NO. AP-75,634

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

ADRIAN ESTRADA,
Appellant,
VS.
THE STATE OF TEXAS,
Appellee.

Trial Court Cause No. 2006CR2079
Appeal from the 226th Judicial District
Bexar County, Texas

The Honorable SID HARLE, Judge, 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) ADRIAN ESTRADA, TDCJ # 999521, TDCJ Polunsky Unit, 3872 FM 30 South, Livingston, Texas 77351, is the appellant and was the defendant in the trial court. 2)The STATE OF TEXAS, by and through the Bexar County District Attorney's Office, 300 Dolorosa Street, San Antonio, TX 78205, is the appelle and prosecuted this case in the trial court.

The trial attorneys were as follows: (1) ADRIAN ESTRADA was represented by SUZANNE KRAMER, 101 Strumberg, San Antonio, TX 78204 and CELESTE RAMIREZ, 115 E Travis; Ste 431 San Antonio, TX, 78205. (2) The State of Texas was represented by SUSAN REED, District Attorney, and SCOTT SIMPSON and KRISTA MELTON, Assistant District Attorneys, 300 Dolorosa Street, San Antonio, TX 78205.

The appellate attorneys are as follows: (1) ADRIAN ESTRADA is represented by BRIAN W. STULL of the American Civil Liberties Union Capital Punishment Project, 201 W. Main Street, Suite 402, Durham, NC 27707, and CYNTHIA ORR of Goldstein, Goldstein, and Goldstein, Goldstein, & Hilley, 310 S. St. Mary's St., 29th Fl. Tower Life Bldg., San Antonio, TX 78205. (2) The State of Texas was represented by SUSAN REED, District Attorney, and CRYSTAL CHANDLER, Assistant District Attorney, 300 Dolorosa Street, San Antonio, TX 78205.

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MISCELLANEOUS

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

This brief is filed on behalf of Appellant, Adrian Estrada, by Brian W. Stull of the American Civil Liberties Union's Capital Punishment Project and Cynthia Orr of Goldstein, Goldstein, and Hilley.

On March 8, 2006, Adrian Estrada was indicted on two counts of capital murder. 1 CR 18.[1] The indictment alleged that, on or about the 12th Day of December, 2005, Mr. Estrada "did intentionally and knowingly cause the death of an individual, namely, Stephanie Sanchez, by cutting and stabbing [her] with a deadly weapon, namely a knife . . . and did intentionally and knowingly cause the death of another individual, namely, an unborn child, by cutting and stabbing the complainant with a deadly weapon, namely, a knife, and both murders were committed during the same criminal transaction." *Id.* The cause number case was 2006-CR-2079, and the case was docketed into the 226th District Court of Bexar County, Texas. *Id.*

An evidentiary hearing on Mr. Estrada's motion to suppress statements was held on January 29, 2007. 18 RR 1-39. On February 28, 2007, the trial court denied the motion in a written order setting forth its findings of facts and conclusions of law. SCR1 1-6. An evidentiary hearing on the defense's motion to recuse the District Attorney based on the State's seizure from Mr. Estrada's jail

[1] The citations to the record in this brief refer to the record volumes as follows: "RR" - Reporter's Record; "CR" - Clerk's Record; "SCR1" - Supplemental Clerk's Record, filed on May 12, 2008; "SCR2" – Supplemental clerk's record, filed on June 24, 2008.

cell of privileged attorney-client communications was held on January 4, 2007. 6 RR 1-38. The motion was denied on January 5, 2007. 8 RR 4.

Jury selection commenced on January 5, 2007, 7 RR 4, and the jury was sworn on January 30, 2007. 19 RR 7. The trial commenced that same day, *id.*, and Appellant was found guilty as charged on February 2, 2007. 22 RR 59. The sentencing phase commenced on February 6, 2007. The court presented two special issues to the jury. On February 7, 2007, the jury answered special issue No. 1, the future dangerousness issue, "Yes."24 RR 43. It answered special issue No. 2, the "mitigating circumstances" issue, "No." *Id.* The Honorable Sid Harle sentenced Appellant to death the same day. 24 RR 45. A Motion for New Trial was filed on March 7, 2007, SCR2 1-10, and apparently denied by operation of law. TEX. R. APP. PROC. 21.8 (c). Appeal in this case is automatic, pursuant to Tex. Code Crim. Proc. Art. 37.071 § 2 (h); TEX. R. APP. PROC. 25.2(b), and this brief is filed accordingly.

STATEMENT CONCERNING ORAL ARGUMENT

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

1) Remorseful, Peaceful, Non-violent, And A Model Prisoner Subject to Lifetime Incarceration if Not Executed, Adrian Estrada Poses Absolutely No Threat of Future Danger and the State's Showing of Future Dangerousness Was Legally Insufficient. (Appellant's Point 1)

2) By Presenting False and Highly Misleading Testimony on a Crucial Issue at the Penalty Phase of His Trial, The State Violated Mr. Estrada's Constitutional Rights Under The Fifth, Sixth, Eighth and Fourteenth Amendments. (Appellant's Point 2)

3) Trial Counsel Failed to Provide Constitutionally-Required Effective Assistance of Counsel When She Failed to Correct the Record by Introducing the Current TDCJ Classification Policy. (Appellant's Point 3)

4) The Police Failed to Scrupulously Honor Adrian Estrada's Invocation of the Right to Remain Silent During Custodial Interrogation. The Resulting Statement Must be Suppressed (Appellant's Point 8)

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

At the sentencing phase in this case, the State presented absolutely no evidence that Adrian Estrada would pose a threat of future danger. In fact, Mr. Estrada, 22, was known as peaceful and respectful, had no prior criminal record, and was a model inmate during a year-long pretrial incarceration. *See* Point 1. Instead, the prosecution persuaded the jury to find that Mr. Estrada would be a future danger by presenting false expert testimony on this crucial issue. In contradiction of clear Texas Department of Criminal Justice policy, the State's "expert" testified that Mr. Estrada would **not be subject to stringent conditions of custody** for the remainder of his life, if given a sentence of life imprisonment without parole. *See* Point 2. After hearing this false testimony, as well as the State's improper argument that Mr. Estrada posed a future danger because of violent conduct it believed he **would have committed had he not been apprehended and convicted,** *see* Points 1, 23, the jury found that Appellant would be a future danger and sentenced him to death.[1] Thus, the State obtained a death sentence by overreaching, a theme replayed throughout this prosecution.

The case began when Appellant's former girlfriend, pregnant, 17-year-old Stephanie Sanchez, was found dead in her San Antonio home on December 12, 2005. That same day, police detectives took Mr. Estrada to the police station, accused him vigorously of murder, and then continued custodial interrogation despite his repeated requests to cease the interrogation and go home, in violation

[1] The jury arrived at its death verdict only after sending one note asking what to do if it could not agree on the issue of future dangerousness and another asking if Mr. Estrada would ever be subject to less restrictive custody status. The trial court did not provide such clarification; the death sentence followed.

of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* Point 8.

At the guilt-innocence phase, the State repeatedly introduced irrelevant, yet highly prejudicial, evidence, including an emotion-packed 911 recording in which the victim's family members screamed uncontrollably. *See* Point 14. Equally improper and prejudicial were the State's opening argument and summation, which were replete with highly inflammatory arguments. *See* Points 17.

Adrian Estrada is the only person on death row who would not be there but for the killing of a woman pregnant with a non-viable fetus. His appeal is the first this Court will hear in which a defendant has been sentenced to death for this crime. And his appeal is among the first this Court will hear of a death sentence imposed since life without parole became the mandatory alternative sentence for a capital murder conviction. In the event that this Court does not grant relief on the numerous trial errors established herein, other constitutional violations require relief, including constitutional problems with the statutes under which he was convicted and sentenced to death. See Points 6, 33-39, 42-44, *infra*.

As demonstrated below, based on each of these and many other errors, this Court should reverse the trial court's judgment and order appropriate relief.

STATEMENT OF FACTS[2]

Statement Obtained by Police Ignoring Request to Cease Custodial Interrogation

On December 12, 2005, two San Antonio police officers and Detective

[2] The facts outlined below include the relevant background for many of Appellant's points of error. As necessary, additional facts are set forth in the pertinent points of error.

("Det.") Elizabeth Greiner came to Adrian Estrada's home. 18 RR 8-9, 21-22.[3] Mr. Estrada was then 22 years old.[4] His mother and older sisters were telling him to get an attorney, as was his pastor, who was then on the telephone. 18 RR 9. Det. Greiner told the family that "we wanted to speak with him," and "I just wanted to talk to him." 18 RR 21-22. Mr. Estrada was "offer[ed] a ride" to the police station, 18 RR 21-22, in an unmarked police vehicle, and driven there for an interrogation lasting "a little over five hours." 18 RR 12. On the way to the police station, Mr. Estrada spoke with his pastor on a police cell phone; the pastor again advised him to get a lawyer, but Det. Greiner ended the call by telling the pastor not to interfere. 18 RR 10-11; 29 RR State's Ex. 1 at 4.

The police "snuck" Mr. Estrada into the police station through "the back." App. 2 at 11 (10:04).[5] They placed him in "Room 4," a small interrogation room, where a camera (apparently hidden) was already recording. 29 RR State's Exhibit 2 (showing interrogation room, captioned "Room 4"). Although he had been told on the way to the police station that he would be "free to leave" and that the police

[3] References to the 18th volume of the Reporters Record are to the suppression hearing concerning this statement, as pertinent to Points 8-12, *infra*. The statement introduced at the guilt phase of the trial, State's Exhibit 2A, differed from the statement introduced at the hearing, State's Exhibit 2, only in that 2A was redacted to remove irrelevant and prejudicial references to the age of Mr. Estrada's then girlfriend, [redacted] who was 16. The State did not follow through with its promise to redact all such references, creating reversible error. *See* Appellant's Point 16, *infra*; 18 RR 48-49; 20 RR 13-16.

[4] 29 RR State's Exhibit 1 at 1 (police report stating Mr. Estrada's date of birth as July 9, 1983).

[5] Citations to "App. 2" refer to Appellant's Appendix 2, filed under separate cover. The appendix is a professionally-prepared transcript of the police interrogation of Mr. Estrada. All time cites refer to the time on the internal clock in the State's DVDs showing the interrogation. *See* 29 RR State's Exhibits 2 & 2A. Although State's Exhibit 2A is a minimally redacted version of State's Exhibit 2, the internal clock reads exactly the same in both DVDs. Therefore, with the exception of redactions, *see* Point 16, *infra*, an event cited at, for example, 10:04 may be found on either DVD at that time. The internal clock was an hour and fifteen minutes fast. 18 RR 20; SCR1 3. The interrogation commenced on the evening of Dec. 12, 2005. *Id.* All times noted from 9-12 are pm that day; times from 12 to 3 are am on Dec. 13, 2005.

would take him home if he wished, 18 RR 11-12, Mr. Estrada was not told he was free to move around the police station. Instead, officers brought him beverages, App. 2 at 2, and escorted him to the bathroom. App. 2 at 268-69 (1:45-1:51).[6]

Det. Greiner began the interrogation. App. 2 at 2 (9:58). Mr. Estrada stated he been romantically involved with Ms. Sanchez, a member of the youth group he led as a youth minister. App. 2 at 33-34. Their relationship had problems, *Id.* at 60, and Mr. Estrada eventually started seeing a different member of the group, [redacted] App. 2 at 145-46 (11:37). He later learned that Ms. Sanchez was pregnant and he likely the father. App. 2 at 93-94. He did not, initially, make any statements confessing to harming her. *Id.* at 156-57 (11:44:54).

Det. Curtis Walker eventually entered. App. 2 at 178 (12:36). Sitting between Mr. Estrada (seated in a corner) and the door, Det. Walker gestured with his fingers and hands, smacked them on the table for emphasis, and raised his voice frequently as he launched a series of allegations. State's Exhibit 2 at 12:57:17-1:04:27. He told Mr. Estrada that he had no doubt that Mr. Estrada committed homicide, that eyewitnesses identified him and his car, that he was the investigation's prime suspect and "central figure," that the police possessed enough evidence to charge him already and would do so in a probable cause statement, that he was a "cold blooded killer," and that he would be going to prison for a long time, where he would have a "boyfriend." App. 2 at 199-214

[6] Det. Greiner stated, "[You] need to go to the bathroom, I'll make sure no one's there, and I'll get one of the guys to walk you down the hall." App. 2 at 268-69. An unidentified male police officer entered the room a few moments later to escort Mr. Estrada to the bathroom. *Id.*

(12:53:50-1:04). Det. Elizabeth Greiner previously had advised Mr. Estrada that he was not under arrest, that he could leave at any time, and that he would be provided a ride home. 18 RR 11-12.

Once Det. Walker began to pressure him, Mr. Estrada said, ". . . I'm ready to leave," and, I'm gonna leave right now." App. 2 at 214-15 (1:03-1:04). Det. Walker responded by asking, "Do you want to talk to Det. Greiner before you leave or something?" *Id.* Mr. Estrada responded, "No." *Id.* He then requested a ride home, as he had been promised. *Id.* Det. Greiner returned to the room because she became aware Mr. Estrada was attempting to end the interrogation. 18 RR 23-24. Det. Walker explicitly told Det. Greiner, "Yeah, he's wanting to go home." App. 2 at 215 (1:04). Det. Greiner responded, "Oh okay. I was coming in to tell him what [Ms. [redacted] had to tell me." App. 2 at 215 (1:05). Mr. Estrada repeated his request to "go home." App. 2 at 216 (1:05). In response Det. Greiner asked, "You don't want to hear what she has to say?" App. 2 at 216-17 (1:05) 18 RR 16-17, 38-38. Mr. Estrada finally relented and the interrogation continued. *Id.*

Appellant then stated he went to Ms. Sanchez's house because he wanted to talk with her, and they had talked at her kitchen table. App. 2 at 230 (1:19). He told her that he was "tired of everything" and did not love her. App. 2 at 231 (1:20). She did not want to accept this, and "started getting out of control." App. 2 at 232 (1:20). He tried to leave; she tried to block him, slapping him in the face. App. 2 at 232-33, 239 (1:26). Distraught over their breakup and not wanting him to leave, she tried to stab him with a large knife from her kitchen. App. 2 at 226

(1:16), 239-43. Appellant said he then choked her as she continued to scream and curse and say she wanted to kill him; she dropped the knife, and he stabbed her repeatedly with it. App. 2 at 244-47 (1:31).[7] He stated, "I couldn't take it anymore, she wanted me … she was going to keep ruining my life." App. 2 at 226 (1:16). Crying, Mr. Estrada said, "I didn't go over there intending to do that." App. 2 at 229 (1:18).[8] He stated nothing about the fetus, and no desire to harm it.

During the interrogation, Mr. Estrada cried,[9] said he regretted his acts which were not "justifiable,"[10] and cooperated with the police.[11]

Having obtained this inculpatory statement and abundant other evidence, the police said they would take Mr. Estrada home, 20 RR 21, after going to his sister's home to collect the shirt he had been wearing. App. 2 at 273 (1:57), 275, 294-95 (2:43); 18 RR 31-32. Telegraphing their belief that Mr. Estrada was cooperative and not dangerous, the police said they would take him wherever he wanted, App. 2 at 287-88 (2:08), and finally drove him home. 18 RR 32. The police were not worried: they retired to a diner to await a warrant. 20 RR 21.

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[7] Medical evidence established repeated stabbing of Ms. Sanchez's neck and back. 20 RR 91-92.

[8] Mr. Estrada stated that he used the knife with which Ms. Sanchez tried to cut him, which came from her kitchen where she was cooking. State's Exhibit 2 at 239-40. He said he discarded the knife on the street. State's Exhibit 2 at 247-48. The crime scene detective said that knives were missing from the kitchen's knife set. 19 RR 127-28. There is no evidence that Mr. Estrada came armed to Ms. Sanchez's home.

[9] *See* 29 RR State's Exhibit 2A at 1:10:47-1:20; 1:26:14-1:26:44; 1:33:32-1:34:10; 2:10-2:45 (all showing crying); App. 2 at 223, 224, 225, 290, 294-295 (all noting crying).

[10] *See* App. 2 at 223 (responding to Det. Greiner's suggestion that he acted in self defense, Mr. Estrada said it was not "justifiable"); 261 (it was a "mistake I made that I regret so bad . . .").

[11] Soon after Det. Mussey tried to contact Mr. Estrada, hours after the homicide, Mr. Estrada returned his call. 19 RR 201-202. During the interrogation, the police repeatedly praised Mr. Estrada for being forthcoming and cooperative. *See* App. 2 at 275-76 ("You're cooperating, you've told me where everything is, you know . . . ."); 276 ("And you wanted to keep talking and you've cooperated . . ."); 282 ("Well, it – you've been cooperative. We're more than willing to cooperate with you, okay."). *See also generally* State's Exhibits 2, 2A, 4.

