Point 28, *supra*, this error caused egregious harm requiring reversal.

40. The trial court's instruction charging the jury to presume a death sentence was the appropriate penalty constituted reversible error.

The trial court instructed the jury to answer the second special issue by deciding whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." 3 CR 435 (tracking Art. 37.071 § 2(e)(1)). This charge violated the Eighth Amendment by requiring the defendant to disprove a death sentence is warranted, instead of requiring the State to prove a sentence is

[258] *See Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993) (refusing to apply harmless error where the jury was improperly instructed on the burden of proof at the guilt/innocence phase).

warranted beyond a reasonable doubt. Under this scheme, once future dangerousness has been established under the first special issue, Art. 37.071 § 2 (b)(1), "death is to be deemed the appropriate penalty unless the defendant proves otherwise," creating a '"presumption of death' in violation of the Eighth Amendment." *See* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13.[259] Reversal is required because this burden-shifting statute constitutes structural error. *Sullivan*, 508 U.S. at 281. In the alternative, in this close case, the error caused egregious harm requiring reversal.

41. The trial court committed reversible error by instructing the jury to consider mitigating evidence in its future danger decision.

In accordance with article 37.071 § 2 (d)(1), the trial court instructed the jury, in deciding future dangerousness, to "consider all evidence admitted at the guilt or innocence [phase] and the punishment [phase], including *evidence of the defendant's background or character, or of the circumstances of the offense, that militates for or mitigates against the imposition of the death penalty*." 3 CR 434-35 (emphasis added). The future dangerousness issue is distinct from the mitigation issue. Although a lack of future dangerousness mitigates, *McKoy,* 494 U.S. at 441, not all mitigating evidence bears on future dangerousness. By instructing the jury to consider such evidence in connection with this special issue, the Court injected confusion and there is a reasonable likelihood that the jury

[259] *Walton v. Arizona*, 497 U.S. 639, 686 (1990) (Blackmun, J., dissenting), *overruled by Ring*, 536 U.S. at 589, 609; *see also Kansas v. Marsh*, 548 U.S. 163, 203-11 (2006) (Souter, J., dissenting) (similar). *But see Kansas v. Marsh, supra*; *Matchett v. State*, 941 S.W.2d 922, 935 (Tex.Crim.App. 1996) (rejecting this argument and relying on *Walton* majority).

factored any perceived lack of mitigation evidence into its future dangerousness determination. Thus, the instruction violated the Eighth Amendment by rendering unreliable the future danger inquiry used to narrow the class of murders eligible for the death penalty,[260] producing an arbitrary, capricious, and disproportionate result. U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13. This structural error requires reversal irrespective of prejudice. *Sullivan*, 508 U.S. at 281; *Nelson*, 472 F.3d at 314-15. In any case, the error caused Velez egregious harm and requires reversal.

42. The trial court committed reversible error by failing to charge on residual doubt as mitigation.

The court erred by not charging the jury that it could consider any residual doubt about Velez's guilt as a mitigating circumstance. 3 CR 434-38. The trial court's instruction charging the jury to presume a death sentence was the appropriate penalty constituted reversible error. The Supreme Court recently left open whether capital defendants have a constitutional right to argue residual doubt evidence at sentencing. *See Oregon v. Guzek*, 546 U.S. 517, 525-26 (2006).[261] Given "abundant evidence accumulated in recent years" of exoneration of death-row inmates,[262] "the evolving standards of decency that mark the progress of a maturing society," *Roper*, 543 U.S. at 561, demand that jurors be permitted to

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[260] *See, e.g., Kennedy v. Louisiana,* 554 U.S. 407, 440 (2008) (citing "future dangerousness" inquiry as narrowing function).

[261] *But see Blue v. State*, 125 S.W.3d 491, 502 (Tex.Crim.App. 2003) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 173-76 (1988)). The *Blue* decision was before the Supreme Court in *Guzek* clarified that "*Franklin* did not resolve whether the Eighth Amendment affords capital defendants such a right." *Guzek*, 546 U.S. at 525. Moreover, in *Blue*, the admissibility of residual doubt evidence and counsel's ability to argue it was not at issue because the defendant in that case was permitted to do both. 125 S.W.3d at 502-03.

[262] *See Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

consider residual doubt before imposing the ultimate sentence. *See* U.S. Const. amends. VI, VIII, XIV; Tex. Const. art. I, § 13. This rule, moreover, is constitutionally required where, to secure a sentence of death, Texas must prove future dangerousness, i.e. "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2 (b)(1). Any evidence offered by the defense tending to disprove such future dangerousness – including evidence that the defendant was not guilty – would certainly be relevant and admissible and the jury should have been so instructed. *Skipper*, 476 U.S. at 5 n.1. *See also Ward*, 592 F.3d at 1181 (considering weak evidence of guilt in finding sentencing error prejudicial).

Moreover, this Court should find as a matter of state law[263] that capital defendants have a right to a residual doubt instruction.[264] Texas has a compelling interest in minimizing the possibility of executing an innocent person, an interest that would be served by permitting consideration of residual doubt.

By blocking consideration of mitigation evidence, the trial court committed structural error. *Nelson*, 472 F.3d at 314-15. In the alternative, the Court should reverse due to egregious error. Given the undisputed character testimony of Maria Hernandez and Leticia Velez at sentencing that Velez was innocent, 20 RR 104,

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[263] *See* Tex. Const. art 1, § 13; Art. 37.071 § 2 (e)(1) (requiring capital sentencing juries to determine whether "sufficient mitigating circumstance or circumstances [exist] to warrant … a sentence of life imprisonment," including "the circumstances of the offense").