The State introduced Mr. Estrada's confession into evidence. 19 RR 225.

Other Guilt-Phase Evidence

Over defense objection, the prosecution commenced its case by introducing into evidence a nearly seven-minute audiotape of the 911 call Ms. Sanchez's family members made upon discovering her body. 18 RR 44-46;19 RR 22; 30 RR State's Exhibit 5 (CD recording of 911 call). On this recording, family members scream and cry uncontrollably and unintelligibly, scream that the father of the victim is "going crazy," and appeal to fellow family members to administer first aid.[12] At trial, one of the family members testified to essentially these same facts, including the administration of CPR and attempts to give her aid. 19 RR 63-72.

Neighbor Rosizela Figueroa testified that she saw a green Camaro in the Sanchez driveway on the December 2005 day of a 17-year old neighbor's death. 19 RR 29, 34-35. She identified a photograph of a black car belonging to Adrian Estrada as the car she saw that day. 19 RR 29-30, 34-35. Neighbor Blanca Valenzuela testified that she saw a black Trans Am backed into the driveway of the deceased young woman that day. 19 RR 40-43. She identified Adrian Estrada as the driver, and said that she had seen him about 15 times with her, often on Tuesday nights when bible study was held at her home. 19 RR 40-43. He was with a girl who sat in the passenger side of the car, who had long hair. 19 RR 47. She said she saw Appellant walk out of the house that afternoon. 19 RR 48, 50.

[12] Although the State responded to defense objections to this evidence by insisting it needed to introduce the 911 call for the fact that blood flowed from the victim's mouth, purportedly pertinent to later medical testimony, 18 RR 46-47, Jonathan Vargas, the State's own witness, testified to precisely this fact at trial. 19 RR 72. *See* Point 14, *infra*.

On December 12, 2005, emergency medical services personnel responded to the home of Stephanie Sanchez. 19 RR 78-79. Medical evidence established that she had been stabbed repeatedly in the neck and back. 20 RR 91-92.

The State introduced evidence of Mr. Estrada's cell phone records, showing he was in the general vicinity of Ms. Sanchez's home that day, 20 RR 46-48, 63-65; 30 RR State's Exhibits 56, 60, 61, a video recording of Mr. Estrada purchasing a shirt at Walmart that day, 20 RR 52-53; 30 RR State's Exhibit 57, and police testimony stating that officers could not find the shoes and knife Mr. Estrada said he had discarded from his car on a city street many hours earlier. 20 RR 20-21.

Ms. Sanchez's physician testified that Ms. Sanchez had previously had an abortion in 2004 and a miscarriage in July of 2005. 21 RR 8-9; 29 RR State's Exhibits 41, 43. Her third pregnancy appeared to be developing normally, 21 RR 15-16, and the non-viable fetus was approximately 13 weeks old on December 12, 2005. 21 RR 17-19. DNA evidence established that it was 92,000 times more likely that Mr. Estrada was the father than a person selected at random. 21 RR 91.

Ms. Sanchez's mother, Mary Vargas, approved of the relationship between her daughter and Mr. Estrada. 19 RR 160-61. She said Mr. Estrada "was never violent" and "never . . . disrespectful." 19 RR 196. She knew about the abortion, and that Appellant had driven her daughter to have the procedure. 19 RR 163. When Ms. Sanchez became pregnant again and miscarried, Mr. Estrada met the Sanchez family at the hospital. 19 RR 172. Ms. [redacted] believed that they broke up after the miscarriage, but were still talking. 19 RR 174. The two spent a day

together, and Ms. Sanchez became pregnant again some weeks later. 19 RR 176-77. Ms. [redacted] also testified to conversations between her family and the church pastors; initially, they told the church Appellant impregnated their daughter; then they said he had not, allegedly at Appellant's request. 19 RR 179-80.

Ms. [redacted] also testified to "victim-impact" evidence, including Ms. Sanchez's aspirations to work as a missionary after graduation. 19 RR 154-59.

Appellant moved for a directed verdict on the charge of murder of the fetus because the State presented no evidence that he knowingly or intentionally caused the death of the fetus, rather than recklessly or negligently. 21 RR 102-03. The State responded by relying solely on a theory of "transferred intent," *i.e.*, his intent to kill Ms. Sanchez sufficed for both counts of murder. 21 RR 103. Although the court would later deny the State's request for a transferred intent instruction, 21 RR 136-40, it overruled the defense motion for a directed verdict. 21 RR 104.

State's Guilt-Innocence Summation: During its summation, the State speculated that the killing was spurred by a disagreement over whether Ms. Sanchez would get an abortion, 22 RR 52-53; argued that Appellant "knowingly killed the baby" because "he already got rid of one baby" when he "took her down there for the abortion," 22 RR 52; speculated that the stab wounds in the neck were "for mom," and the second set were for "baby," 22 RR 55-56; asserted that the victim's home was "filled with the dreams and hopes of a 17-year-old mother to be," 22 RR 22; argued that Mr. Estrada had failed to state that he did not intend to kill the fetus. 22 RR 16-17. It concluded by contending the jury would commit

a crime by not returning a verdict of capital murder. 22 RR 56.

The jury convicted Mr. Estrada of capital murder. 22 RR 59.

Sentencing Phase

Attempting to prove future dangerousness, the State relied solely on the capital conviction and on Appellant's sexual misconduct, while a youth minister, with two young women from the El Sendero Church. [redacted] testified that Appellant subjected her to unwanted sexual touching and fondling during separate incidents in November of 2004 and April of 2005, but not intercourse. 23 RR 13-23. He was 21 and she 15. 23 RR 13; 29 RR State's Exhibit 1 at 1.

[redacted] testified she had had a consensual sexual relationship with Appellant. 23 RR 60-62. She said she was in love with him at the time. *Id*. They started dating in the summer of 2005; he was 22, she 16. 23 RR 34, 36.

Peaceful, Respectful, and Non-Violent: Corrections officers testified that Mr. Estrada's disciplinary history during his year of pretrial incarceration was exemplary. 23 RR 123. He was "very polite[,] . . . good-natured," got along well with others and didn't "strong arm" anyone. *Id.* 127.

Mr. Estrada had previously been employed at the San Antonio College Library. 23 RR 132. His supervisor, Linda Casas, a librarian for 28 years, described his work as follows, "It was great. I mean he earned the respect from the other – his other coworkers," who unlike Mr. Estrada, "were "all [college] students, and they all worked great together." *Id.* 133. Ms. Casas explained, "I would leave them alone for three to four hours knowing that the job was being

done." *Id.* Part of his job involved helping students who approached the library counter with the computers and databases. 23 RR 136. Ms. Casas never saw Mr. Estrada be violent or disrespectful to anyone, or be quick to anger. *Id.* at 134.

Weir Labatt is a former city councilman who employed Adrian's mother as a housekeeper for 26 years. 23 RR 137. He knew Adrian since his birth. *Id.* at 138. He explained that Adrian was raised by his mother, and had no father. *Id.* As a child, Adrian used to come to the Labatt home with his mother. *Id.* When Adrian's mother became a citizen two years before trial, Mr. Labatt was there and he saw Adrian proudly supporting his mother. 23 RR 139. Mr. Labatt related that Adrian had participated in football, track, and ROTC. *Id.* Mr. Labatt's wife gave Adrian a guitar, and he became a very good player. 23 RR 140. Adrian had recently helped the Labatt family clear cedar at their home and telephoned when Mr. Labatt's mother-in-law passed away. *Id.* Mr. Labatt knew that Adrian dreamed of becoming a firefighter, but a prosecution objection to this evidence was sustained. *Id.* Adrian was "never violent or disrespectful." 23 RR 141. Mr. Labatt was aware that Adrian had no prior criminal record. *Id.* He observed that Adrian "was a very nice, attractive, clean cut, well-behaved young man." *Id.*

The defense also presented the testimony of expert Larry Fitzgerald, a former spokesman for Texas Department of Criminal Justice (TDCJ), who explained the security employed in the incarceration of inmates sentenced to life imprisonment without parole. 23 RR 149-53. Mr. Fitzgerald explained that the best possible classification for an inmate sentenced to life imprisonment without

parole is "G3," which imposes restrictive limits on the inmate's prison jobs, where he can be housed, and the movement permitted. *Id.* at 149-51. This classification prohibits inmates from ever having a job outside the perimeter walls of the prison and from leaving the prison without armed escort. 23 RR 150. An inmate sentenced to life imprisonment without parole would **never** be eligible for a less restrictive status than G3. *Id.* at 149-50, 174-75.

Peace Officer A.P. Merillat, who investigated crimes within TDCJ for the Special Prosecution Unit, testified in rebuttal. 23 RR 176. His testimony contradicted Mr. Fitzgerald's. Officer Merillat stated that if an inmate has "an aggravated sentence, which capital life is an aggravated sentence, **you have to remain in the G-3 position for 10 years before you can be considered for promotion from that level.**" 23 RR 181 (emphasis added).

This "expert" rebuttal testimony was demonstrably false. TDCJ had, in fact, already adopted and promulgated classification procedures for life-without-parole sentences,[13] procedures which clearly and unequivocally stated 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." *Unit Classification Procedure* 2.0, Texas Department of Criminal Justice at 2 (Appellant's Appendix 1 (filed under separate cover) at 3).[14] The

[13] The law went into effect on September 1, 2005. *See* TEXAS PENAL CODE ANN. § 12.31.
[14] *See also Fewer restrictions not an option: Life without parole offenders face a lifetime of tight supervision Criminal Justice* CONNECTIONS, January/February 2006 Issue (available at http://www.tdcj.state.tx.us/mediasvc/connections/JanFeb2006/agency2_v13no3.html) (last checked October 29, 2008) (reporting in January of 2006 that inmates "sentenced to life without parole are not

State did not stop Mr. Merillat's materially false and highly misleading testimony. Signaling the importance of this issue, the jury later submitted a jury note questioning which "expert" testimony was correct on this question. 2 CR 546-47.

State's Sentencing Phase Summation: Future Danger?

In its penalty-phase summation, the State argued future dangerousness. 24 RR 10-13. Its argument, however, was hypothetical and speculative – Mr. Estrada would have harmed [redacted] **if** he had not been arrested in this case **and if** the two had eventually broken up. 24 RR 12-13. *See also* 24 RR 9 (arguing that Appellant poses the "type of danger . . . that parents can't protect their children from," even though incarcerated capital murders have no access to children).

Jury Note Evincing Serious Questions About Future Dangerousness

The jury charge required a decision on, *inter alia*, special issue 1 – whether "there is a probability that the defendant, Adrian Estrada, would commit criminal acts of violence that would constitute a continuing threat to society." 2 CR 548-53. Attempting to answer this issue, the jury sent two notes to the court. In the first, the jury asked "what happens if we can't come to a decision on issue 1?" 2 CR 544-45. In the second, it asked, "Based on the testimony of Fitzgerald and Merilatt, is there a possibility that the defendant would be eligible for a less restrictive status after 10 years (or some other period of time)?" 2 CR 546-47 (parenthetical in original). Although TDCJ had already promulgated a policy

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eligible for a less restrictive custody than General Population Level 3 (G3) . . . and that "'G3 is the highest custody level an offender can receive'") (quoting Classifications and Records Operations Manager Becky Price)). Appellant explains why judicial notice of the TDCJ policy is appropriate in note 39, *infra*.

specifically answering this question in the negative, *see* note 14, *supra*, the prosecutor did not apprise the jury of this fact which it needed to do its job. Instead, it allowed the court to answer, "You have the law and the evidence." 24 RR 42; 2 CR 540-41. Approximately four hours later, the jury returned a death verdict, finding that Mr. Estrada posed a threat of future danger. 24 RR 42-43.

POINTS OF ERROR:

ADRIAN ESTRADA POSES NO THREAT OF FUTURE DANGER

1. Remorseful, Peaceful, Non-violent, And A Model Prisoner Subject to Lifetime Incarceration if Not Executed, Adrian Estrada Poses Absolutely No Threat of Future Danger and the State's Showing of Future Dangerousness Was Legally Insufficient.

Corrections officers who guarded Adrian Estrada during his year-plus pretrial incarceration testified that he was peaceful and law-abiding. Character witnesses who knew him for years testified that he was peaceful, respectful, helpful, and caring. Police officers, who could have arrested him after his statement, instead, praised him for his cooperation and released him into the community. Mr. Estrada cried profusely during his video-taped interrogation, and cooperated. The State provided no expert testimony stating he would pose a future danger, nor any character evidence against him. If his conviction is affirmed, Mr. Estrada will never walk the streets again and will die in prison either from old age or by execution. In these circumstances, he poses no threat of future violence to anyone. The state's proof of future dangerousness was legally insufficient.[15]

[15] *See* U.S. Const. amend. XIV; *Jackson v. Virginia*, 443 U.S. 307, 323 (1979).

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 (Tex.Crim.App. 2007) (citation omitted). 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.*

It is so here. Other than his capital conviction for killing his pregnant girlfriend, the State relied **only** on Appellant's sexual conduct, while a youth minister, with two young women from the El Sendero Church to allege future dangerousness. Mr. Estrada was 21 to 22 years old at the time of the allegations; the young women ranged from 15 to 16. Ms. [redacted] testified she was subject to Appellant's unwanted sexual touching and fondling during two incidents, but that there was no intercourse. 23 RR 14-23. Ms. [redacted] said she had a consensual sexual relationship with Appellant. 23 RR 61-62. She said she was in love with him at the time. 23 RR 62. The State's allegations were limited to these teenagers whom Appellant was "leading" as a youth pastor; it did not show a threat of future danger in any other circumstance. This evidence was legally insufficient. *See Berry*, 233 S.W.3d at 864 (finding legally insufficient evidence where dangerousness proven only in circumstances not present in prison).

As detailed herein, this Court has cited various circumstances

demonstrating a lack of future dangerousness and others that would support it. Mr. Estrada's case involves abundant evidence of the former and wholly insufficient evidence of the latter. For example, the State's proof lacked expert or character testimony suggesting that Mr. Estrada is a future danger, a key factor this Court has repeatedly cited when finding legally insufficient evidence.[16] Also important under this Court's cases, Mr. Estrada is remorseful, as exhibited during his interrogation when he cried[17] and said he regretted his acts which were not "justifiable."[18] Similarly, he cooperated with the police.[19]

Significantly, a former employer and a former San Antonio city councilman[20] each testified to Mr. Estrada's helpfulness, thoughtfulness, and

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[16] *See Smith v. State*, 779 S.W.2d 417, 419-21 (Tex.Crim.App. 1989) (insufficient evidence of future dangerousness when it showed appellant had peaceable reputation in the community, was described as "mild mannered," with no history of violence or prior criminal conduct, and **the state did not introduce opinion testimony of future dangerousness**); *Keeton v. State*, 724 S.W.2d 58, 61-64 (Tex.Crim.App. 1987) (same where although "murder was clearly senseless, unnecessary and cold-blooded . . . **[t]here was no psychiatric evidence . . . nor 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 concerning 20-year old offender 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 v. State*, 600 S.W.2d 288, 293-94 (Tex.Crim.App. 1980) (same where the state failed to present evidence of other criminal acts, **character evidence or psychiatric testimony**), *overruled on other grounds*, *Janecka v. State*, 739 S.W.2d 813 (Tex.Crim.App. 1987); *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**).

[17] *See* 29 RR State's Exhibit 2A at 1:10:47-1:20; 1:26:14-1:26:44; 1:33:32-1:34:10; 2:10-2:45 (all showing crying); App. 2 at 223, 224, 225, 290, 294-295 (all noting crying).

[18] *Compare* App. 2 at 223 (1:10:31) (responding to police suggestion Mr. Estrada acted in self defense, he said it was not "justifiable"); 261 (1:42:22) (it was a "mistake I made that I regret so bad . . .") *with Barney v. State*, 698 S.W.2d 114 (Tex.Crim.App. 1985) (finding future danger and noting **lack of remorse**).

[19] Soon after Det. Mussey tried to contact Mr. Estrada, hours after the homicide, Mr. Estrada returned the call. 19 RR 201-202. During the interrogation, the police repeatedly praised Mr. Estrada for being forthcoming and cooperative. *See* App. 2 at 275-76 (1:59) ("You're cooperating, you've told me where everything is, you know, you're doing this of your free will."); 276 (1:59:37) ("And you wanted to keep talking and you've cooperated . . ."); 282 (2:04:16) ("Well, it – you've been cooperative. We're more than willing to cooperate with you, okay."); 286 (2:07:58) ("Do you know what, you can hold your head up high cause you told the truth.") *Compare with Martinez v. State*, 924 S.W.2d 693, 697 (Tex.Crim.App. 1996) (finding sufficient evidence of future danger and noting appellant's lack of cooperation with police).

[20] The former councilman is Mr. Labatt, whose home Mr. Estrada's mother cleaned for years. 23 RR 137.

caring. 23 RR 132-36; 139-141.[21] No witness refuted these observations given under oath. Indeed, the State's own witness, Mary Vargas, agreed that he "was never violent" and that "he never was disrespectful." 19 RR 196.

Another key indicator regarding future dangerousness during a sentence of life without parole is conduct during incarceration.[22] Here, corrections officers testified that Mr. Estrada's disciplinary history was spotless. 23 RR 123. He was "very polite[,] . . . good-natured," got along well with others and did not "strong arm" anyone. 23 RR 127. The jury heard absolutely no evidence to suggest that Mr. Estrada's behavior would change if sentenced to life without parole.

Mr. Estrada was young at the time of the offense – 22 years of age -- another factor this Court has cited.[23] 29 RR State's Exhibit 1 at 1. Moreover, Mr. Estrada's record of prior offenses, limited to the unadjudicated offenses concerning the other two teens,[24] is **less severe** than the records of most of the

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[21] *See Smith*, 779 S.W.2d at 419-21 (finding legally insufficient evidence of future dangerousness where appellant had a peaceable reputation and was described as "mild mannered").

[22] *Compare Marras v. State,* 741 S.W.2d 395, 407-08 (Tex.Crim.App. 1987) (finding insufficient evidence of future dangerousness where officers testified he "was a peaceable and trusted inmate"), *overruled on other grounds*, *Garrett v. State*, 851 S.W.2d 853 (Tex.Crim.App. 1993) *with Williams v. State*, __S.W.3d __, 2008 WL 2355932, at *21-22 (Tex.Crim.App. June 11, 2008) (finding sufficient evidence of future dangerousness and noting "violent behavior in jail, gang membership," and "prison disciplinary reports, show[ing] that appellant was involved in numerous fights while incarcerated . . . "); *Masterson v. State*, 155 S.W.3d 167, 173 (Tex.Crim.App. 2005) (same and noting "Appellant's violent conduct . . . in the county jail, including fighting with other inmates and . . . verbal threats to one deputy . . ."); *Chambers v. State,* 866 S.W.2d 9, 17 (Tex.Crim.App. 1993) ("Officers from the Smith County Jail testified that appellant was a disciplinary problem who had to be segregated from the prison population because of his inability to interact with the others and his propensity to resort to violence.").

[23] *See*, *e.g.*, *Huffman v. State*, 746 S.W.2d 212, 224-25 (Tex.Crim.App. 1988) (overturning death sentence for murder by 22-year old, and citing youth as factor).

[24] These allegations are admittedly serious. Based on the testimony, Mr. Estrada could be prosecuted for Indecency With a Child (applicable to teen victims under 17, provided, *inter alia*, the perpetrator is not less than 3 years older), TEX. PENAL LAW § 21.11, and Sexual Assault, TEX. PENAL LAW § 22.011, each of which are felonies in the second degree, punishable by 2-20 years imprisonment. TEX. PENAL LAW § 12.33. Serious as they are, however, these allegations are different in kind from the types of aggravated and violent prior conduct (or convictions) this Court has held show future dangerousness. *See*, *e.g.*, *Brooks*

defendants for whom this Court has found legally insufficient evidence.[25]

The opinions of the police, as revealed in their conduct, also demonstrate that Adrian Estrada poses no threat of future danger. This Court has repeatedly held that a police officer's observation-based opinion about a defendant's likelihood of future violence is relevant to his future-dangerousness. *Lane v. State*, 933 S.W.2d 504, 507 (Tex.Crim.App. 1996) (citing *Chambers,* 866 S.W.2d at 17). Here, the evidence shows that the responsible police detectives – who interrogated Mr. Estrada for hours, obtained an inculpatory statement, and closely investigated the homicide – clearly did not believe he would pose a threat of violence. After they had obtained a confession, they told him that they would take him wherever he wanted, released him, and retired to a diner to await a warrant. 20 RR 21; App. 2 at 287 (2:08) ("[I]t's your choice wherever you'd like us to take you."). If Mr. Estrada had posed any threat of violence, these highly experienced

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v. State, 990 S.W.2d 278, 284-85 (Tex.Crim.App. 1999) (relying on prior drive-by shooting, unlawfully carrying a weapon, assault and battery during various acts of violence, burglary of habitation, physical assaults on fellow inmates and prison officials); *Whitaker v. State*, 977 S.W.2d 595 (Tex.Crim.App. 1998) (relying on "evidence that appellant assaulted woman, assaulted another woman during their relationship, and that appellant kidnapped another woman, threatening her with a butcher knife until she provided appellant with the phone number of a friend who was hiding from appellant . . ."); *Amos v. State*, 819 S.W.2d 156, 162 (Tex.Crim.App. 1991) (citing "a prior assault upon a police officer in the course of an arrest" after one of "several auto thefts involving dangerous high speed chases").

[25] *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, 659 (Tex.Crim.App. 1991) (same despite evidence of appellant's 8-10 unadjudicated burglaries, assaults on his father-in-law and reputation for not being peaceable or law-abiding in jail); *Huffman*, 746 S.W.2d at 224-25 (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,* 741 S.W.2d at 407-08 (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."); *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*, 618 S.W.2d at 68-69 (same despite prior robbery attempt).

detectives, 19 RR 210, would never have released him from their custody.

This Court's recent decision finding legal insufficiency -- *Berry v. State* -- provides additional guidance. In *Berry*, 233 S.W.3d at 864, the appellant killed her newborn child and abandoned another newborn. The State showed the appellant's pattern of keeping "children sired by one man and discarding the children sired by other men." *Id.* But it did not show a threat of future danger in any other circumstance. *Id.* This Court found only "a very low probability that, if sentenced to life in prison, she will have any more children, and that therefore it is unlikely that she would be a danger in the future." *Id.* The Court also found that the State's summation misstated the law and misdirected the jury's attention by asking it to assume that "appellant would be living in the freeworld," posing a danger to another child. *Id.* at 863. Under the law then in effect, the appellant, if not sentenced to death, would have served 40 years before becoming eligible for release, past her childbearing years and ability to repeat her crime. *Id.* at 864. This Court found the evidence of future dangerousness legally insufficient. *Id.*

Here, too, the State merely showed a pattern of sexual misconduct between Appellant (then 21-22) and teenagers in his youth group, and presented evidence that he had killed one who had become pregnant. However, "it did not prove that any other stimulus led to a violent or dangerous act in any other context." *Berry*, 233 S.W.3d at 864. If allowed to live, Mr. Estrada will spend the rest of his life in

prison. Art. 44.251 (a).[26] The State offered absolutely no evidence that he would have access to teenage women, much less that he would be placed in an authority position over them. Texas prisons house women and men separately.[27] The stimulus to Mr. Estrada's past crimes does not existent in prison.[28] *Cf. Berry*, 233 S.W.3d at 864 (finding "a very low probability that, if sentenced to life in prison, [appellant] will have any more children"). The State failed to show any possibility (much less a probability beyond a reasonable doubt) that Mr. Estrada would commit any crimes under the "lifetime of tight supervision await[ing] offenders sentenced to life without parole in Texas."[29]

And, as in *Berry*, without any evidence of future dangerousness, the State employed a misleading summation to obtain a death sentence. Just as the State in *Berry* misleadingly contended that the appellant could harm another child – a

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[26] Unless otherwise indicated, "article" shall refer to articles of the TEXAS CODE OF CRIMINAL PROCEDURE.

[27] *See*, *e.g.*, *Berry*, 233 S.W.3d at 863; http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm (listing separate male and female units) (last checked Oct. 29, 2008).

[28] Officer Merillat testified that inmates had taken women guards as hostages and engaged in consensual sexual encounters with guards, and that interrelated crimes (like smuggling contraband) occurred. 23 RR 185-86. None of this evidence, however, was tied to Adrian Estrada, whose disciplinary record in jail was exemplary. 23 RR 123, 127. And none of these crimes or scenarios bears any resemblance to the stimulus of Mr. Estrada's unadjudicated crimes – relationships with young women charges in his youth group. The State's reliance on acts by other inmates to prove Mr. Estrada's future conduct constitutes mere speculation. But legally sufficient proof emerges from facts and evidence, not speculation. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex.Crim.App. 2007) (ruling that "conclusions based on mere speculation or factually unsupported inferences or presumptions . . ." do not constitute legally sufficient evidence). Tellingly, when the State argued against a bail reduction, it contended only that Appellant posed a threat of future danger to "the members of his youth group should he make bond." 2 RR 17.

[29] *See* http://www.tdcj.state.tx.us/mediasvc/connections/JanFeb2006/agency2_v13no3.html) (last checked October 29, 2008). This lifetime of tight supervision was also established by Mr. Fitzgerald's testimony. 23 RR 150-151, 174-75. *See also* App. 1. Officer Merillat's testimony to the contrary, 23 RR 181, completely contradicts black and white TDCJ written policy and should not be considered by this Court.

This Court has held that future dangerousness concerns danger both in prison and the "free world." *Berry,* 233 S.W.3d at 863 (collecting cases). In those cases, however, life without parole was not the alternative sentencing option, as now required. Art. 37.071 § 2(g). Now, for the jury to consider a defendant's danger in the free world, it would have to find proof beyond a reasonable doubt that there was a probability the defendant would escape or be released from prison outside the present law. Art. 37.071 § 2(g). The jury heard no such evidence.

hypothetical event that almost certainly could not have occurred – the State here misleadingly speculated that Appellant might have harmed Ms. [redacted] in the past had certain contingencies occurred. *See also* 24 RR 9-10 (arguing that Appellant poses the "type of danger . . . that parents can't protect their children from"). Similarly, the prosecutor sought to convince the jury of future dangerousness by calling Mr. Estrada "evil upon evil upon evil." 24 RR 32. As this Court explained in *Berry*, however, "'evil' does not equate with 'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" *Berry*, 233 S.W.3d at 864 n.6.[30]

In a futile attempt to shore up its insufficient proof of future dangerousness, the State sought to convince the jury that the crime was premeditated. Rather than relying on the type of evidence this Court has found demonstrative of premeditation and future dangerousness,[31] however, the State relied on conduct with little if any probative value of premeditation and, indeed, subject to innocent explanations.[32] 24 RR 29 (arguing that he backed in the car, arrived while victim was alone, and had previously said, "I wish I could kill [her] for all the trouble she's been causing me"). Absent other evidence indicating that the crime was premeditated, such as use of a disguise, entering the home under cover of night, or

[30] This Court also observed, "Robert Hanssen . . . and Aldrich Ames . . . are likely considered 'evil' by many persons, but they have never been accused of committing criminal acts of violence." *Id.* at 864 n.6.
[31] *See*, *e.g.*, *Dinkins v. State*, 894 S.W.2d 330, 360 (Tex.Crim.App. 1995) (finding future danger and that appellant "anticipated a conflict and armed himself in preparation," used a fake name to meet victim, purchased a gun and ammunition day before, and "secreted two pistols in his sling" for meeting).
[32] Although conduct subject either to an innocent or an inculpatory explanation may create "*reasonable suspicion* of involvement in criminal activity . . . justify[ing] a temporary stop or detention," *Woods v. State*, 956 S.W.2d 33, 37 (Tex.Crim.App. 1997), it lacks sufficient probative value to satisfy the heavy burden of proving future danger beyond a reasonable doubt. Art. 37.071 § 2(a)(2)(c).

bringing arms there,[33] the speculative evidence on which the State relied does not rebut Mr. Estrada's plain-spoken confession, stating that he had not planned to kill or harm his girlfriend. App. 2 at 224-29.[34] The State's self-serving arguments that the jury should believe **only** the portions of Appellant's statement it says are true – and disbelieve the parts showing he does not deserve the death penalty – do not transform legally insufficient evidence into sufficient evidence.[35]

This point of error discusses eleven different decisions by this Court finding legally insufficient evidence of future danger, and six finding sufficient evidence. Mr. Estrada easily poses an equally low (if not lower) threat of future danger than the defendants in all of the cases where this Court has found legally insufficiency. The State's patently insufficient case of future dangerousness here is worlds apart from that found in the many decisions of this Court affirming future dangerousness findings, including those cited herein. To allow the death

[33] There was no evidence Mr. Estrada brought to Ms. Sanchez's home the knife used to kill her. Indeed, his statement indicated the knife came from her home. App. 2 at 240 ("It was on the stove.").

[34] Even if this Court were to find planning or premeditation based on the ambiguous evidence on which the State relies, a weak showing of premeditation alone does not demonstrate legally sufficient evidence of future dangerousness. Premeditation and planning were also present in *Berry*, 233 S.W.3d at 866 ("These were calculated crimes conceived and carried out by appellant alone apparently with the motive to keep the father of her other three children from discovering that she was 'messing' with someone else.") (Hervey, J., dissenting). But this Court still found legally insufficient evidence of future dangerousness. *Id.* at 864. *See also Garcia v. State,* 626 S.W.2d 46, 51 (Tex.Crim.App. 1981) (finding insufficient evidence to support a finding of future dangerousness, despite evidence of premeditation); *Wallace*, 618 S.W.2d at 71(same).

[35] The State also repeatedly argued that the brutality of the crime sufficiently proved future dangerousness. 24 RR 10-12, 37-38. This Court has repeatedly rejected virtually identical arguments in cases with equal or greater brutality. *See Smith*, 779 S.W.2d at 420 (insufficient evidence of future dangerousness even though death caused by 14 stab wounds after victim was tied down and raped); *Huffman*, 746 S.W.2d at 214, 217 (same 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 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*, 600 S.W.2d at 292 (same where 6-year old victim "had died of asphyxiation," was stabbed numerous times and bruised in the head and face).

penalty for Adrian Estrada when he does not pose a threat of future danger is to allow a death penalty of one. Such an arbitrary and freakish result would not only violate this Court's jurisprudence on legal sufficiency of future dangerousness, but also Mr. Estrada's right to be free from cruel and unusual punishment. U.S. Const. amend. VIII. *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

The State's theme in favor of death was that Mr. Estrada was a wolf in sheep's clothing, evil masked in the cloak of good. 24 RR 9; 23 RR 6-7. In truth, every prisoner sentenced to life without parole bears the unmistakable mark of a convicted capital murderer – a prison-issue jump suit and mandatory confinement under "tight supervision." Serving life without parole as a convicted capital murderer, Mr. Estrada would have no stimulus to commit the type of crimes this case involves and no ability to do so. The State's evidence proves completely unconvincing, and legally insufficient.[36]

2. By Presenting False and Highly Misleading Testimony on a Crucial Issue at the Penalty Phase of His Trial, The State Violated Mr. Estrada's Constitutional Rights Under The Fifth, Sixth, Eighth and Fourteenth Amendments.

TDCJ Policy: (effective 9-2005) *"[O]ffenders convicted of Capital Murder and sentenced to 'life without parole'* ***will not be classified to a custody less restriction than G-3 throughout their incarceration****."*[37]

Officer Merillat: (2007 Trial) *"[I]f you have an aggravated sentence, which capital life is an aggravated sentence,* ***you have to remain in the G-3 position for 10 years before you can be considered for***

[36] To the extent this Court disagrees, it should reverse the conviction and order a new sentencing trial because the death sentence lacks support by factually sufficient evidence. *See* Point 5, *infra*.
[37] TDCJ Unit Classification Policy, Effective Sept. 1, 2005. *See* App. 1 at 3.

promotion from that level."[38]

Lacking evidence that Mr. Estrada poses a threat of future danger, the State relied on the false and highly misleading testimony of its "expert" witness regarding TDCJ classification to obtain a death sentence. Officer A.P. Merillat falsely testified that capital murderers sentenced to life without parole are eligible for a lenient prison custody status after 10 years, misinformation the prosecution failed to correct. The crucial need to correct this false testimony could not have been greater than when the jury asked in a note what it should do if it could not agree on future dangerousness and then asked if, based on Mr. Fitzgerald and Officer Merillat's testimony, Mr. Estrada would be eligible for a less restrictive custody status after 10 years. 2 CR 544-47. By allowing this false testimony to go uncorrected in the first instance, and especially after these jury notes, the State deprived the jury of crucial information it needed to make its decision and violated Mr. Estrada's constitutional rights. *See* U.S. Const. amends. V, VI, VIII, XIV.