[264] This Court is not bound by the Supreme Court's decisions on the issue of residual doubt. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex.Crim.App. 1998). This Court should follow numerous of its sister jurisdictions in allowing the jury to consider residual doubt. *See Smith v. Black*, 904 F.2d 950, 968-69 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004) (and cases cited therein).

114, and the significant doubts about his guilt, *see* Points 1, 3, 7, 8, *supra*, the jury's consideration of residual doubt was key. *See also Ward*, 592 F.3d at 1181.

43. The indictment's failure to charge Special Issue One was reversible error.

As Velez argued pretrial, 1 CR 131-32, his indictment was deficient because it did not contain grand jury findings of special issue one. *See* U.S. Const. amends. VI, XIV.[265] Under Article 1, § 10 of the Texas Constitution, a criminal defendant need not "answer for a criminal offense, unless on an indictment of a grand jury." Under Article 37.071, a capital defendant can receive a death sentence only if his jury finds the requisite special issues. Thus, before the State could seek a death sentence against Appellant, a grand jury had to find the future dangerousness special issue (effectively an aggravating factor), which is "the functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609 (internal quotation marks omitted).[266]

This Court must reform the sentence to life without parole because the State's error in failing to obtain an indictment charging the special issue cannot be harmless error analysis and, even if it can be, the State cannot prove it harmless beyond a reasonable doubt.[267] Alternatively, this Court should remand to allow the State to attempt to obtain a new indictment charging the requisite special issue.

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[265] *Compare* 24 RR 5-7 (charging special issues) with 1 CR 18 (indictment without special issues charged). *But see Russeau*, 171 S.W.3d at 886 (rejecting this claim).

[266] Because of *Ring*, federal courts now agree that aggravating circumstances must be found by a grand jury under the Fifth Amendment. *See, e.g., United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005) (*en banc*).

[267] *See United States v. Resendiz-Ponce*, 425 F.3d 729, 732-33 (9th Cir. 2005), *rev'd on other grounds*, 549 U.S. 102 (2007).

44. Because the future danger inquiry of Texas's capital statute violates the Eighth Amendment and the Texas constitution, Velez's death sentence cannot stand.

As counsel argued below, 1 CR 125, 127, the State's future dangerousness scheme violates the Eighth Amendment. The capital statute employs an unreliable inquiry into future dangerousness as a criterion to narrow the class of murders eligible for the death penalty,[268] producing arbitrary, capricious and disproportionate results in violation of the Eighth Amendment. *See* U.S. Const. amends. VIII; XIV;[269] Tex. Const. art. I, § 13. The future dangerousness inquiry is central to juries' sentencing decisions. As all nine justices of the Supreme Court agreed in *Kennedy*, however, it can lead to inconsistent results.[270]

Since the Supreme Court approved Texas's capital statute in *Jurek*, 428 U.S. at 275-76, powerful empirical evidence has demonstrated that, contrary to the Supreme Court's implicit assumption in *Jurek*, Texas's future danger scheme is prone to results so arbitrary as to be "'freakishly' imposed." *Id.* (*citing Furman*, 408 U.S. at 310 (Stewart, J., concurring)). In approving the scheme in *Jurek*, Justice Stevens posited that the inquiry was "no different from the task performed countless times each day throughout the American system of criminal justice."

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[268] *See, e.g.*, *Kennedy*, 554 U.S. at 440 (noting that the Court has "upheld the constitutionality of [various] aggravating factors," including whether the defendant "'would commit criminal acts of violence that would constitute a continuing threat to society,'"); *see also, Jurek*, 428 U.S. at 269-70.

[269] *See Kennedy*, 554 U.S. at 439-40 (citing, *inter alia*, *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972)).

[270] *Kennedy*, 554 U.S. at 440 (noting that Texas's future danger scheme (and 2 other types of narrowing factors) are "standards [with] the potential to result in some inconsistency of application"); *id.* at 461-62 (Alito, J., dissenting) (citing Texas's future danger scheme as one of three examples of narrowing factors that could be "far more definite and clear-cut"). Four other justices joined Justice Kennedy's majority opinion, while three joined Justice Alito's dissent.

Jurek, 428 U.S. at 275-76. As examples, he cited "whether to admit a defendant to bail," "determining what punishment to impose," and the release of an inmate out on parole. *Id.* Yet while the law tolerates inconsistency in these predictive assessments bearing on revocable decisions, the Supreme Court held just one year after *Jurek* that the Eighth Amendment demands *heightened* reliability in procedures used to determine if a state may take a life. *See Gardner*, 430 U.S. at 357-58. The future dangerousness scheme not only fails to meet this heightened standard, but fails to produce the reliable results Justice Stevens assumed it would.

Constitutionally unreliable: Assuming for the purpose of this Point of Error that this Court finds the evidence of future dangerousness sufficient in this case, a comparison of the cases in which this Court has found *insufficient* evidence of future dangerousness with this case demonstrates the utter lack of reliability and consistency in the future danger inquiry. As demonstrated above, Velez's record shows that he would pose less of a future danger than those other defendants based on several relevant factors, including the nature of the capital offense, his prior criminal record, the lack of expert testimony or character testimony suggesting that he is a future danger, and his flawless prison record.[271]

Arbitrariness in the future danger inquiry is not limited to this case. Neither experts in psychology and psychiatry,[272] nor lay jurors,[273] nor any predictor[274] has

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[271] For judicial efficiency, this argument incorporates by reference each of the arguments in Point 28, *supra*, comparing Velez's case with the cases where insufficient evidence of future danger was found.