Factual History: In Texas, effective September 1, 2005, almost 18 months before Mr. Estrada's February 2007 sentencing trial, life without parole became the only sentencing alternative to a death sentence for capital murder. *See* TEXAS PENAL CODE, § 12.31. In July of 2005, TDCJ adopted and promulgated classification procedures for sentences of life without parole, stating unambiguously that "offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G-3

[38] Testimony of Officer A.P. Merillat against Adrian Estrada on Feb. 6, 2007 (23 RR 181).

throughout their incarceration." *Unit Classification Procedure* 2.0, Texas Department of Criminal Justice, at 2 (Appellant's Appendix 1 at 3).[39] In January of 2006, TDCJ disseminated news of this change in its newsletter.[40]

The G-3 classification issue proved to be a critical, if not dispositive, issue for the sentencing jury. The defense presented the testimony of former TDCJ spokesman Fitzgerald. 23 RR 145-58. Mr. Fitzgerald testified that capital murderers sentenced to life imprisonment without parole begin their incarceration in General Population Level III status, known as G-3. 23 RR 162-63. At G-3, an offender "will never have a job outside the perimeter walls of the penitentiary" and "will never leave the outside of the penitentiary without direct armed escort." 23 RR 150.[41] In contrast, offenders with less restrictive custody can work outside the prison's perimeter on a garden or a hoe squad. 23 RR 150-51. While capital murderers could receive **a more restrictive** status than G-3 through misbehavior, their status could **never** become less restrictive. 23 RR 150-151, 174-75.

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[39] Appellant requests that this Court take judicial notice of this TDCJ regulation because it constitutes an adjudicative fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201(b) (setting forth when judicial notice is appropriate). Appellate courts have discretion to take judicial notice under this rule, and should do so "where necessary to avoid an unjust judgment." *Watkins v. State*, 245 S.W.3d 444, 456 (Tex.Crim.App. 2008) (citing Steven Goode et. al, 1 TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 201.7, 75 (3d ed. 2002)). *See*, *e.g.*, *Ex parte Stover*, 946 S.W.2d 343, 344 n.2 (Tex.Crim.App. 1997) (taking "judicial notice that Cenikor is a non-profit organization" providing substance-abuse treatment). The TDCJ's *Unit Classification Procedure* 2.0 (July 2005) existed at the time of this 2007 trial, its accuracy cannot be reasonably disputed and it is verifiable through TDCJ. Thus, taking judicial notice is fully appropriate and within this Court's discretion. This Court should exercise its discretion to do so in order to rectify Appellant's unjust death sentence, which, as explained below, is predicated on the State's misrepresentation of TDCJ policy.

[40] *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 checked Oct. 29, 2008) (disseminating this new classification policy).

[41] The status also "limits the amount of time – limits the type of job the person can have inside a prison system[,] . . . dictates where the person can stay[, and their] . . . movement. . . ." 23 RR 150.

On the State's rebuttal, directly contradicting Mr. Fitzgerald and the extant TDCJ written policy cited above, Officer Merillat[42] stated authoritatively during his direct examination that if "you have an aggravated sentence, which capital life is an aggravated sentence, **you have to remain in the G-3 position for 10 years before you can be considered for promotion from that level.**" 23 RR 181 (emphasis added). Responding to Mr. Fitzgerald's testimony that an inmate would never be permitted to rise higher than the G-3 level, Officer Merillat claimed, again during direct, "The prison – life without parole is brand-new to the state of Texas. The prison system hasn't had to face that situation yet. This will be one of the very first few times that they have to face it. So there are no – there is nothing to fall back on . . . ." 23 RR 181. When asked on cross if TDCJ had changed its classification policy in the wake of the 2005 law, Officer Merillat responded, "Not to my knowledge." 23 RR 197. The prosecution was charged with pursuing the truth and a just verdict.[43] Yet it did nothing to correct the misinformation Officer Merillat gave to the jury. The result was a corruption of the integrity and truth-seeking function of the trial forum.

The length of time Mr. Estrada would spend in G-3 proved crucial to the jury's decision on future dangerousness. To argue future danger, the prosecutor emphasized the possibility of Mr. Estrada harming a TDCJ employee or escaping.

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[42] Officer Merillat works for Walker County as a law enforcement officer with the Special Prosecution Unit, a state-funded agency. See 23 RR 161-62.

[43] The prosecutor is the representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* TEX. CODE CRIM. PROC. art. 2.01 (stating duty of prosecutor in nearly identical terms).

24 RR 32-36. Obviously, the possibility of Mr. Estrada escaping would increase if he were permitted a less restrictive custody status than G-3, allowing him to work outside the prison walls, to leave without an armed escort, and to work on a "hoe squad" or in similar jobs. 23 RR 150-51. In turn, the defense staked its argument that Mr. Estrada would not pose a threat of danger on the argument that he would "**never"** be permitted a custody status less restrictive than G-3. 24 RR 18-19.

The jury notes bear out the importance of this factual issue to the jury's future dangerousness inquiry. During their penalty phase deliberations, the jurors, obviously struggling to decide the first special issue, asked the Court what would happen if they could not agree on future dangerousness. 2 CR 544-45. They then submitted a second note concerning precisely the classification issue: "Based on the testimony of Fitzgerald and Merilatt [sic], is there a possibility that the defendant would be eligible for a less restrictive status after 10 years (or some other period of time)." 2 CR 546-47. The Court responded: "You have the law and the evidence. Please continue your deliberations." 24 RR 42; 2 CR 540-41. Based on the false evidence before it, the jury decided shortly thereafter that Mr. Estrada would pose a threat of future danger and sentenced him to die.

A. The State Violated *Napue v. Illinois*, 360 U.S. 264 (1959), by Presenting False and Highly Misleading Testimony Crucial to the Jury's Decision to Impose a Death Sentence.

Constitutional due process prohibits the State from securing a conviction or

death sentence through the use of false or highly misleading evidence.[44] This rule entitles Mr. Estrada to a reversal of his death sentence because: (1) Officer Merillat's statements that Appellant would become eligible for less restrictive custody than G-3 "were actually false" and highly misleading;[45] (2) "the state knew they were false" and highly misleading, or should have known they were false and highly misleading;[46] and (3) the statements were material, *i.e.*, not harmless beyond a reasonable doubt.[47] Because there is more than a "reasonable likelihood that the false testimony could have affected the judgment of th[is] jury,"[48] whose decision on future dangerousness depended on this very issue, 2 CR 546-47, Mr. Estrada is entitled to a new sentencing trial.

Actually false and Highly Misleading: It is beyond dispute that Officer Merillat's testimony was actually false and highly misleading. His claims that capital murderers would, with good behavior, become eligible for a more lenient custody level than G-3 after 10 years, and that "there was nothing to fall back on" in 2007, 23 RR 181, were completely false. TDCJ Unit Classification Procedure

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[44] *See Napue*, 360 U.S. at 269 (holding that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment") (citations omitted); *see also Ex parte Castellano*, 863 S.W.2d 476, 479-80 (Tex.Crim.App. 1993) (same).

[45] *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994); *United States v. Rivera Pedin,* 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) (rejecting argument that "the prosecutor's failure to correct . . . false testimony should be excused because the prosecutor believed that [the false] denial was unwitting rather than knowing[:] . . . the *Napue* rule applies where testimony, 'even though technically not perjurious, would surely be highly misleading to the jury . . .'") quoting *Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976)).

[46] *See Ex parte Adams*, 768 S.W.2d 281, 289 (Tex.Crim.App. 1989) (*Napue* applies "where the prosecution knew or should have known that perjured testimony was utilized to secure a conviction") (internal quotation omitted) citing *United States v. Agurs*, 427 U.S. 97, 103 (1976) (reaffirming "knew or should have known" standard); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("whether the nondisclosure [is] a result of negligence or design, it is the responsibility of the prosecutor.")); *Duggan v. State*, 778 S.W.2d 465, 468 (Tex.Crim.App. 1989) ("It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized [its] misleading nature . . . ").

[47] *Ex parte Castellano*, 863 S.W.2d at 485 (citing constitutional harmless error rule).

[48] *United States v. Agurs*, 427 U.S. 97, 103 (1976).

2.0, **adopted in July of 2005**, demonstrates unequivocally that capital murderers **never** become eligible for a more lenient custody status than G-3.

Mr. Estrada need not prove perjury or technical falsity. 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."[49] "There is no need for a defendant to show the witness knew the testimony was false or otherwise harbored a sufficient culpable mental state to render the witness subject to prosecution for perjury." *Ramirez*, 96 S.W.3d at 395. As a leading treatise explains, "whether the rule is violated or not does not depend upon the defendant's ability to demonstrate the witness's specific factual assertions were technically incorrect or 'false.'"[50]

Applying this standard, Merillat's claim that capital murderers could earn a less restrictive status than G-3 after 10 years was certainly false and misleading.

State knew or should have known: The State knew or should have known that Officer Merillat's claims were false for three reasons.

First, the prosecutors themselves knew or should have known. The TDCJ policy, forbidding a capital murderer sentenced to life without parole from ever leaving the four walls of prison without an armed guard, is not merely a technical or obscure fact of concern only to corrections experts. Instead, this information is of critical importance to the prosecutor's job in ascertaining: 1) which defendants

[49] *See 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.
[50] 42 George E. Dix & Robert O. Dawson, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.53 (2d ed. 2002).

pose a threat of future danger warranting the State's pursuit of a death sentence; 2) the appropriateness of plea dispositions in capital cases; and 3) how to prove future dangerousness, when a death sentence is sought.[51] Representing the State of Texas, which relies on TDCJ to incarcerate its convicts, the prosecution sought a death sentence based on its position that Mr. Estrada posed a threat of future danger if not executed. Demonstrating that it **did know** the importance of classification to this special issue, the prosecution specifically asked about it, both on cross examination of Mr. Fitzgerald and of its own expert. 23 RR 162-64, 179-83. If the prosecution did not, in fact, know about TDCJ Unit Classification Procedure 2.0, it had a duty to inquire of other state personnel, including those at the TDCJ both before calling Officer Merillat to the stand and after the jury sent its second note.[52] Asking the jury to sentence Mr. Estrada to death based on TDCJ classification evidence, the prosecution, at a minimum, should have known the current TDCJ policy, readily available on the TDCJ website, and crucial to the jury's decision. *Ex parte Adams*, 768 S.W.2d at 289 (setting forth "should have

[51] The American Bar Association ("ABA") Standards support the common-sense notion that the prosecutors knew or should have known the correct and current policy, given its crucial importance to the future dangerousness inquiry. *See* ABA Prosecution Function, Standard 3-6.2 (a) Information Relevant to Sentencing (available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.2) (last visited Oct. 29, 2008) (requiring prosecutor to provide the sentencing court with "**complete and accurate information** for use in the presentence report . . . [and to] **take steps to present the complete and correct information to the court and to defense counsel**). Although this standard applies to presentence reports, the broader principle – that prosecutors must supply the sentencer with reliable information – applies equally here. The ABA standards illuminate what the prosecutor knew or should have known. Indeed, the Supreme Court cited ABA discovery standards in support of its holding in *Giglio*, 405 U.S. at 154.

[52] The prosecutor's primary "duty [was] not to convict, but to see that justice is done." Art. 2.01. Clearly, justice required that the State acquire accurate sentencing information from TDCJ, especially once the jury crystallized the importance of this issue. *See also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding in context of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that prosecutors have a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case").

known" standard). Although whether its ignorance was in good or bad faith is legally "irrelevant for due process purposes,"[53] if the State did not know, it was willfully or recklessly ignorant of a fact of life and death consequence.

Second, the State's "investigative and prosecutorial personnel," *Castellano*, 863 S.W.2d at 480 n.3, including Officer Merillat himself, knew or should have known that his testimony was false and highly misleading. Courts impute the knowledge of the "prosecution team" to prosecutors.[54] Officer Merillat works for Walker County as a peace officer with the Special Prosecution Unit, a state-funded agency. *See* 23 RR 161-62.[55] The State's witness list represents that he is an "expert on TDC[J]." 2 CR 420. His expertise on Texas prisons is also self-professed.[56] An expert, he had an obligation to know the current TDCJ policy, particularly that to which he swears in support of a death sentence. Given the

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[53] *See Thomas v. State*, 841 S.W.2d 399, 402 n.5 (Tex.Crim.App. 1992).

[54] *See Ex parte Fierro*, 934 S.W.2d 370, 372 n.3 (Tex.Crim.App. 1996) (finding constitutional violation where police officer provided false testimony, disproven by police report, and **stating that "prosecutors have a duty to reveal the perjured testimony of members of the 'prosecution team,' whether or not the prosecutor has knowledge of such perjury**," but finding insufficient prejudice under habeas rules) (emphasis added); *Ex parte Castellano*, 863 S.W.2d at 479 (imputing to the prosecutor knowledge of police officer who investigated case but acted with private motive to falsify evidence); *Ex parte Adams*, 768 S.W.2d at 291-92 (finding *Napue* violation where prosecutor failed to correct inaccurate testimony that witness had identified suspect in pretrial lineup, where police officer conducting lineup knew that was false). *See also United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (cited often by Texas courts and imputing knowledge of state police officers to federal prosecutor) (Under *Napue*, "this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.").

[55] *See also* TEX. GOV'T CODE §§ 41.301-.310 (establishing Special Prosecution Unit and its functions).

[56] Officer Merillat has said that he does not receive compensation for his testimony as an expert witness; he testifies as part of his job duties, like any other law enforcement officer witness. *See* A.P. Merillat, *Future Danger?,* Texas District & County Attorneys Association 13 (3d ed. 2004). Officer Merillat often consults with and testifies for district attorneys across Texas on the issue of future dangerousness, sits on several TDCAA committees, and has been described as a "true gift to TDCAA and prosecutor offices all over the state." *See* Editor's Note, *id.* at vii. He has published several editions of his book entitled *Future Danger?*, which was distributed to all felony prosecutors throughout Texas in 2004, funded by grants from this Court. *See* Publications, *Future Danger?*, Texas District and County Attorneys' Association, *available at* http://www.tdcaa.com/node/1075 (last visited Oct.29, 2008).

stakes, there is absolutely no excuse for him not to know an extremely pertinent, **18-month-old,** published TDCJ classification policy that was the subject of his testimony contradicting Mr. Fitzgerald. Again, although his good or bad faith is legally irrelevant, *Thomas*, 841 S.W.2d at 402 n.5, if he did not know the current policy, it could only be the result of a reckless or willful failure.

Third, the TDCJ is properly considered part of the prosecutorial team for *Napue* purposes under these circumstances. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987) (finding *Brady* obligation applied to state youth agency in case prosecuted by Pittsburgh District Attorney's Office); *id.* at 44 n.4 (same although prosecutor for commonwealth did not have access to state agency's file).[57]

Highly Prejudicial: There can be no question that prejudice ensued from the State's failure to correct this false and highly misleading testimony. The State's evidence of future danger was weak at best. *See* Point 1. Adding to other ample evidence of lack of future danger, proof that Mr. Estrada could never receive a less restrictive status than G-3 and would not become eligible for a better status after 10 years would certainly have strengthened his sentencing phase defense that he was not a future danger. It also would have further undermined the

[57] *See also McCambridge v. Hall*, 303 F.3d 24, 47-48 (1st Cir. 2002) (finding *Brady* violation where exculpatory information was possessed by the Criminal History Systems Board of Massachusetts, rather than local prosecutor); *Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir. 1997) (requiring local prosecutor to disclose exculpatory state prison records impeaching state witness to defendant); *Love v. Johnson*, 57 F.3d 1305, 1314 (4th Cir. 1995) (citing *Ritchie* and holding that State's obligation is "not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control"); *State v. Bates*, 348 N.C. 29, 38-39 (N.C. 1998) (same); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *but cf. Shanks v. State,* 13 S.W.3d 83, 86 (Tex. App.-Texarkana 2000, *no pet.*) (finding TDCJ personnel records of peripheral state witness not subject to disclosure under *Brady*).

State's claim that he was. Such information was material to the determination of the first special issue, and would have resolved a crucial issue for the jury. Indeed, through its second note, the jurors effectively stated that this information was extremely material to – and needed for – their decision on punishment.[58]

Given Officer Merillat's testimony that Mr. Estrada might eventually receive a less restrictive status than G-3, combined with the testimony that Mr. Estrada was a model inmate, 23 RR 123, and the State's argument that he would harm TDCJ employees and could possibly escape, 24 RR 32-35, the jury likely saw it as a real possibility that Mr. Estrada would one day gain a less restrictive status and an opportunity to leave the prison walls and/or harm a civilian or TDCJ employee.[59] As their note suggests, the jurors might well have determined that he would not present a continuing threat at G-3 or a more restrictive level, but that he could present a continuing threat of future danger at a less restrictive level.

In addition, the jury might well have given greater weight to Officer Merillat's testimony. He purportedly had more recent exposure to the prison system than Mr. Fitzgerald, whom the State, through vigorous cross examination, established had left TDCJ in 2003, with no personal involvement there since then. 23 RR 158-59. Officer Merillat's cloak of expertise and current investigations within TDCJ might well have made his testimony that much more influential and

[58] *Cf. Gongora v. Quarterman*, Slip Opinion, No. 07-70031, 2008 WL 4656992 *4 (5th Cir. Oct. 22, 2008) (not designated for publication) (relying on jury notes "demonstrate[ing] that the prosecutor's comments may have influenced the jury's finding . . .," to find prejudice).