[272] *Flores v. Johnson*, 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J. concurring) (noting scientific community's virtually unanimous opinion that "psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific"); James W. Marquart et al., *The Rope, the Chair, and the Needle:*

proven accurate. In one study, Texas juries were wrong in 95% of the cases in which they found that the defendant posed a continuing threat to society.[275]

Unconstitutional role of race: Perniciously, racial considerations and anti-immigrant fervor have sometimes been used to predict future dangerousness. In at least two cases with Hispanic or Latino defendants, a future danger "expert" relied on race to predict a defendant would pose a threat of future danger.[276] In another case, prosecutors improperly told prospective jurors during voir dire that they could consider his status as an illegal alien in considering if he would pose a threat of future danger. *See Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995), *aff'd*, 90 F.3d 1075 (5th Cir. 1996).[277]

Evolving standards of decency: The "national consensus" that has developed against imposing the death penalty based on future dangerousness also shows that the special issue is inherently arbitrary and violates the Eighth Amendment. *Kennedy*, 128 S. Ct. at 2653. When the Supreme Court decided *Jurek*, only a handful of states had passed capital sentencing legislation designed to comply with

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Capital Punishment in Texas 1923-1990, 179-84 (1998); Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63, 85 (2005).

[273] *See, e.g.*, Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 62 (2nd ed. 2005) (noting that neither laypersons nor clinicians had much accuracy in their assessments of dangerousness).

[274] *See, e.g.*, Erica Beecher-Monas and Edgar Garcia Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint For Violence?*, 69 LAW & CONTEMP. PROBS. 301, 317 (Winter/Spring 2006).

[275] Texas Defender Service, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS, 47-48 (2004).

[276] *See Saldano v. State*, 70 S.W.3d 873, 884-85 (Tex.Crim.App. 2002); *Garcia v. State*, 57 S.W.3d 436, 438-41 (Tex.Crim.App. 2001).

[277] Despite the statute's recent salutary amendment to prevent the use of race or ethnicity in answering this special issue, Art. 37.071 § 2 (a)(2), the Supreme Court has long recognized that many jurors naturally fall back on racial stereotypes in their decisions. *See Turner v. Murray*, 476 U.S. 28, 35-36 (1986).

Furman v. Georgia, and a common procedure had not emerged.[278] Thirty-five years later, only one other state, Oregon, has adopted Texas's model of placing central reliance on future danger.[279] Thus, 48 states reject the death penalty based centrally on a jury determination that a capital murderer will constitute a future danger. That number surpasses the 45 states in *Kennedy v. Louisiana*, the 30 states in *Atkins v. Virginia* and *Roper v. Simmons*, and the 42 states in *Enmund v. Florida* "that prohibited the death penalty under the circumstances those cases considered."[280]

Estrada v. State and *Coble v. State violate the Eighth and Fourteenth Amendments*: In *Estrada*, 313 S.W.3d at 281, this Court held that the future danger inquiry was not whether the appellant would pose a threat of future danger if spared execution, but whether he "would" constitute a threat of future violence "whether in or out of prison," even if he would never be out of prison. *Id.* In *Coble*, 2010 WL 3984713 at *6, this Court stated the test focused on a defendant's internal restraints and character for violence, rather than whether he would be violent under the restraints inherent in his sentence if not executed. For the reasons stated in Point 28, *supra*, and incorporated by reference here, this construction violates the Eighth and Fourteenth Amendments on several grounds.

Constitutionally insufficient appellate review: In *Jurek*, the Supreme Court

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[278] *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1045-49 (1995) (setting forth history of capital sentencing statutes).
[279] *See* Stephen Hornbuckle, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441, 448 nn.37 & 38 (1994) (collecting statutes of then-36 jurisdictions with the death penalty, and noting that only [t]wo states, Texas and Oregon, vary from [the common] scheme").
[280] *Kennedy*, 554 U.S. at 425-26 (citing *Roper*, 543 U.S. at 564; *Atkins v. Virginia*, 536 U.S. 304, 313-15 (2002); *Enmund v. Florida*, 458 U.S. 782, 789 (1982)).

cited this Court's "prompt judicial review" when it found Texas's death penalty statute did not violate the Eighth Amendment. 428 U.S. at 276. Nevertheless, in *McGinn v. State*, 961 S.W.2d 161, 169 (1998), a bare majority of this Court held that it lacked authority to conduct factual sufficiency review of a capital jury's finding of future dangerousness. The dissenting judges would have held that factual sufficiency review is a constitutional requisite because it is part and parcel of "prompt judicial review." *Id.* at 173-74 (citing, *inter alia*, *Jurek*, 428 U.S. at 276); 176 (same). Factual sufficiency review identifies cases where, even if the evidence is legally sufficient, the jury's verdict is "manifestly unjust" and "shocks the conscience."[281] An appellate system that allows death verdicts that "shock the conscience" cannot pass constitutional muster. *See* U.S. Const. amends. VIII; XIV; Tex. Const. art. 5, § 6; art. I, § 13.[282]

Conclusion: Death penalty jurisprudence has evolved since 1976, and now "insist[s] upon confining the instances in which the [death penalty] can be imposed." *Kennedy*, 554 U.S. at 420. Based on the evidence accumulated since *Jurek*, the arbitrary and capricious, unreliable and disproportionate nature of Texas's future danger determination is manifest and no longer tolerable.

45. Texas Prosecutors' unfettered, standardless and unreviewable discretion violates equal protection, due process and the Eighth Amendment.

Texas lacks statewide standards governing the discretion of local prosecutors to seek or decline to seek the execution of death-eligible defendants. Art. 37.071.

[281] *Grotti v. State*, 273 S.W.3d 273, 280 (Tex.Crim.App. 2008) (quoting *Watson v. State*, 204 S.W.3d 404, 426 (Tex.Crim.App. 2006) (internal quotation marks omitted).
[282] *See also* Point 28 (discussing *Cole*, 333 U.S. at 202, incorporated here by reference).

The trial court committed reversible error by denying Appellant's motion to preclude application of the death penalty on equal protection, due process, and Eighth Amendment grounds.[283] *See* 1 CR 125-26. *See also* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. art. I, § 13.

Equal protection: "[U]niform" and "specific" vote-counting standards are required to prevent the arbitrary and disparate treatment of similarly situated voters. *Bush v. Gore*, 531 U.S. 98, 105-06 (2000). Because Texas's death penalty system concerns a right more fundamental than the right to vote – the right to life, s*ee Furman*, 408 U.S. at 270-71 (Brennan, J., concurring) – its system must satisfy the equal protection principles enunciated in *Bush.* Just as a "State may not, by … arbitrary and disparate treatment, value one person's vote over that of another," *Bush*, 531 U.S. at 104-05, a state may not, by arbitrary and disparate treatment, value one person's life over that of another.[284] Texas does just that and the result is disparate treatment of similarly-situated defendants.

Due process: Due process requires a three-part balancing of: (1) the private interest "affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used;" and (3) the state's interest, including the burden entailed. *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976).

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[283] *But see Threadgill v. State*, 146 S.W.3d 654, 671-72 (Tex.Crim.App. 2004) (rejecting equal protection component of this argument); *Matamoros v. State,* 901 S.W.2d 470, 478 (Tex.Crim.App. 1995) (prosecutors' discretion to seek death penalty not unconstitutional).

[284] Since *Bush*, numerous commentators have recognized that its logic prohibits standardless prosecutorial discretion to seek or not to seek the death penalty. *See, e.g.,* 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, 90-94 (Fall 2001).

Texas fails this test. The interest at stake – the right to life – could not be more fundamental. The lack of standards increases the risk of an erroneous deprivation by failing to ensure that the death penalty is limited to "the most serious adult criminal conduct." *Atkins,* 536 U.S. at 306. Because statewide standards would reduce the risk of arbitrary application with relative ease, and state prosecutors' interest in maintaining this unbridled discretion is minimal at best, prosecutors' standardless discretion violates due process.

Cruel and unusual punishment: Capital sentencers' decisions must be guided by standards that narrow and guide their discretion. *See, e.g., Gregg*, 428 U.S. at 195. However, because a prosecutor's "decision whether or not to seek capital punishment is no less important than the jury's, . . . [his or her] 'discretion must [also] be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"[285] In *Gregg*, Justice White asserted that prosecutors would not exercise their standardless discretion in an arbitrary or capricious manner, and that "defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong." 428 U.S. at 225 (White, J., concurring). However, it is now clear that Justice White was wrong. Geography and the race of the victim, more than the nature of the offense or the State's proof, are the most important predictors of when a prosecutor will seek the death

[285] *DeGarmo v. Texas*, 474 U.S. 973, 974-975 (1985) (Brennan, J., dissenting from denial of cert.) (citation omitted).

penalty.[286]

46. This Court should reverse due to the cumulative harm of the errors.

This case presents a number of clear-cut, indisputable errors. The outcome hangs on whether this Court finds these errors caused sufficient harm to require reversal. If the Court finds two or more of these errors harmless, Appellant is entitled to reversal due to the *cumulative harm* of the errors.[287]

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Court to uphold these points of error and order the relief requested herein.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

[286] *See* Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807, n.31 (2008) (collecting studies showing that race of victim is highly significant predictor of who receives a death sentence, including in Texas); Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999 ("Differences in murder rates or population do not explain all the county-by-county disparities. Instead, the 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.").

[287] *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999) (citing *Stahl v. State*, 749 S.W.2d 826, 832 (Tex.Crim.App. 1988) (considering cumulative effect of errors)). *See also United States v. Whitten*, 610 F.3d 168, 201-02 (2d Cir. 2010) (vacating death sentence due to aggregate harm of Fifth and Sixth Amendment violations).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief for Appellant has been mailed by First Class U.S. mail to:

Mr. Rene B. Gonzalez
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BRIAN W. STULL, ESQ.

On this 3d day of ~~February~~ March, 2011

APPENDIX A:

ABBREVIATIONS IN APPELLANT'S CITATIONS TO THE RECORD

Reporter's Record	RR
First Supplemental Reporter's Record	SRR1
Second Supplemental Reporter's Record	SRR2
Third Supplemental Reporter's Record	SRR3
Fourth Supplemental Reporter's Record	SRR4
Clerk's Record	CR
First Supplemental Clerk's Record	SCR1
Second Supplemental Clerk's Record	SCR2
Third Supplemental Clerk's Record	SCR3
Fourth Supplemental Clerk's Record Filed on July 26, 2010	SCR4
Fifth Supplemental Clerk's Record* (incorrectly labeled Fourth, Filed on December 22, 2010)	SCR5
Sixth Supplemental Clerk's Record (incorrectly labeled Fifth, Filed on January 24, 2011)	SCR6
Seventh Supplemental Clerk's Record (correctly labeled)	SCR7
Eighth Supplemental Clerk's Record (forthcoming)	SCR8

In this brief, the above listed abbreviations are preceded by the volume number of the record cited and followed by the page number of that volume. Thus, a citation to 8 RR 52 refers to the eighth volume of the reporter's record, page 52.