[59] Indeed, Officer Merillat testified that inmates had taken women guards as hostages, engaged in consensual sexual encounters with guards, and that interrelated crimes occurred (like smuggling contraband). 23 RR 185-86. These types of crimes would obviously be more likely to occur if an inmate could gain less restrictive status than G3.

consequently that much more prejudicial to Mr. Estrada. In any event, the jury may well have concluded that it did not want to risk returning a life sentence if there was a legitimate chance that Officer Merillat's testimony was correct.

Rather than a difference of opinion or perception,[60] this case presents the constitutionally intolerable risk that outright misinformation produced the death sentence. While the jury heard one expert's correct testimony that a capital murderer could never obtain a better classification than G-3, it also heard the State expert's contradictory "rebuttal" testimony. This false testimony dislodged an unambiguous and verifiable fact, leaving in its place untruth or, at best, a question mark. Through its note, the jury conveyed that its life and death decision hinged on the interrelated classification and future danger issues. But the classification "issue" was a specter of the State's own making. By sponsoring inaccurate testimony that Mr. Estrada could eventually garner greater access to the public, the State blindfolded the jury and turned a case with no evidence of future danger into one resulting in a death sentence. The trial forum was utterly corrupted.

Finally, any "lack of diligence by the defense counsel" does not obviate the requirement of reversal of this unjust death sentence.[61] With this *Napue* claim, "relief . . . may not depend on whether more able, diligent or fortunate counsel

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[60] *Compare with Losada v. State,* 721 S.W.2d 305, 312 (Tex.Crim.App. 1986) (dismissing discrepancy in testimony among witnesses as to a particular date as genuine confusion); *Marshall v. State*, 210 S.W.3d 618, 635-36 (Tex.Crim.App. 2006) (similar), *cert. denied,* 128 S. Ct. 87 (2007). Unlike these cases, Officer Merillat told an outright falsehood, and the jury could not have known that Mr. Fitzgerald testified completely consistently with the extant TDCJ written policy. With the trial court's insistence that the jurors "have all the law and the evidence," 24 RR 42; 2 CR 540-41, the jury was left in the dark that Mr. Fitzgerald was right and the "evidence" from Officer Merillat false.

[61] *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)).

might possibly have come upon the evidence on his own."[62] In short, counsel's level of diligence is not the issue.[63]

Mr. Estrada's eligibility to obtain a less restrictive status than G-3 was plainly crucial to the jury's decision on future dangerousness, and thus whether to sentence him to life imprisonment or death. Officer Merillat's false testimony on this issue, unchecked by the State, proved fatal to Mr. Estrada's defense that he was not a future danger. Based on the jury's second note, it is all but certain that the jury would have found no future dangerousness had it not been misled and misinformed. This is far more than a "reasonable likelihood" that the false or misleading statement affected the judgment of the jury. *Giglio*, 405 U.S. at 154. Reversal of Mr. Estrada's death sentence is therefore required.

B. Officer Merillat's False and Misleading Testimony Violated Mr. Estrada's Rights to Due Process, Irrespective of the Knowledge or Constructive Knowledge of the Prosecution.

Even if the prosecution neither knew nor should have known that Officer Merillat's testimony was false, as sworn testimony of a state agent, Officer Merillat's false and misleading claims violated Mr. Estrada's due process rights all by itself.[64]

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[62] *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).

[63] In any event, defense counsel was ineffective for failing to correct the record. *See* Point 3, *infra*.

[64] *See Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958) (finding, irrespective of the prosecutor's knowledge, that detective's "knowingly false testimony . . . was sufficient to cause the defendants' trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness"); *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) (concluding that, if proven, a state laboratory technician's "deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a

C. The State Violated the Eighth Amendment by Allowing a Death Sentence Based on Materially False Evidence Concerning Classification.

The State's reliance on Officer Merillat's false testimony to obtain a death sentence also violated the Eighth Amendment. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court overturned a capital sentence because of a prosecutor's false statement during closing argument at the penalty, resulting in a "decision [that] does not meet the standard of reliability that the Eighth Amendment requires." *Id*. at 341.[65] Here, too, the jury's death sentence is unreliable because it rests on the State's false representation – here in the form of crucial testimony on the issue of future dangerousness.[66] The constitutionality of Texas's death penalty depends on the jury hearing "all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (Stevens, J.) (plurality opinion). Obviously, hearing **all** of the relevant evidence means **not hearing** demonstrably false and highly misleading evidence on the issue of life or death. Based on false and highly misleading testimony placed before the jury by the State, Mr. Estrada's death sentence is arbitrary and capricious and violates the Eighth Amendment. *Gregg*, 428 U.S. at 188. Accordingly, the sentence must be reversed.

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defendant's due process rights"). *But cf. Briscoe v. LaHue*, 460 U.S. 325, 326 n.1 (1983) ("The Court has . . . not held that the false testimony of a police officer in itself violates constitutional rights.").

[65] *See also Mills v. Maryland*, 486 U.S. 367, 376-77 (1988) ("In reviewing death [penalty cases], the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.") (citing *Lockett v. Ohio*, 438 U.S. 586, (1978) (plurality opinion)). *Cf. Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing sentence based on "materially untrue" evidence, "whether caused by carelessness or design").

[66] *See also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) (overturning death sentence resulting from trial judge's reliance on potentially unreliable secret information not disclosed to defense); *id.* at 362-64 (opinion of White, J.) (stating procedure "fails to meet the 'need for reliability in the determination that death is the appropriate punishment.'") (internal citations and quotation marks omitted).

3. Trial Counsel Failed to Provide Constitutionally-Required Effective Assistance of Counsel When She Failed to Correct the Record by Introducing the Current TDCJ Classification Policy.

In addition, defense counsel was ineffective for allowing Officer Merillat to mislead the jury with his demonstrably incorrect claim that inmates sentenced to life without parole can achieve a custody status less restrictive than G-3 after 10 years.[67] 23 RR 181. Faced with the circumstances here, no reasonably competent defense attorney could have missed the opportunity to simultaneously contradict the State's key expert with the State of Texas's own duly enacted policy and to use the State's own words to support the defense theory disputing future dangerousness.[68] Where a preponderance of the evidence in the record demonstrates that there "is … no plausible professional reason for a specific act or omission," a claim of ineffective assistance of counsel may be raised on direct appeal and sustained if there is sufficient prejudice.[69]

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 would have

[67] 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). A basic investigation, like that undertaken by appellate counsel, would have revealed the then extant TDCJ policy.
[68] Counsel explicitly argued that Mr. Estrada would not pose a threat of danger because he would be subject, at a minimum, to G-3 conditions for the rest of his life. *See* 24 RR 18-19.
[69] *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). *See*, *e.g.*, *Andrews v. State*, 159 S.W.3d 98, 102-03 (Tex.Crim.App. 2005) (finding ineffectiveness 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).

chosen life without parole.[70] Accordingly, Mr. Estrada 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 attorney could have failed to learn of and obtain. As appellate counsel quickly learned through the simple expedient of an internet search using Google (G3 "life without parole"), a reasonably-competent attorney could not have avoided learning of the current policy.[71] A basic open records request of TDCJ would have led to the written policy itself. *See* App. 1. Undoubtedly, other avenues to this information also exist. Counsel's failure to locate any of several avenues to the truth, and to guide the jury there, was inexcusable and completely ineffective.

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.[72] Both the Supreme Court and this Court

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[70] *Strickland v. Washington*, 466 U.S. 668, 687 (1984); U.S. Const. amends. VI, XIV. As Appellant demonstrates in Point 40, *infra*, counsel was ineffective on numerous other grounds. To the extent that the Court does not find sufficient prejudice to warrant relief flowing from the unprofessional error discussed in this point, it should consider this harm in combination with the harm flowing from counsel's other errors.

[71] *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 checked Oct. 29, 2008) (disseminating this new classification policy).

[72] *See 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 10.11(A) ("As set out in Guideline 10.7(A), counsel at every stage of the case have **a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation**."); 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

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)).[73] Moreover, these precedents uniformly hold that counsel cannot make a reasonable strategic decision without first conducting an adequate investigation.[74] Here, by failing to take the simple investigative steps that would have led to the extant TDCJ written policy, counsel failed to conduct an adequate investigation and her representation fell below basic competence.

Counsel's argument to the jury demonstrated that there was no imaginable "strategic motive" for her fatal investigative omissions. *Andrews*, 159 S.W.3d at 101. Counsel staked her argument against future dangerousness on Mr. Estrada's restriction to G-3 status for life (called 3-G in counsel's argument below):

> Mr. Fitzgerald told you that Mr. Estrada will never, no matter what, get a higher level than this 3-G . . . He will never be allowed to work outside the prison walls. He will never be allowed any furloughs. There will be certain areas in the TDC system that he won't be allowed to work, such as administrative offices. And, of course, if there's any disciplinary problems, that level could certainly go lower. . . . Many of their freedoms were taken away, and these freedoms can never be gained back by these people who get this 3-G classification.

24 RR 18-19. Counsel could have, but failed to, fortify this challenged fact with

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added); 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); 10.7 (A) (requiring independent investigations relating to the issues of both guilt and penalty."). *See also* State Bar of Texas Guidelines and Standards for Texas Capital Counsel Guideline 11.7 (F)(3) (same as ABA Guidelines for Capital Counsel 10.11 (F)(3) (published in 69 TEXAS BAR JOURNAL 966, 974 (2006) (available at www.texasbar.com) (last checked Oct. 29, 2008)).

[73] *See also Rompilla*, 545 U.S. at 387 (quoting *Wiggins*); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *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).

[74] *See*, *e.g.*, *Wiggins*, 539 U.S. at 534 (holding that strategic choices cannot be made without complete investigation or reasonable professional judgment to limit investigation).

unassailable documentary evidence. Obviously, obtaining such evidence and presenting it to the jury would have substantially bolstered counsel's trial strategy. No competent attorney would have missed the opportunity to solidify her theory of the case with the duly established written policy of the State of Texas.[75]

At trial, the conflicting testimonies of Mr. Fitzgerald and Officer Merillat resulted in a falsely-perceived contest of experts and unnecessary jury confusion. 2 CR 546-47. Armed with the written policy, however, competent counsel could have completely prevented or dispelled this confusion through a variety of methods, including: 1) introducing the written policy through Mr. Fitzgerald, through an appropriate TDCJ witness, or by asking the trial court to take judicial notice of the policy;[76] 2) introducing the written policy through one of the aforementioned methods in surrebuttal; 3) cross examining Officer Merillat on the written policy, which flatly contradicts his trial testimony; 4) moving to strike Officer Merillat's false and misleading testimony as outside the scope of his expertise and unreliable;[77] 5) asking the prosecutor to withdraw Officer Merillat's false and misleading testimony on this point, a request that likely would have been

[75] *See, e.g., Jacobs v. Horn*, 395 F.3d 92, 104 (3rd Cir. 2005) (finding trial counsel ineffective for failing "to investigate and discover evidence to support the defense he pursued.").
[76] Judicial notice would have been appropriate because the TDCJ regulation constitutes an adjudicative fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201(b). With a Texas seal and appropriate attestation, *see, e.g.,* App. 1, the document would be self-authenticating. TEX. R. EVID. 902 (1).
[77] 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 Officer Merillat has, his testimony on current classification policy is obviously unreliable and falls outside his field of expertise.

granted;[78] or 6) moving for a new trial on the meritorious grounds in Point 2, *supra*.[79] In short, competent counsel would have enjoyed a variety of opportunities to introduce the current policy into evidence and to destroy (or prevent altogether) Officer Merillat's prejudicially false claims.[80] Counsel's complete failure to correct this false and misleading testimony was ineffective.[81]

Moreover, while a competent attorney would have garnered the written TDCJ policy in advance of trial, counsel missed the boat at two other crucial junctures. First, as demonstrated in note 81, *supra*, competent counsel is required to impeach damaging testimony by state witnesses when possible. Thus, once Officer Merillat contradicted Mr. Fitzgerald's claim, defense counsel should have taken the rudimentary steps to garner the true TDCJ policy. Second, once the jury asked its probative question about when Mr. Estrada would be eligible for a less restrictive custody status, counsel should have seen and heard bells, lights, and buzzers. Permitting a rare glimpse into the jury's thought process, the note would have prompted any reasonably competent attorney to take immediate steps to

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[78] Given its obligation to seek truth and justice, rather than "win[s]," the prosecution would have had to agreed to withdraw Mr. Merillat's testimony on this point, once its falsity was shown in black and white. *See Berger*, 295 U.S. at 88; *see also* TEX. CODE CRIM. 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.").

[79] With time to reflect on the verdict, the jury notes, and the conflicting testimonies of Messers Fitzgerald and Merillat, a minimally competent lawyer would have acquired the TDCJ policy and used it as the basis for a motion for new trial. *See* Tex. R. App. Proc. 21.3; 21.4 (providing 30-day filing deadline for motion).

[80] 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.

[81] *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) (same and noting that competent counsel would have forced State's expert to admit mistaken testimony on the stand). *See also Millam v. State*, 745 N.W.2d 719, 723-24 (Iowa 2008) (ineffective failure to impeach child witness with fact that she had previously falsely accused others).

uncover the true policy and to seek an appropriate remedy.[82]

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.[83]

Here, too, 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. *See* 2 CR 544-45 (deadlock note concerning future dangerousness); *id*. at 546-47 (note asking when Mr. Estrada would be eligible for a less restricted custody status). Consistent with the dearth of evidence of future dangerousness, *see* Point 1, *supra*, the jury notes conveyed its difficulty in deciding the future danger issue.[84] As the second note conveys, 2 CR 546-47, key to the jury's future dangerousness decision was whether Mr. Estrada would be permitted a less restrictive custody status. The jury never received the correct answer because of counsel's unprofessional errors.

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[82] At that late juncture, competent counsel could still have moved for a mistrial, moved to reopen the evidence, or requested that the judge correctly instruct the jury that, according to duly established TDCJ policy, Mr. Estrada would never be eligible for a less restrictive custody status than G-3.

[83] *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 failure 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 the time to his possible parole); *Ware v. State*, 875 S.W.2d 432, 433, 434, 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, and finding prejudice where jury asked if defendant had felony conviction, to which the court responded, "'all the information you need is in the court's charge.'"). *See also Carpenter v. Vaughn*, 296 F.3d 138, 156-57 (3rd Cir. 2002) (ineffective failure to object to trial court's misleading response to jury note asking if it could sentence the defendant to life with a "guarantee of no parole"; the judge responded, "simply, no absolutely not," a "plain misstatement of Pennsylvania law").

[84] *See Ramonez v. Berghuis*, 490 F.3d 482, 489-491 (6th Cir. 2007) (ineffective failure to interview important witnesses, and prejudice where jury sent out a note saying it was "deadlocked"); *Kucel*, 907 S.W.2d at 897 (relying on jury note to find prejudice due to counsel's failure to correct misinformation); *Ware*, 875 S.W.2d at 436-37 (relying on jury note to find prejudice where counsel ineffectively failed to introduce evidence key to jury's sentencing decision).

Indeed, had counsel conducted a basic investigation in the first instance, the jury never would have asked this question and likely would have concluded that Mr. Estrada would not pose a threat of future danger if subject to G-3 custody for life. For these and the reasons discussed in Point 2, *supra*, incorporated herein, the prejudice flowing from counsel's ineffectiveness was ample and tangible. In this close case, the jury notes more than demonstrate that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome would have been a sentence of life without parole. *See Strickland*, 466 U.S. at 687.

4. The trial court committed reversible error by failing to instruct the jury that the mere fact that a capital offense is committed is insufficient in itself to warrant a finding of future dangerousness.

Article 37.071 § 2(b)(1) requires the court to submit to the jury "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." "While the commission of a capital offense is undeniably brutal the mere fact that such an offense is committed is insufficient in itself to prove future dangerousness."[85]

[85] *Dinkins v. State*, 894 S.W.2d at 358 (citing *Green v. State*, 682 S.W.2d 271, 289 (Tex.Crim.App. 1984)). *Dinkins* remains good law. In repeated *dicta*, this Court has noted that if "severe enough," a capital murder's circumstances can justify a finding of future dangerousness. *See*, *e.g.*, *Fuller v. State*, 253 S.W.3d 220, 231 (Tex.Crim.App. 2008) (stating this dicta while finding future dangerousness based upon the circumstances of the offense **and** testimony from a psychologist). However, the only case Appellant has been able to locate where this Court relied solely on the circumstances of the offense to justify a finding of future dangerousness is *State v. Bell*, 938 S.W.2d 35, 42 (Tex.Crim.App. 1996), involving a gruesome sadistically premeditated home invasion, rape, and double murder. *Id.* (noting that the defendant "assembled an 'equipment kit' consisting of a sharpened knife, handcuffs, an electrical cord with the ends cut off . . ." went to the victims' home, pulled a knife on one victim, "handcuffed him, and bound his feet together with the extension cord . . ." and then tied up the second victim, chased down the first victim who had escaped from a closet, beat him and stabbed him, after which he gagged and raped the second victim, and choked her to death). Clearly, *Dinkins*'s statement – that the "mere fact that such an offense is committed is insufficient in itself to prove future dangerousness," 894 S.W.2d at 358 -- remains good law, even if the most **severe** offenses, like one in *Bell*, would warrant such a finding.