* The Clerk incorrectly labeled as the Fourth Supplemental Clerk's Record *both* the supplemental clerk's record filed on July 26, 2010, and the one filed December 22, 2010 (which should have been the Fifth). The Clerk continued the erroneous numbering with the Sixth Supplemental Clerk's Record, which it labeled as the Fifth. The Seventh Supplemental Clerk's Record is correctly labeled. In the citations to the record, this brief follows the list above, rather than the incorrect labels on the Fifth and Sixth Supplemental Clerk's Record.

Texas Department of Criminal Justice

Number: 2.00
Date: July 2005
Page: 1 of 2
Supersedes: October 2003

UNIT CLASSIFICATION PROCEDURE

SUBJECT: CUSTODY DESIGNATIONS

AUTHORITY: TDCJ Classification Plan, revised 10/03

PURPOSE: The purpose of custody assignment shall be to ensure each offender in TDCJ receives appropriate and adequate supervision and housing commensurate with the changing needs and requirements during his/her incarceration. Custody assignments shall be primarily influenced by institutional adjustment factors and sentence length; however, factors such as prior criminal record, prior institutional adjustment and current offense of record may be considered when making initial classification decisions relating to custody. Custody assignment shall serve to indicate the type of housing required (cell or dormitory), the level of supervision required by the offender, and the appropriate job assignment.

PROCEDURES:

The principal custody designations for Institutional offenders are General Population Level 1 (G1), General Population Level 2 (G2), General Population Level 3 (G3), General Population Level 4 (G4), General Population Level 5 (G5) and maximum (administrative segregation) custody. Principal custody designations for State Jail offenders are State Jail Level 1 (J1), State Jail Level 2 (J2), State Jail Level 4 (J4) State Jail Level 5 (J5) and Special Management. The diversity of characteristics in the offender population compels that special status categories also be provided which are consistent with special custody or treatment requirements. These special status categories are death sentence status, medical status, mental health (psychiatric) status, mentally retarded offender (MROP) status, physically disabled offender status, safekeeping status and transient status.

Assignment to a special status category may preclude assignment to a principal custody designation (e.g., death sentence status offenders; MROP status offenders in an MROP-Sheltered Facility; psychiatric status offenders in an inpatient facility). Offenders with special medical or mental health needs, intellectual impairments or physical handicaps will generally be referred to as "special needs" offenders. "Special needs" offenders shall be assigned to the appropriate special status category upon recommendation by the appropriate treatment professional(s). Refer to the TDCJ Classification Plan, 10/03 for additional information.

The following reviews are conducted by classification committees regarding custody consideration:

1. Upon initial assignment to a unit, the offender will be reviewed for custody assignment.

2. Upon receipt of a major disciplinary case for which major punishment was assessed, the offender will be reviewed for custody consideration to ensure the offender is assigned the custody that best fits his/her security needs.

3. Once an offender is seen for a major disciplinary, the UCC will set a subsequent review date for promotional consideration. Institutional offenders may be eligible for promotion in custody designation six (6) months from the date of the major disciplinary; however, the offender must be reviewed within twelve (12) months. SJ offenders may be eligible for promotion three (3) months from the date of the major disciplinary, but must be reviewed after six (6) months.

4. While some custody designations are overrideable, others are mandatory. For instance, offenders with a security precaution designator (SPD) of ES, SA, or HS will not be assigned to a custody less restrictive than G4 (J4 for State Jail offenders). In addition, Institutional offenders serving a 50 year or more sentence who have not completed the 5 year/10 year flat time requirement, will not be assigned to a custody less restrictive than G3. Institutional and SJ offenders with SPD removal codes of NE, NA, and NS will not be assigned to a custody less restrictive than G3 or J2, respectively. (Although State Jail offenders with a removal code can be assigned to J2 custody, they still have the same housing and job restrictions as a G3 offender). Effective 9/1/05, offenders convicted of Capital Murder and sentenced to "life without parole" will not be classified to a custody less restrictive than G3 throughout their incarceration.

Upon assignment of a custody, it is the responsibility of the Classification Committee to assess the need for a custody override. A custody override statement is required when the custody assigned to an offender by the Classification Committee is different than the computer recommended custody. The override will explain what the computer recommends and why, as well as what the committee assigned custody is and why. When an override is required, the Classification Committee shall document the override on the docket and the committee history form. The information on the Docket and the Committee History Form should match the information being entered on the computer.

The following pages include charts depicting the custody designation characteristics (Attachment A), the custody conversion chart (Attachment B) and guidelines the computer uses to assign computer recommended custodies (Attachment C). Refer to the TDCJ Classification Plan, 10/03 for more detailed information regarding custody designations.

ATTACHMENT 2.00A

OFFENDER CUSTODY CHARACTERISTICS AND BOUNDARIES
CORRECTIONAL INSTITUTIONS DIVISION

GENERAL POPULATION LEVEL 1 (G1/J1)

CHARACTERISTICS

G1/J1 custody– shall only be assigned to SAT II, Line Class I time-earning status, or State Jail offenders who have all of the following characteristics:

(1) No requirement for a more restrictive custody;
(2) No evidence of current psychological instability, (PULHES psych indicator of 2,3 or 4) based on the recommendation of mental health professional treatment staff, which would negatively impact the offender's ability to successfully function in General Population Level I (G1/J1) custody;
(3) No current or prior convictions for capital murder, murder or voluntary manslaughter; no current or prior convictions of any type where the offender intentionally caused the death of another person; no current or prior convictions of kidnapping, injury to a child, injury to the elderly, escape or stalking.
(4) No major disciplinary convictions resulting in major penalties within the past twenty-four (24) months for offender and/or staff assaults, with or without a weapon; no disciplinary offenses for extortion or sexual abuse.
(5) No placement of security precaution designator for escape (ES), staff assault (SA), hostage (HS); no predator codes of PD or PP.
(6) No placement of security precaution removal code of escape removal (NE), staff assault removal (NA), hostage removal (NS)
(7) No unresolved felony or United States Immigration Service detainers; no blue or white warrants for State Jail offenders
(8) To be promoted to G1/J1, must have a clear conduct record, with no disciplinary convictions resulting in major penalties, for a minimum period of six (6) months, unless a State Jail offender, then three (3) months, (newly-received offenders to TDCJ may be approved for immediate assignment to General Population Level I G1/J1).
(9) No pattern of freeworld convictions for offenses of violence, and no freeworld convictions for offenses of sexual misconduct.
(10) Must be within 24 months of parole eligibility.
(11) No confirmed or suspected STG.

BOUNDARIES

G1/J1 custody - SAT II, Line Class I time-earning status, or State Jail offenders are subject to the following classification boundaries:

(1) Eligible for contact visits with visitors on approved visitation list;
(2) May be eligible for consideration for an emergency absence;
(3) Eligible for consideration to participate in specialized vocational training programs;
(4) Unarmed periodic supervision required on job assignments or activities inside or outside the security perimeter (sight-checked at a minimum of once every two (2) hours);
(5) May be housed in a cell or dormitory, in accordance with the following guidelines;
   a. General Population Level I (G1/J1) - offenders shall be assigned to dormitories on a priority basis.
   b. General Population Level I (G1) – SAT II or Line Class I status offenders may be assigned to the trusty camp adjacent to their assigned unit upon approval by the Warden and medical department. Upon assignment to the trusty camp, the designation of OT will be utilized for custody and housing purposes. (Does not apply to State Jail offenders).
   c. General Population Level I (G1/J1) – SAT II, Line Class I time-earning status or State Jail offenders shall only be assigned to housing areas which are specifically designated for General Population (G1/J1) custody offenders. However, General Population I (G1/J1) and General Population Level II (G2/J2) offenders may be housed together, in exceptional circumstances, upon prior approval of the housing scheme by the Chairperson of the SCC.
(6) Recreation – Institutional offenders - allowed a minimum of four (4) hours weekdays; seven (7) hours weekends. (Refer to AD 03.40 for specific guidelines).

   State Jail offenders – allowed a minimum of four (4) hours weekdays. At least one (1) hour of this recreation time will be in the gym or outdoors (weather permitting). Seven (7) hours will be allowed on the weekends with at least two (2) hours of this recreation time in the gym or outdoors (weather permitting).
(7) Commissary – allowed to make commissary purchases up to $75 every (2) two weeks.
(8) Property – allowed to keep personal property except items restricted through disciplinary actions or under AD-03.72.
(9) Jobs - may be assigned to any job deemed appropriate by the unit administration.
(10) Education Programs – eligible for consideration to participate in academic programs if specific program criteria are met.

ATTACHMENT 2.00A

GENERAL POPULATION LEVEL 2 (G2/J2)

G2/J2 custody – shall primarily be assigned to those SAT III, IV, Line Class I time-earning status, or State Jail offenders who have all of the following characteristics:

(1) No requirement for a more restrictive custody;
(2) No recent pattern of in-prison assaultive behavior (three (3) or more separate disciplinary convictions resulting in major punishment within the past twenty-four (24) months for offender and/or staff assaults, with or without a weapon);
(3) In order to promote to Level II, must have a clear conduct record, with no disciplinary convictions resulting in major penalties for a minimum period of six (6) months, unless State Jail offender, then three (3) months, (newly received TDCJ offenders may be approved for immediate assignment to General Population Level II (G2/J2) custody);
(4) Offenders committed to TDCJ with 3G (murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, aggravated robbery, Health and Safety Code, Chapter 481.134 (c), (d), (e), and (f), sexual assault, any offense with affirmative finding – use of a deadly weapon) offenses for sentences of fifty (50) years or more must have served ten (10) years flat time to be eligible for General Population Level II (G2/J2) custody;
(5) Offenders committed to TDCJ-CID with non-3G offenses for sentences of fifty (50) years or more must have served five (5) years flat to be eligible for General Population Level II (G2/J2) custody;
(6) No placement of security precaution designator for escape (ES), staff assault (SA), hostage (HS);
(7) No placement of security precaution removal code of escape removal (NE), staff assault removal (NA), or hostage removal (NS) (unless State Jail offender).

G2/J2 custody – Primarily SAT III, SAT IV, Line Class I time-earning status, or State Jail offenders shall be subject to the following classification boundaries:

(1) Eligible for contact visits with immediate family members;
(2) May be eligible for consideration for an emergency absence;
(3) Requires direct armed supervision on job assignments and activities outside the security perimeter, and requires indirect supervision inside the security perimeter;
(4) May be housed in a cell or dormitory, in accordance with the following guidelines:
   a. General Population Level II (G2/J2) custody offenders may be assigned to a dormitory within the security perimeter; however, a General Population Level II (G2/J2) custody offender shall not be assigned to a trusty camp.
   b. General Population Level II (G2/J2) custody offenders shall only be assigned to housing areas which are specifically designated for General Population Level II (G2/J2) custody offenders. However, in exceptional circumstances, General Population Level II (G2/J2) and General Population Level I (G1/J1) offenders may be housed with General Population Level III (G3) custody offenders the main building of a unit with prior approval of the housing scheme by the Chairperson of the SCC.
(5) Recreation – Institutional offender - allowed four (4) hours weekdays; seven (7) hours weekends. (Refer to AD 03.40 for specific guidelines).