Since Mr. Estrada has no prior criminal record and the uncharged offenses were not indicative of a future danger that he would commit criminal acts of violence, *see* Point 1, *supra*, the state was forced to rely primarily on the offense itself. To prevent the jury from drawing the impermissible inference that Mr. Estrada was a future danger to society solely because he committed a capital offense, his attorney requested the jury to be instructed that it could not find future dangerousness merely because a capital offense was committed. 23 RR 203-04. The trial court refused to give this instruction. 23 RR 205. In doing so, it erred under *Rogers v. State*, 105 S.W.3d 630, 639-40 (Tex.Crim.App. 2003), and violated Mr. Estrada's constitutional rights to due process, to be free from cruel and unusual punishment, and to a jury trial. U.S. Const. amends. VI, VIII, XIV.

A criminal defendant is entitled to a jury instruction on any defense theory supported by the law and the facts. *Rogers,* 105 S.W.3d at 639. Below, one of Mr. Estrada's most important defenses was that the jury's capital murder verdict did not necessarily prove he would constitute a future danger. 23 RR 204. Thus, under *Rogers*, he was entitled to an instruction on the law set forth in *Dinkins*.

Moreover, he was entitled to this instruction under the Eighth Amendment. The constitutionality of Texas's death penalty statute depends on "the sentencing jury . . . hav[ing] adequate guidance to enable it to perform its sentencing function." *Jurek*, 428 U.S. at 276. That a capital murder conviction does not itself prove a reasonable probability of future dangerousness is not self evident. If it were, this Court would have been wasting its breath to speak the obvious in its

decisional law. *See Dinkins,* 894 S.W. 2d at 358. And if the lawyers, judges and others reading this Court's decisions needed to know this important concept, then surely so did the jurors in whose hands a life and death decision was placed.

The jury was not properly informed that the mere fact that a capital offense was committed was not sufficient to prove future dangerousness. The error severely prejudiced Mr. Estrada, causing far more than "some harm" because – in a weak case of future dangerousness such as here – an uninformed jury could have easily based its future dangerousness finding merely on the commission of the capital murder. *See Mann v. State*, 964 S.W.2d 639, 641 (Tex.Crim.App. 1998) (preserved instructional errors causing "some harm" require reversal). This Court must reverse so that Mr. Estrada may be tried by a properly instructed jury.

5. The Death Sentence for Appellant, Remorseful, Peaceful, and Respectful, Lacks Support by Factually Sufficient Evidence.

If this Court somehow finds the future-danger evidence legally sufficient, it should, nevertheless, reverse the death sentence on factual sufficiency grounds. Given the paucity of evidence suggesting Mr. Estrada would pose a danger of criminal violence during a life of imprisonment, and the wealth of evidence showing he would not, the jury's future dangerousness finding was "manifestly unjust" and "shocks the conscience."[86]

A. Factual Sufficiency Review of Future Dangerousness Finding is Constitutionally Required.

[86] *Grotti v. State*, __S.W.3d __, 2008 WL 2512832, at *4 (Tex.Crim.App. 2008) (quoting *Watson v. State*, 204 S.W.3d 404, 426 (Tex.Crim.App. 2006) (internal quotation marks omitted). *See also* U.S. Const. amends. VIII; XIV; Tex. Const. art. 5, § 6.

In *McGinn v. State*, 961 S.W.2d 161, 169 (1998), a bare (5-judge) majority of this Court held that it lacked authority to conduct factual sufficiency review of a capital jury's affirmative finding of future dangerousness. Four judges disagreed. *See id.* at 171-77 (concurring and dissenting opinions). The dissenting judges would have held that factual sufficiency review is a constitutional requisite under the Eighth Amendment. *Id.* at 173-74 (citing, *inter alia*, *Jurek*, 428 U.S. at 276 (citing "prompt judicial review" to uphold Texas's capital statute); 176 (same)). At least three judges in the minority believed that the Court's prior multi-factored sufficiency analyses of future dangerousness were **factual**, rather than legal, in nature. *Id.* at 171 (collecting cases); 176-77. Two judges believed that applying a true "legal sufficiency" test to findings of future dangerousness would result in automatic affirmance because "the facts of any capital murder support a finding of future dangerousness when reviewed in that most favorable light." *Id.* at 177.

As shown below, *McGinn* was: 1) "flawed from the outset," 2) conflicts with this Court's subsequent precedents, and 3) creates unjust results, including the potential for wrongful executions, including here. It should be overruled.[87]

Flawed from the outset: The *McGinn* majority premised its decision on the contention that "attempting to determine whether a jury's prediction of the probability of future dangerousness is . . . wrong . . . is an impossible task." 961 S.W.2d at 168. **Moreover, it argued, "the issue is highly subjective because it**

[87] *See Bawcom v. State*, 78 S.W.3d 360, 363-65 (Tex.Crim.App. 2002) (citing these factors as bases for overruling precedent).

calls for a prediction of future events rather than an assessment of events that have already occurred." ***Id.*** **at 169. And the majority asserted that it could not weigh mitigating evidence, nor invade the jury's fact-finding province.** ***Id.*** The majority was wrong for several reasons.

First, contrary to *McGinn*'s premise, this Court is no stranger to the factual review of future-conduct predictions. In its review of bond decisions, this Court – both before and after *McGinn* – has repeatedly reviewed lower court decisions concerning the likelihood that an accused would pose a future danger to the community and appear for future court proceedings.[88] Indeed, in concluding that future danger predictions are "no different from the task performed countless times each day throughout the American system of criminal justice," the Supreme Court cited bail decisions as an example. *Jurek,* 428 U.S. at 275-76.

The *McGinn* majority also objected to factual sufficiency review on the ground that it is "highly subjective." *McGinn*, 961 S.W.2d at 169. Even if it is, *but see id.* at 171-77 (dissent rejecting this approach), subjective analyses often are part of appellate review, and fall well within this Court's authority and capacities.

For example, proportionality review is a largely "subjective" exercise, *Harmelin v. Michigan*, 501 U.S. 957, 986 (1991), but one routinely conducted by Texas appellate courts.[89] Similarly, appellate courts in more than half of death-

[88] *See, e.g., Ex parte Anderer*, 61 S.W.3d 398, 406 (Tex.Crim.App. 2001) (reviewing bond decision involving prediction of future dangerousness); *Dallas v. State*, 983 S.W.2d 276 (Tex.Crim.App. 1998) (similar); *Ex parte Valenciano*, 720 S.W.2d 523 (Tex.Crim.App. 1986) (similar).

[89] *Winchester v. State*, 246 S.W.3d 386, 391 (Tex. App.—Amarillo 2008, *pet. stricken*); *Alberto v. State*, 100 S.W.3d 528, 530 (Tex. App.—Texarkana 2003, no pet.); *Bradfield v. State*, 42 S.W.3d 350, 353 (Tex.

penalty jurisdictions conduct proportionality review.[90] Appellate courts deciding death-penalty appeals, including this Court, can and do routinely engage in the type of "subjective" assessment of mitigating evidence the *McGinn* majority found not "possible." 961 S.W.2d at 168.[91] And, as this Court has held, appellate courts are the best equipped to answer a number of subjective questions.[92]

McGinn's rejection of factual sufficiency review was also flawed at the outset because such review constitutes an inherent part of this Court's authority as the court of direct appeal for capital cases. *See* Tex. Const. art. 5, § 6.[93] At the time *McGinn* was decided, this Court had already reviewed the factual sufficiency

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App.—Eastland 2001, *pet. ref'd*); *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App. – Houston [14th Dist.] 2000, *pet. ref'd*).

[90] In 19 states, proportionality review is statutorily required. *See* Ala. Code § 13A-5-53(b)(3) (1981); Del. Code Ann. tit. 11 § 4209(g)(2)(a) (1972); Ga. Code Ann. § 17-10-35(c)(3) (1973); Ky. Rev. Stat. Ann. § 532.075(3)(c) (1976); La. Code Crim. Proc. Ann. art. 905.9.l(c) (1976); Miss. Code Ann. § 99-19-105(3)(c) (1977); Mo. Rev. Stat. § 565.035(3)(3) (1983); Mont. Code Ann. § 46-18-310(l)(c) (1977); Neb. Rev. Stat. § 29-2521.03 (1978); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1986); N.J. Stat. Ann. § 2C:11-3(e) (1978); N.M. Stat. § 31-20A-4(C)(4) (1979); N.Y. Crim. Proc. Law § 470.30(3)(b) (1995); N.C. Gen. Stat. § 15A-2000(d)(2) (1977); Ohio Rev. Code Ann. § 2929.05(A) (West 1981); S.C. Code Ann. § 16-3-25(C)(3) (1962); S.D. Codified Laws § 23A-27A-12(3) (1979); Tenn. Code Ann. § 39-13-206(c)(l)(D) (1989); Wash. Rev. Code § 10.95.130(2)(b) (1981). *See also Sinclair v. State*, 657 So.2d 1138, 1142 (Fla. 1995) (requiring proportionality review under Florida constitution).

[91] *See Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990) (collecting examples of appellate courts weighing mitigating evidence, and equating such review with the "meaningful appellate review of death sentences promot[ing] reliability and consistency"); *Williams v. State*, 991 S.W.2d 565, 570-71 (Ark. 1999) (outlining appellate weighing process); *People v. Hooper*, 665 N.E.2d 1190, 1194-195 (Ill. 1996) (same); *Roney v. State*, 872 N.E.2d 192, 197-98 (Ind. Ct. App. 2007) (same); *State v.Cole*, 155 S.W.3d 885, 906 (Tenn. 2005) (same); *State v. Elledge*, 26 P.3d 271, 279 (Wash. 2001) (same); Conn. Gen. Stat. § 53a-46b (b) (2008) (requiring state supreme court review of whether sentence product of passion, prejudice, or arbitrary factors, and of whether evidence fails to support aggravating factors); La. Sup. Ct. R. 28 (requiring review of excessiveness, including review of contribution of passion, prejudice, arbitrary factors, and of whether evidence supports aggravating circumstance, and proportionality); Ohio Rev. Code § 2929.04 (A) (requiring Ohio appellate courts to review and independently weigh the mitigating and aggravating factors); Tenn. Code Ann. § 39-13-206 (requiring appellate courts to review whether sentence is arbitrary, whether evidence supports finding of statutory aggravating circumstance, whether aggravating circumstances outweigh any mitigating circumstances, and proportionality).

[92] *See, e.g., Villarreal v. State*, 935 S.W.2d 134, 138 n.5 (Tex.Crim.App. 1996) (stating reasonable expectation of privacy determination is most suitable for appellate courts).

[93] *See also Bigby v. State*, 892 S.W.2d 864, 874-75 (Tex.Crim.App. 1994) ("Clearly under either the statute or the constitution we are empowered to review a case both upon the law and the facts."). *Watson v. State*, 204 S.W.3d 404, 414 (Tex.Crim.App. 2006) (reaffirming *Bigby* and reviewing long-standing history of factual sufficiency review); Tex. Const. art. 5, § 6; Art. 44.25 ("The courts of appeals or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts.")

of facts required to uphold a death sentence, and found it important to do so, "particularly where the extreme penalty has been assessed." *Villareal v. State*, 146 S.W.2d 406, 410 (Tex.Crim.App. 1940), *overruled on other grounds by*, *Mays v. State*, 563 S.W.2d 260, 264 n.5 (Tex.Crim.App. 1978). Three years after *McGinn*, this Court found that it could review the factual sufficiency of deliberateness, a previous statutory prerequisite for the death penalty. *Wardrip v. State*, 56 S.W.3d 588, 591 (Tex.Crim.App. 2001). Outside this Court's broad field of factual sufficiency review power, *McGinn* stands alone.

Indeed, as the *McGinn* dissenters recognized, 961 S.W.2d at 171, 176-77, the factors this Court has traditionally analyzed to determine the sufficiency of a showing of future dangerousness fit hand in glove with this Court's factual review power.[94] Contrary to the contention that it is "**impossible**" to conduct factual sufficiency review of future dangerousness findings, *McGinn*, 961 S.W.2d at 168, such multi-factored analyses routinely employ a **subjective** judgment concerning the interplay of mitigating and aggravating factors.

Finally, the *McGinn* majority sought to avoid an invasion into the fact-finding province of juries. 961 S.W.2d at 169. But in *Clewis v. State*, 922 S.W.2d 126, 134 (Tex.Crim.App. 1996), this Court rejected a similar argument by the dissent and held that respect for the jury's province would be accomplished by reversing factually insufficient judgments for a new jury trial, rather than ordering

[94] *See*, *e.g.*, *Keeton v. State,* 724 S.W.2d 58, 61 (Tex.Crim.App. 1987) (setting forth multi-factored analysis used to examine the sufficiency of evidence of future dangerousness).

a judgment of acquittal. *See id.* at 157-58 (Keller, C. J., dissenting) (arguing that majority's decision disrespected jury's fact-finding province). As *Clewis* demonstrates, *McGinn*'s jury deference argument proves illusory: such deference may be accomplished by remanding for a new capital sentencing trial.

Under *McGinn*, this Court's only options are to affirm legally sufficient death sentences or to reform legally insufficient ones to life imprisonment. Art. 44.251. Legally sufficient death sentences, however, may be manifestly unjust. Reversal for factual sufficiency poses a sage alternative. An all or nothing approach does not always suffice. This Court should have the option of calibrating relief to the level of insufficiency (legal or factual) presented.

Subsequent Decisions Undermine McGinn: In *Wardrip*, 56 S.W.3d at 590, this Court reiterated that factual sufficiency review of a jury's finding of future dangerousness is impossible because it involves a prediction of the future, rather than a finding of historical fact which is "right or wrong at the time of trial." *Id.*

Recently, however, this Court has **expanded** factual sufficiency review to situations where the jury's verdict may not have been wrong under the instructions it received. *See Wooley v. State,* __ S.W.3d __, 2008 WL 2512843, at * 6 (Tex.Crim.App. June 25, 2008). There, this Court held that the factual sufficiency of evidence would be measured against "elements of the offense as defined by a **hypothetically** correct jury charge." *Id*. at * 6 n.9 (emphasis added). In so ruling in *Wooley*, this Court affirmed that factual sufficiency review is not necessarily "a direct review of the jury's verdict itself." *Wooley*, 2008 WL 2512843, at * 6.

Wooley's logic and rationale are inconsistent with *McGinn*. *Wooley* teaches that to undertake factual sufficiency review of future dangerousness, this Court **need not** as it argued in *Wardrip*, review the death verdict to determine if it was "wrong at the time of trial." 56 S.W.3d at 590. *See Wooley,* 2008 WL 2512843, at * 6. Instead, factual sufficiency review is designed to prevent manifest injustice, *Grotti*, 2008 WL 2512832, at *4, which could never be more important than it is in the context of reviewing a death sentence.

Furthermore, after *McGinn*, the Supreme Court held that in "assessing prejudice" of ineffective assistance of counsel, "we **reweigh** the evidence in aggravation against the totality of available mitigating evidence." *See Wiggins*, 539 U.S. at 534 (emphasis added). This Court has since applied *Wiggins* in its evaluation of ineffective assistance of counsel, conducting its own reweighing of mitigating and aggravating evidence.[95] Thus, in *Martinez*, this Court did what the *McGinn* majority said it could not do – it weighed mitigating evidence. *McGinn*'s foundational reasoning has been completely undermined by subsequent precedent.

Justice and Fairness Require Factual Sufficiency Review

Following *McGinn* ten years ago, this Court has reviewed more than 335 death verdicts on direct appeal.[96] During this decade, the Court has found evidence of future dangerousness insufficient only **once**. *Berry*, 233 S.W.3d at 864.

[95] *See*, *e.g.*, *Ex parte Martinez*, 195 S.W.3d 713, 730 (Tex.Crim.App. 2006) (reweighing mitigating and aggravating evidence). *Id.* at 740 (Hervey, J., concurring) (same).

[96] *See* http://www.courts.state.tx.us/pubs/annual-reports.asp (Court of Criminal Appeals Activity for fiscal years 1999-2007) (last checked Oct. 29, 2008). The figure above does not include decisions between January 21, 1998, when *McGinn* was decided, and September 1, 1998 (the date fiscal year 1999 commenced), or decisions after August 31, 2007 (the last date for which data is available). Not all of these cases address legal sufficiency of future dangerousness, but that claim is a frequent one before this Court.

Viewed through this prism, *Berry* and the decade-drought of relief on insufficiency grounds strongly suggest that, without factual sufficiency review, findings of future dangerousness (and concomitant death sentences) are now upheld on appeal with less stringent review. And, under *McGinn*, legally-sufficient findings of future dangerousness can be upheld even if '"manifestly unjust' [and they] 'shock[] the conscience.'" *Grotti,* 2008 WL 2512832, at *4.

In *Jurek*, the Supreme Court cited this Court's "prompt judicial review" when it ruled that Texas's 1974 death penalty statute did not violate the Eighth Amendment. 428 U.S. at 276. Logically, the Supreme Court understood "prompt judicial review" to constitute review of the **appropriateness** of death sentences, rather than the mere review of legal errors that this Court had undertaken long before 1973.[97] By failing to perform this type of review under *McGinn*, this Court has undermined the constitutionality of Texas's death penalty statute.

An appellate system that allows death verdicts that "shock the conscience" cannot pass constitutional muster. As the *McGinn* dissenters predicted, in *McGinn*'s wake, findings of future dangerousness are frequently not subjected to the stringent review required by the Eighth Amendment, a problem of grave concern to Appellant if this Court should somehow reject his legal sufficiency claim. Such a system "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated

[97] *See* Carl E.F. Dally et al., *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 St. Mary's L.J. 211, 217 (1981) ("In death penalty cases, review by the Court of Criminal Appeals continues to be a matter of right; death penalty cases are appealed directly from the trial court to the Court of Criminal Appeals.").

mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). And it violates the Eighth Amendment, this Court's constitutional review powers, and basic fairness.

B. The Evidence of Appellant's Future Dangerousness Proves Factually Insufficient.

If this Court were somehow to reject Appellant's showing of legal insufficiency, it would still have to reverse because the state presented factually insufficient evidence of Appellant's future dangerousness. Setting aside the State's impermissible and misleading argument that Mr. Estrada poses the "type of danger . . . that parents can't protect their children from," 24 RR 9, the State relied on its contention that the crime was brutal and premeditated. Even if this Court rejects Appellant's Point 1, and finds that this evidence could support a finding of future dangerousness if viewed in the light most favorable to the State, it surely fails when viewed in a neutral light. *Wooley,* 2008 WL 2512843, at * 6.

For example, the State argued premeditation below because the car was backed into the driveway and Mr. Estrada carried extra clothing in his car before going to the gym. 24 RR 29-30. Backing a car in and carrying extra clothing in one's car are everyday activities for millions of law-abiding citizens.[98] Whatever may be inferred from these activities in the light most favorable to the State, neutral light illuminates them as subject to numerous innocent explanations. The inferences from these innocuous activities are too tenuous and conjectural to

[98] *See*, *e.g.*, *State v. Struhs*, 940 P.2d 1225, 1228-29 (Utah App. 1997) (rejecting claim of reasonable suspicion to justify stop of vehicle based on defendant's having backed his unlit vehicle into location).

constitute factually sufficient evidence of future dangerousness.

Similarly, viewed in a neutral light, the murder in this case falls short of the type of merciless and heinous murder severe enough on its own to warrant a finding of factually sufficient evidence. *See Bell,* 938 S.W.2d at 42 (sole case in which this Court has relied only on the crime to find future dangerousness, in which appellant committed a gruesome and sadistically premeditated home invasion, rape, and double murder, involving a sharpened knife and handcuffs).[99]

In sum, under neutral light, the State's proof fails to establish that Appellant – youthful, repentant, respectful, and a well-behaved prisoner – poses a threat of future violent acts. Reversal is required.

6. The Texas Future Danger Inquiry Results in the Death Penalty's Arbitrary and Disproportionate Imposition, Violating the Eighth Amendment.

In the event that this Court somehow rejects Appellant's Points 1-5 it should nevertheless vacate his sentence on the ground that the State's future dangerousness scheme violates the Eighth Amendment.[100] The capital statute employs an unreliable inquiry into future dangerousness as a criterion to narrow the class of murders eligible for the death penalty,[101] producing arbitrary and capricious as well as disproportionate results. It therefore violates the Eighth

[99] In addition to these arguments why the evidence of future danger proved insufficient, this Point of Error incorporates by reference the legal sufficiency arguments in Appellant's First Point of Error.

[100] Counsel preserved this issue by motion below. 1 CR 82-87; 8 RR 5-6. Moreover, this constitutional challenge to the statute may be raised for the first time on appeal. *See* Rabb v. State, 730 S.W.2d 751, 752 (Tex.Crim.App. 1987); *see also Holberg v. State*, 38 S.W.3d 137, 139 n.7 (Tex.Crim.App. 2000).

[101] *See, e.g.*, *Kennedy v. Louisiana,* __ U.S. __, 128 S. Ct. 2641, 2661 (2008) (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,'" and that the Court has spent "more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder"); *see also Jurek*, 428 U.S. at 269-70.

Amendment's ban on cruel and unusual punishment.[102] The future dangerousness inquiry is central to juries' sentencing decisions.[103] As all nine justices of the Supreme Court agreed in *Kennedy*, however, it can lead to inconsistent results.[104]

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 "'freakish[ly]' imposed." *Id.* (citing *Furman*, 408 U.S. at 310 (Stewart, J., concurring)).

In approving the future dangerousness 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." *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,[105] the Supreme Court held just one

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[102] U.S. Const. amends. VIII; XIV. *See Kennedy*, 128 S. Ct. at 2658 (citing, *inter alia*, *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972)).

[103] Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 Tex. Rev. L. & Pol. 49, 128 (Fall, 2000) (acknowledging that "(b)y some accounts, the issue of future dangerousness has become the single most important factor in determining which defendants spend their lives in prison and which defendants are sent to the execution chamber").

[104] *Kennedy*, 128 S. Ct. at 2661 (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 2673-74 (Alito, J., dissenting) (citing Texas's future danger scheme as 1 of 3 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.

[105] Texas could theoretically reduce the arbitrariness of its future danger determination by implementing a process whereby inmates who have proven not to constitute a future danger in the time since their sentencing proceeding could have their sentences commuted to life. *See* Jessica L. Roberts, Student Note, *Futures Past: Institutionalizing the Re-Examination of Future Dangerousness in Texas Prior to Execution,*

year after *Jurek* that the Eighth Amendment demands **heightened** reliability in procedures used to determine if the state may take a life.[106] Thus, very soon after it approved Texas's future danger scheme in *Jurek*, the Supreme Court implicitly called into question that decision's premise that capital sentencing proceedings mirroring routine criminal procedures would necessarily meet Eighth Amendment demands. Moreover, in *Jurek*, Justice Stevens obviously believed that the future danger determination would not produce arbitrary and capricious results.

Assuming for the purpose of this Point of Error that this Court finds the evidence of future dangerousness sufficient in this case, however, 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, Mr. Estrada's record shows that he would pose less of a future danger than these defendants based on several relevant factors, including the nature of the capital offense, his prior criminal record (even assuming the unadjudicated offenses concerning the other two teens), the lack of expert testimony or character testimony suggesting

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11 TEX. J. ON C.L. & C.R. 101, 131-32 (2005) (arguing that the jury's finding of future dangerousness should be reevaluated in a hearing much closer to execution).

[106] *See Gardner*, 430 U.S. at 357-58 (overturning death sentence resulting from trial judge's reliance on potentially unreliable secret information not disclosed to defense, even though such a procedure passed constitutional muster pre-*Furman*, and would pass muster for non death sentences, because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action."; *id.* at 362-64 (White, J., concurring) ("A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the character and record of the individual offender fails to meet the need for reliability in the determination that death is the appropriate punishment") (internal citations and quotation marks omitted). *See also California v. Ramos,* 463 U.S. 992, 998-999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

that he is a future danger, and his exemplary prison record.[107]

Arbitrariness in the future danger inquiry is not limited to this case alone. Neither experts in psychology and psychiatry,[108] nor lay jurors,[109] nor any predictor[110] have proven accurate. In one study, 95% of cases where a Texas jury found that the defendant posed a continuing threat to society, the defendant never committed serious assaults while incarcerated.[111]

Perniciously, racial considerations and anti-immigrant fervor have sometimes filled the void of accurate means of predicting future dangerousness. In at least two cases with Hispanic or Latino defendants, a future danger "expert"

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[107] For judicial efficiency, this argument incorporates by reference each of the arguments in Point 1, *supra*, comparing Mr. Estrada with cases in which this Court found insufficient evidence of future dangerousness.

[108] *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: Capital Punishment in Texas 1923-1990*, 179-84 (1994) (setting forth data showing Texas future danger predictions wrong); 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) (finding clinical predictions of future danger inaccurate and overstated); Grant T. Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 Law & Hum. Behav. 377 (2002) (same); John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901, 905 (2000) (same); William Gardner et al., *Clinical Versus Actuarial Predictions of Violence in Patients with Mental Illness*, 64 J. Consulting & Clinical Psychol. 602 (1996) (same); Douglas Mossman, *Assessing Predictions of Violence; Being Accurate About Accuracy*, 62 J. Consulting & Clinical Psychol. 783 (1994) (finding predictions of future danger vastly overstated); Brian Sites, Comment, *The Danger of Future Dangerousness in Death Penalty Use*, 34 FLA. ST. U. L. REV. 959, 963, (2007) (comparing future dangerousness determination to "Russian Roulette"). The Supreme Court's approval of such expert testimony in *Barefoot v. Estelle,* was based on an honest, but disproven trust in the jury system. The Court stated, "(w)e do not share in this low evaluation of the adversary process." 463 U.S. 880,899 n.7 (1983). It is **now** clear that juries do not reliably make this life-and-death determination.

[109] *See, e.g.,* Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 62 (1998) (noting that that neither laypersons nor clinicians had much accuracy in their assessments of dangerousness).

[110] *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) (criticizing the accuracy of actuarial predictions).

[111] TEXAS DEFENDER SERVICE, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS, 47-48 (2004) (examining prison records of 155 defendants sentenced to death with expert testimony that the defendant posed a continuing threat to society introduced at trial and finding only eight had engaged in "serious assaultive behavior").

has relied on race to predict a defendant would pose a threat of future danger.[112] 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).[113]

Data collected during comprehensive studies of capital jurors (including Texas jurors) bear out that race has an outsized influence on juror assessments of future dangerousness.[114] This data shows that parties may increase the likelihood of a jury finding future dangerousness through completely arbitrary means – the

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[112] *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). Both decisions involved the same expert, Dr. Walter Quijano. In *Garcia*, this Court ruled that defense counsel was not constitutionally ineffective for eliciting this improper testimony. 57 S.W.3d at 439. Victor Saldano ultimately won habeas corpus relief due to this improper testimony, when the State Attorney General overruled the local district attorney and waived procedural bars to the claim. *Saldano v. Roach,* 363 F.3d 545, 556 (5th Cir. 2004). A former Texas prosecutor and judge turned law professor has cited these cases as among many reasons for abolishing the death penalty. Lupe S. Salinas, *Is it Time to Kill the Death Penalty?*, 34 Am. J. Crim. L. 39 (2006).

[113] Although the capital sentencing statute was recently amended to prevent the State from presenting evidence that a defendant's race or ethnicity bears on the question of future dangerousness, TEX. CODE CRIM. PROC. Art. 37.071 § 2 (a)(2), the Supreme Court has recognized that many jurors naturally fall back on racial stereotypes in their decisions. *See Turner v. Murray*, 476 U.S. 28, 35-36 (1986).

[114] *See*, *e.g.*, William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1502-03, 1531 (2004) ("The statistical evidence reveals that white male jurors were far more likely than African-American male jurors to think of the African-American defendant as dangerous to others and far less apt than their black counterparts to see the defendant as sorry for what he did."); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 223 (2001) ("It appeared further that white jurors saw black defendants as more dangerous than white defendants, and that black jurors saw defendants who killed blacks as more dangerous than those who killed whites."). Other studies consistently demonstrate that race impacts capital sentencing decisions in Texas, and, thus by inference, the future danger determination. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post -Furman Capital Statutes*, 26 Crime & Delinq. 563-635 (1980); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 69 Soc. Sci. Q. 853-73 (1988); Brock et al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 Am. J. Crim. L. 43, 67-70 (2000). These studies consistently find that death sentences are more likely to be imposed when the victim is white, and that minorities who kill whites are more likely to be sentenced to death than another racial combination.

injection of racial considerations into the jury selection process.[115] This link between future dangerousness findings and a jury's racial composition is particularly disturbing in light of evidence that Texas prosecutors have frequently been cited for racial discrimination in jury selection.[116]

The "national consensus" that has developed against imposing the death penalty based on future dangerousness further demonstrates that this scheme 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 *Furman*, and a common

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[115] The Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987), does not bar consideration of this important data. There, the Supreme Court predicated its rejection of petitioner's Eighth Amendment claim under *Furman* that racial considerations infected Georgia's capital sentencing scheme on that scheme's "carefully defined standards that . . . narrow a sentencer's discretion to impose the death sentence." *Id.* at 304. In contrast, the claim here is that race is one factor among many demonstrating that Texas's narrowing criteria (the future dangerousness determination) is itself unreliable, arbitrary, and capricious. For similar reasons, *Bell v. State*, 938 S.W.2d 35 (Tex.Crim.App. 1996), does not control. There, the appellant made an argument that the future dangerousness inquiry was sometimes infected by racial considerations, but did not demonstrate that the future dangerousness inquiry is inherently unreliable, and even appellant's argument on race was supported by scant evidence. *Id.* at 51-52. Notably, in *Bell*, the Court invited a similar challenge under the Texas Constitution. *Id. See* Point 7, *infra*. This claim also is not foreclosed by *Robinson v. State*, 851 S.W.2d 216 (Tex.Crim.App. 1991) or its progeny, which rejected unadorned *McCleskey* claims distinct from the arguments here.

[116] *Miller-El v. Dretke*, 545 U.S. 231, 239, 263 (2005) (concluding that "for decades leading up to the time this case was tried[,] prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries"); *Emerson v. State*, 851 S.W.2d 269, 275 (Tex.Crim.App. 1993) (reversing conviction due to prosecutor's intentional racial discrimination in jury selection, hereinafter "*Batson* violation"); *Esteves v. State*, 849 S.W.2d 822 (Tex.Crim.App. 1993) (remanding to 859 S.W.2d 613, 614 (Tex. App.-Hous. 1993) (*Batson* violation)); *Wright v. State*, 832 S.W.2d 601, 605 (Tex.Crim.App. 1992) (same); *Hill v. State*, 827 S.W.2d 860, 870 (Tex.Crim.App. 1992) (same); *Brooks v. State*, 802 S.W.2d 692, 695 Tex.Crim.App. 1991) (*Batson* violation); *Young v. State*, 826 S.W.2d 141, 146-47 (Tex.Crim.App. 1991) (remanding to 848 S.W.2d 203, 210 (Tex. App.-Dallas 1992) (*Batson* violation)); *State v. Oliver*, 808 S.W.2d 492, 495-96 (Tex.Crim.App. 1991) (remanding to 826 S.W.2d 787, 790 (Tex. App.-Beaumont 1992) (*Batson* violation)); *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex.Crim.App. 1989) (same); *Chambers v. State*, 784 S.W.2d 29, 30 (Tex.Crim.App. 1989) (same); *Dewberry v. State*, 776 S.W.2d 589, 591 (Tex.Crim.App. 1989) (remanding for further proceedings where the "exclusion of five of six blacks from the jury in this case established a prima facie case of discrimination"). *See also Harris v. Texas,* 467 U.S. 1261, 1263-64 (1984) (Marshall, J., dissenting from denial of *certiorari*) (noting that 2 judges and other witnesses testified that Harris County prosecutors systematically excluded blacks from juries for decades); *Tompkins v. State*, 774 S.W.2d. 196, 203 (Tex.Crim.App. 1987) (rejecting *Batson* claim in reluctant opinion, and noting "that black jurors have been relatively uncommon on [Harris Co.] capital murder juries").

procedure had not emerged.[117] Thirty-two years later, only one other state, Oregon, has adopted Texas's model of placing central reliance on an inherently unreliable future dangerousness model.[118] 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."[119] Given these numbers, the consensus against the unreliable use of future dangerousness is strong, even when counting the four additional state statutes which make future danger one sentencing factor among others.[120]

The Supreme Court's death penalty jurisprudence has evolved since 1976. *Jurek* was only the starting point.[121] The Court's jurisprudence has reflected an

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[117] *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).

[118] *See* Steven Hornbuckle, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law,* 73 Tex. L. Rev. 441, 448 nn.27 & 38 (1994) (collecting statutes of 36 states with the death penalty, and noting that only [t]wo states, Texas and Oregon, vary from [the common] scheme").