   State Jail offender – allowed four (4) hours of recreation each weekday. At least one (1) hour of this recreation time will be in the gym or outdoors (weather permitting). Seven (7) hours will be allowed on the weekends with at least two (2) hours of this recreation time in the gym or outdoors (weather permitting).
(6) Commissary – allowed to make commissary purchases up to $75 every two (2) weeks.
(7) Property – allowed to keep personal property except items restricted through disciplinary actions or under AD-03.72.
(8) Jobs - may be assigned to any job deemed appropriate by the unit administration. (Unless State Jail offender with a NE, NA, NS code). Offender in this category may not be assigned to maintenance work, clerk position, dock worker, or any job where the offender would have access to multiple areas of the unit.
(9) Education Programs - eligible for consideration to participate in academic/vocational programs if specific program criteria are met.

ATTACHMENT 2.00A

GENERAL POPULATION LEVEL 3 (G3, Does not apply to State Jail Offenders)

G3 custody – shall be assigned to primarily SAT III, SAT IV, or Line Class I time-earning status offenders. Custody shall only be assigned to offenders who have one or more of the following characteristics;

(1) No requirement for a more restrictive custody;
(2) No recent pattern of in-prison assaultive behavior (three (3) or more separate disciplinary convictions resulting in major punishment within the past twenty-four (24) months for offender and/or staff assaults, with or without a weapon);
(3) In order to promote to General Population Level III (G3), an offender must have a clear conduct record, with no disciplinary convictions resulting in major penalties for a minimum period of six (6) months, (newly received TDCJ offenders may be approved for immediate assignment to General Population Level III (G3) custody);
(4) Offenders committed to TDCJ for sentences of fifty (50) years or more for a 3G offense and have not served ten (10) flat years.
(5) Offenders committed to TDCJ for sentences of fifty (50) years or more for a non-3G offense and have not served five (5) flat years.
(6) No placement of security precaution designator of escape (ES), staff assault (SA) or hostage (HS);
(7) Placement of a security precaution removal code of escape removal (NE), staff assault removal (NA), or hostage removal (NS) will prevent an offender from being assigned to a custody less restrictive than G3.
(8) Offenders convicted of Capital Murder and sentenced to "life without parole".

The codes of escape (ES) and staff assault (SA) must be removed if the incident which caused the placement of the designator occurred more than ten (10) years ago in accordance with AD 04.11 (unless approved by the SPDRC to remain due to extraordinary circumstances).

G3 custody – Primarily SAT III, SAT IV, or Line Class I time-earning status offenders shall be subject to the following classification boundaries:

(1) Eligible for contact visits with immediate family members;
(2) May be eligible for consideration for an emergency absence;
(3) Requires direct armed supervision on job assignments and activities outside the security perimeter, and requires indirect supervision inside the security perimeter;
(4) May be housed in a cell or dormitory, in accordance with the following guidelines:
    a. General Population Level III (G3) custody offenders may be assigned to a dormitory inside the main building of a unit;
    b. General Population Level III (G3) custody offenders shall not be assigned to a dormitory outside of the main building of a unit, inside the security fence.
    c. General Population Level III (G3) custody offenders shall not be assigned to a trusty camp;
    d. General Population Level III (G3) custody offenders shall only be assigned to housing areas that are specifically designated for General Population Level III (G3) custody offenders. However, in exceptional circumstances, General Population Level III (G3) and General Population Level II (G2) offenders may be housed together upon prior approval of the housing scheme by the Chairperson of the SCC.
(5) Recreation – allowed four (4) hours weekdays; seven (7) hours weekends. (Refer to AD 03.40 for specific guidelines).
(6) Commissary – allowed to make commissary purchases up to $75 every two (2) weeks.
(7) Property – allowed to keep personal property except items restricted through disciplinary actions or under AD-03.72.
(8) Jobs - may be assigned to any job except maintenance worker, SSI, any other clerk position, dock worker, or any job where the offender would have access to multiple areas of the unit.
(9) Education Programs - eligible for consideration to participate in academic programs if specific program criteria are met. Access to vocational programs determined by Warden based on location of vocational shops.

ATTACHMENT 2.00A

GENERAL POPULATION LEVEL 4 (G4/J4)

G4/J4 custody – shall be primarily assigned to those SAT IV, Line Class I, II, III time-earning status, or State Jail offenders who have one or more of the following characteristics:

(1) No requirement for a more restrictive custody;
(2) Does not qualify for a less restrictive custody assignment;
(3) Has recently demonstrated a positive change in behavior and attitude and was previously in General Population Level V (G5/J5) custody;
(4) Two (2) or more non-assaultive disciplinary convictions resulting in major penalties within the past six (6) months;
(5) One (1) disciplinary conviction resulting in a major penalty for offender or staff assault without a weapon within the past twelve (12) months;
(6) Line Class II, III time-earning status, Institutional offender, if the offender is not assaultive or aggressive in nature. Age, physical size, and the circumstances surrounding any assaultive disciplinary offenses will be taken into consideration when determining appropriate custody assignment.
(7) Placement of a security precaution designator for escape (ES), staff assault (SA), or hostage (HS) will prevent an offender from being assigned to a custody less restrictive than G4/J4. Offenders with ES, SA and HS designators must be assigned to a Level 5 facility.

Note:
General Population Level IV (G4/J4) custody may be assigned to offenders who have the following characteristics:

A newly-received offender, upon transfer to his initial unit of assignment, may be assigned to General Population Level IV (G4/J4) custody by the UCC if the offender's current offense of record is for a violent crime; if the UCC establishes that the offender has a pattern of free-world convictions for offenses of violence; or if the offender has committed an assault on staff or offenders in an adult correctional institution within the past twenty-four (24) months.

G4/J4 custody – Primarily SAT IV, Line Class I, II, III time-earning status, or State Jail offenders shall be subject to the following classification boundaries:

(1) Generally, allowed one (1) visit each weekend; ineligible for contact visits; S3 and S4 Institutional offenders with one (1) year clear major disciplinary shall be allowed to receive contact visits with immediate family members (frequency dependent on time-earning status when applicable);
(2) Ineligible for emergency absence;
(3) Requires direct armed supervision on job assignments and activities outside the security perimeter; requires indirect supervision on jobs inside the security perimeter;
(4) Must be housed in a cell specifically designated for housing General Population Level IV (G4/J4) custody offenders. (Note: Female and State Jail offenders in General Population Level IV (G4/J4) custody may be housed in dormitories specifically designated for housing General Population Level IV (G4/J4) custody offenders.)
(5) Recreation – Institutional offender - allowed four (4) hours weekdays. (Refer to AD 03.40 for specific guidelines).

State Jail offender – allowed two (2) hours of recreation each weekday. At least one (1) hour of this recreation time will be in the gym or outdoors (weather permitting). Four (4) hours will be allowed on the weekends with at least one (1) hour of this recreation time in the gym or outdoors (weather permitting).
(6) Commissary – generally allowed to make commissary purchases up to $30 every two (2) weeks; however, SAT III, SAT IV, and State Jail offenders with one (1) year clear major disciplinary shall be allowed to make purchases up to $75 every two (2) weeks.
(7) Property – allowed to keep personal property except items restricted through disciplinary actions or under AD-03.72.
(8) Jobs – will generally be assigned to field force and secure jobs inside the perimeter as designated by the Warden. May not be assigned to maintenance worker, SSI, any other clerk position, dock worker, or any job where the offender would have access to multiple areas of the unit.
(9) Education Programs – participation in educational programs will be determined by the Warden on a unit by unit basis and specific program criteria. Access to vocational programs to be determined by the Warden based on location of the vocational shops.

ATTACHMENT 2.00A

GENERAL POPULATION LEVEL 5 (G5/J5)

G5/J5 custody – shall be primarily assigned to those Line Class I, II, III time-earning status or State Jail offenders who have one or more of the following characteristics:

(1) One (1) or more disciplinary conviction resulting in major penalty for an assault with a weapon on staff or offenders within the past twenty-four (24) months;
(2) Two (2) or more disciplinary convictions resulting in major penalties for offender or staff assaults without a weapon within the past twelve (12) months;
(3) One (1) or more disciplinary convictions resulting in major penalties for extortion or sexual abuse within the past twenty-four (24) months.
(4) Primarily Line I, II,III time-earning status, or State Jail offender, if the offender is assaultive or aggressive in nature. Age, physical size, and the circumstances surrounding any assaultive disciplinary offenses will be taken into consideration when determining appropriate custody assignment.
(5) Escape from a TDCJ secure adult correctional facility within the past five (5) years will prevent an offender from being assigned to a custody less restrictive than G5/J5.

Note:
General Population Level V (G5/J5) custody may be assigned to offenders who have the following characteristics:

(1) Recent history of escape or attempted escape from an adult correctional institution (within the past ten (10) years).
(2) A newly-arrived offender, upon transfer to his initial unit of assignment, may be assigned to General Population Level V (G5/J5) custody under the following circumstances:
   (a) If the current offense or record is for a violent crime against a person and the UCC does not establish that a pattern of convictions for violent acts exists, the offender may still be considered for (G5/J5) custody. However, the offender may be considered for assignment to a less restrictive custody in light of other classification characteristics.
   (b) If in addition to the offender's current conviction for a violent crime, a pattern of convictions for violent acts can be established by the UCC, then the offender may be assigned to (G5/J5) custody.
   (c) If the offender has committed an assault on staff or offenders in an adult correctional institution within the past twenty-four (24) months, then the offender may be assigned to (G5/J5) custody.

G5/J5 Custody – Primarily Line Class I, II, III time-earning-status, or State Jail offenders shall be subject to the following classification boundaries:

(1) Generally ineligible for SAT status good conduct time credits (does not apply to State Jail offenders);
(2) Ineligible for contact visits;
(3) Ineligible for an emergency absence;
(4) Requires direct armed supervision on job assignments and activities outside the security perimeter, requires direct supervision inside the security perimeter (however, certain positions with limited access to ingress/egress from the position (i.e., dishwasher) may be allowed frequent, indirect supervision with the approval of the Warden);
(5) Must be housed in a cell specifically designated for housing only General Population Level V (G5/J5) custody offenders;
(6) Recreation – Institutional offender - allowed two (2) hours a day; (Refer to AD 03.40 for specific guidelines).

   State Jail offender – allowed one (1) hour a day.
(7) Commissary – allowed to make commissary purchases up to $20 every two (2) weeks;
(8) Property – allowed to keep personal property except items restricted through disciplinary actions or under AD-03.72.
(9) Jobs – primarily assigned to field force. May not be assigned to maintenance worker, SSI, any other clerk position, dock worker, or any job where the offender would have access to multiple areas of the unit.
(10) Education Programs – generally ineligible for participation in educational programs but may be eligible in certain situations such as GRAD process.