[119] *Kennedy*, 128 S. Ct. at 2653 (citing *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-15 (2002); *Enmund v. Florida*, 458 U.S. 782, 789 (1982)). These cases involve two types of Eighth-Amendment proportionality rules. The first, represented by *Kennedy* and *Enmund*, forbids execution for all **but** those "who commit a narrow category of the most serious crimes." *Id.* at 2650 (internal citations and quotation marks omitted). The second, represented by *Atkins*, *Simmons*, and this case, forbids execution, even where the first test is met, for all **but** those "whose extreme culpability makes them the most deserving of execution." *Id*. Thus, any claim, such as this one, demonstrating a statute's use of a highly unusual narrowing function asserts a claim under this second proportionality rule.

[120] *See* VA. CODE ANN. § 19.2-264.2 (requiring, for death sentence, either a finding of future dangerousness or that the offense was "outrageously or wantonly vile, horrible or inhuman"); IDAHO CODE § 19-2515(9) (permitting death penalty based upon any one of several aggravators, including a finding of future dangerousness); OKLA. STAT. ANN. tit. 21, § 701.12, (same); WYO. STAT. ANN. § 6-2-102(h) (same).

[121] One final significant change since *Jurek* was decided has been the 2005 amendment of the Texas capital statute to require sentences of life imprisonment without the possibility of release for those capital murderers not sentenced to death. Art. 37.071 § 2(g), amended by 2005 Tex. Gen. Laws ch. 787 § 9. This change is significant because of the *Jurek* Court's incentive in 1976 to err on the side of the safety of the public in accepting potentially unreliable predictions of future danger. With Texas's new statute, protection of the public is largely if not entirely accomplished by sentences of life without parole. *See*

"insist[ence] upon confining the instances in which the [death penalty] can be imposed." *Kennedy*, 128 S. Ct. at 2650. Under today's jurisprudence and, based on the evidence accumulated since *Jurek*, the arbitrariness and disproportionality of Texas's future danger determination is manifest and no longer acceptable.

7. The Texas Future Dangerousness Scheme Violates Texas's Constitutional Proscription Against Cruel *or* Unusual Punishment.

In addition, this Court should strike Appellant's death sentence because it violates the Texas Constitution's ban on cruel **or** unusual punishment. Tex. Const. art. I, § 13.[122] Even if the future dangerousness inquiry passes Eighth Amendment scrutiny, it does not meet the heightened demands of the Texas Bill of Rights.[123]

As here, the California Constitution bars cruel **or** unusual punishment. *See* CA. CONST. art. I, § 6 (1849). In *People v. Anderson*, 493 P.2d 880 (Ca. 1972), the California Supreme Court interpreted this provision to provide greater protection than the Eighth Amendment's ban on cruel **and** unusual punishment, and found

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notes 14, 37, 39, *supra*. Given this development, the prediction of future danger should be subject to a higher reliability requirement under the Eighth Amendment. *Cf. Baze v. Rees*, __ U.S. __, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) ("While . . . [a] legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.").

[122] Texas's selection of the word "or" was not inadvertent. In an earlier version of the 1845 Constitution, the framers would have barred "cruel **and** unusual punishment." *See* Journal of Texas Constitutional Convention of 1845, July 4, 1845, Art. I, § 11 (available in the Texas Legislative Reference Library). The 1845 framers rejected the "and" in favor of "or," a change that survived in the official versions of the 1845 and 1876 Constitutions. *See generally* http://tarlton.law.utexas.edu/constitutions/index.html (collecting Texas Constitutions) (last visited October 29, 2008).

[123] Scholars have determined that Texas's constitutional framers meant for the State Constitution to carry greater protections of individuals against the powers of the government. *See* James C. Harrington, *Framing a Texas Bill of Rights Argument,* 24 St. Mary's L.J. 399, 404 (1993) ("The delegates saw the United States Constitution as protecting the privileged and moneyed minorities from the democratic majority and the Texas Constitution as shielding the democratic majority from the economically advantaged minorities"); *id.* at 406 (noting that, unlike the United States Constitution, Texas's Bill of Rights (including this provision) appears in Article I, at the very beginning of the State's charter and are the means to ensure the "general, great and essential principles of liberty and free government" (quoting TEX. CONST. art. I, pmbl.)).

the state's death penalty violated the state constitution. *Id.* at 883-887, 899.[124]

The California Supreme Court's rationale instructs. The Court noted that California's framers, acting in 1849, chose to disjoin the "cruel and unusual" formation in the United States Constitution and other state constitutions with the word "or," as many other states had done. *Id.* at 885. The court further reasoned:

> The fact that the majority of constitutional models to which the delegates had access prohibited cruel or unusual punishment, and that many of these models reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed, persuades us that the delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state.

Id This reasoning applies with equal force here for two reasons. First, the Texas framers were also familiar with the constitutional models from other states.[125] Second, as this Court has held, the words of the Texas Constitution must be accorded their plain and natural meanings.[126] Thus, Texas's Constitution plainly bars punishment that is either cruel **or** unusual.[127] As such, it provides greater

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[124] California's constitution was subsequently amended to allow capital punishment. *See*, *e.g.*, *People v. Robertson*, 655 P.2d 279 (Ca. 1982).

[125] *Framing a Texas Bill of Rights Argument*, 24 St. Mary's L.J. at 402; May, *The Texas Constitution: A Reference Guide* 5 (1996) (noting primary reliance on Louisiana constitution, which bars cruel **or** unusual punishment, and lesser reliance on the United States Constitution). *See also* La. Const. art. 1, § 20.

[126] *Gallagher v. State*, 690 S.W.2d 587, 591-92 (Tex.Crim.App.1985) ("[C]onstitutional provisions which are not ambiguous and are not open to more than one construction or interpretation must be given their full effect without regard to the consequences. And constitutional provisions will not be construed to be ambiguous and contradictory if such construction is avoidable. And when the significance of a phrase or clause is plainly discoverable from the words thereof, there is no reason to resort to rules of construction and effect should be given to the meaning thus ascertained..") (internal citations omitted).

[127] 14 states bar "cruel or unusual punishment." *See* James R. Acker et al., *Challenging the Death Penalty Under State Constitutions*, 42 Vand. L. Rev. 1299, 1321 n.113 (1989) (collecting state constitutions). In these states, at least 3 high courts have followed the lead of the California Supreme Court and found broader protection than the Eighth Amendment. *See Tillman v. State*, 591 So.2d 167, 169 n.2 (Fla. 1991)

protection than the Eighth Amendment.[128]

In *Anderson v. State*, 932 S.W.2d 502, 509 (Tex.Crim.App. 1996), this Court considered the above argument and assumed, without deciding, that the Texas Constitution bars both cruel punishments as well as unusual punishments. The Court went on to find that Texas's death penalty was neither cruel nor unusual. *Id.* at 509-10. In doing so, however, the Court did not consider the evidence presented above that the future dangerousness inquiry results in inaccurate, unreliable, arbitrary and disproportionate determinations; nor did it consider the highly unusual nature of Texas's statute, as compared to other American capital statutes.[129]

As evinced by the arbitrary finding that Adrian Estrada would pose a threat of future violence, the sentence here is precisely the kind of "disproportionate and unusual punishments" states sought to prevent in adopting constitutional bars against cruel or unusual punishment. *See Anderson*, 493 P.2d at 885-86. "It

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("The use of the word 'or' indicates that alternatives were intended."); *People v. Lorentzen*, 194 N.W.2d 827, 829 (Mich. 1972) ("The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition."); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) ("This textual difference does not appear to be accidental or inadvertent."); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003) ("We have at least tacitly recognized that under our state constitution we will look at the two words individually."). Apparently, only two courts have rejected this argument. *State v. Combs*, 504 N.W.2d 248, 252 (Minn. Ct. App. 1993); *Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. 1993) (Because "of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by the 25th Article of our Declaration of Rights."). Notably, however, the *Thomas* decision is premised on the availability of proportionality review for death sentences, purportedly unavailable under this Court's precedents. *Anderson*, 932 S.W.2d at 509.

[128] *See also* Jonathan D. Nelson, Case Notes, *Henderson v. Arkansas: One Strike And You're Out--Does The Arkansas Constitution Provide Its Citizens With More Protection Than The United States Constitution In The Context Of Cruel And/Or Unusual Punishment?*, 56 Ark. L. Rev. 229, 253 (2003) ("Severe or excessive punishments should be considered cruel, while rare or uncommon punishments should be considered unusual. Thus, since the Arkansas Constitution prohibits cruel or unusual punishment, severe or excessive punishment, as well as rare or uncommon punishment, should be prohibited.").

[129] For economy, Appellant incorporates by reference all of the arguments in the previous point of error.

clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper." *Tillman*, 591 So.2d at169. As demonstrated by this Court's reformation of death sentences for capital murderers posing more of a future danger than Mr. Estrada, *see* Point 1, *supra*, the death sentence here is certainly unusual. Therefore, it violates the Texas Constitution.

As demonstrated in Point 6, *supra*, and incorporated herein, the compelling juror data concerning race and future dangerousness should be considered as additional evidence of the unconstitutional nature of the future dangerousness inquiry under Texas's ban on cruel **or** unusual punishment. *See* n. 115, *supra*.[130]

Because Appellant's death sentence and Texas's future danger inquiry violate the Texas constitution, the sentence must be vacated.

UNLAWFULLY OBTAINED STATEMENTS
Background Applicable To Appellants Points 8-12

Mr. Estrada unambiguously invoked his constitutional right to remain silent during custodial interrogation when he successively told both Det. Walker and

[130] As demonstrated in note 115, *supra*, *McCleskey v. Kemp* does not preclude this Court's consideration of the comprehensive studies of Texas capital jurors showing that race infects juror assessments of future dangerousness. Should this Court disagree, it should still reject *McCleske*y as inapplicable under Texas constitutional jurisprudence. In *McCleskey,* a narrow five justice majority of the Supreme Court concluded that a defendant cannot rely on statistical evidence of a "significant risk of racial bias" to prevail under a claim that his death sentence violates the Eighth Amendment, and instead, must point to "exceptionally clear proof" of discrimination. *Id.* at 296-99. This decision, not binding on this Court's interpretation of the Texas constitution, has been roundly condemned as a low point in the quest for equality, comparable to *Dred Scott v. Sanford*, 60 U.S. 393 (1857) and *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Lewis Powell, one of the five justices to vote in the majority, after retirement publicly acknowledged that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. 451 (1994). Other judges and state courts have either outright rejected or otherwise criticized *McCleskey* under their respective state constitutions. *See State v. Loftin,* 724 A.2d 129, 151-52 (N.J. 1999) (rejecting *McCleskey* on state constitutional grounds); *Claims of Racial Disparity v. Comm. of Corr.,* No. CV054000632S, 2008 WL 713763, at *6 (Conn. Super. Ct. Feb. 27, 2008) (not designated for publication) (same)); *see also* Ky. Rev. Stat. Ann § 532.300-532.309 (2008) (providing for racial discrimination challenge based on statistical evidence by statute); *Foster v. State*, 614 So. 2d 455, 466-67 (Fla. 1992) (Barkett, C.J., dissenting in part) (arguing for rejection of *McCleskey*).

then Det. Greiner that he did not want to speak with them and wanted to go home. App. 2 at 214-16 (1:04:13-1:05:23). Instead of scrupulously honoring this right, the detectives continued their interrogation. The trial court's failure to suppress the resulting statements was constitutional error. *See* U.S. Const. amends. V; XIV. Moreover, the waiver of Mr. Estrada's right to counsel was not knowing, voluntary, and intelligent because the police misled him concerning this right. Finally, the intense pressure tactics employed by the police rendered Mr. Estrada's statement coerced, involuntary and, thus, inadmissible on these grounds as well.[131]

Factual Background. Adrian Estrada was 22 years old and had never before been arrested when two San Antonio police officers and Det. Greiner came to his family's home. 18 RR 8-9. When the officers arrived, Mr. Estrada's family and his pastor, who was on the telephone, were telling him to get an attorney. 18 RR 9. Det. Greiner told the family that "we wanted to speak with him," and "I just wanted to talk to him." 18 RR 21-22. After stepping outside, Mr. Estrada got in an unmarked police vehicle for a ride to the police station, based on Det. Greiner's representation that "he would have been taken home . . . if he wanted to leave . . . [the police] would have made arrangements, if he would have liked." 18 RR 11-12. He was driven to the police station, where he was interrogated by detectives

[131] Mr. Estrada's suppression motion and argument following the hearing preserved these legal issues. 18 RR 34-39; 1 CR 142-46. Because the legal issues involved in these claims rely on the undisputed facts memorialized by the State's video recording of Mr. Estrada's interrogation, *see* 29 RR State's Exhibit 2, the standard of review is *de novo*. *See State v. Maldonado,* 259 S.W.3d 184, 185 n.2 (Tex.Crim.App 2008) (applying *de novo* review where "[t]he facts are not in dispute"). *Cf. Oursbourn v. State,* 259 S.W.3d 159, 177-78 (Tex.Crim.App 2008) (stating "if there is a video definitively showing that the officer did or did not hold a gun to the defendant's head–the legality of the conduct is determined by the trial judge alone, as a question of law"). *See also United States v. Axsom,* 289 F.3d 496, 499-500 (8th Cir. 2002) (collecting cases applying *de novo* standard to appellate "in-custody" review).

for "a little over five hours." 18 RR 12. On the way to the police station, Mr. Estrada spoke with the pastor again on a police cell phone; the pastor advised him to get a lawyer. 18 RR 11; 29 RR State's Ex. 1 at 4. Det. Greiner took the police phone from Mr. Estrada and told the pastor that he had no right to interfere, and "ended the call." 18 RR 10-11. Although Det. Greiner claimed to have advised Mr. Estrada that he was not under arrest, and that he could leave at any time, 18 RR 11, subsequent facts clearly demonstrated that a reasonable person in Mr. Estrada's situation would have understood that he was the prime suspect in a homicide investigation and could not leave.

At the police station, Mr. Estrada was "snuck" into the "the back." App. 2 at 11 (10:04). He was placed in interrogation "Room 4," and seated in a corner. *See* 29 RR State's Exhibit 2. The police did not tell him he could leave the room to get a beverage, food, or go to the restroom. Rather, he relied on the police officers to bring him beverages and to escort him from the interrogation room to the bathroom. App. 2 at 2 (9:54:14), 165 (11:49:15-11:59:57), 268-69 (1:46, 1:51). Although he learned at some point that his mother was "up front," App. 2 at 11 (1:04:37), 162-63 (11:48:10-11:48:25), he was never told he could see her or given any hint of how to find her until **after** the interrogation was over, when Det. Greiner said she was on a "couch around the corner." App. 2 at 290 (2:30:30).[132]

Soon after arriving in the interrogation room, Mr. Estrada renewed the issue

[132] Det. Greiner had told Mr. Estrada, "I will take you home or you can leave with your mom, if she's – if she's still up front." App. 2 at 162 (11:48:10). But, as noted, Mr. Estrada was never told **how to find his mother or that he could leave to find her**.

of securing an attorney. App. 2 at 6-7 (10:01:13). Mr. Estrada referred back to a conversation he had with Det. Rawson about his right to an attorney and his pastor's advice to get one. Mr. Estrada said that he had never before been in this type of situation and that he had asked Det. Rawson for advice because "he knows the way things work." App. 2 at 7 (10:01:22). Mr. Estrada then asked, "Why do people like ask to defend me?" App. 2 at 9 (10:02:21). Det. Greiner responded by evading the question: "Exactly but you know you told me out there that you had nothing to hide that you wanted to talk to us . . . so you agreed to come down and talk to us and that's all we're going to do tonight." *Id.* (10:02:24). Later, she read Mr. Estrada *Miranda* warnings. App. 2 at 15 (10:06:20). He said he understood his rights, but did not explicitly waive them. *Id*. (10:07:00).

Approximately three hours after Mr. Estrada had arrived at the station, he had not made any inculpatory statements, 18 RR 4, 33, despite constant pressure by Det. Greiner to confess. App. 2 at 100 (11:02:37) (telling Mr. Estrada he needed to tell the truth); 166-67 (2:29:45). At that point, Det. Greiner left the interrogation room and Mr. Estrada's then girlfriend, Ms. [redacted] entered. As seen in State's Exhibit 2, she yelled, screamed, cried, and shrieked at Mr. Estrada. *See* App. 2 at 172 (12:30:37). The transcript does not fully reflect the loud torrent of emotions she unleashed on Mr. Estrada, but State's Exhibit 2 (12:30:00-12:30:37) does. The police had told Ms. [redacted] that Mr. Estrada had sex with Ms. Sanchez, got her pregnant, and killed her. App. 2 at 171-78 (12:31:46-12:35:18). Devastated by these allegations, Ms. [redacted] hurled them at Mr. Estrada,

screaming, "You're lying to me. You freaking killed her . . ." App. 2 at 173 (12:31:46). *See also* App. 2 at 174-78 (similar). The encounter rubbed Mr. Estrada emotionally raw. He noticeably cried. (12:34:43-12:35:18).

Ms. [redacted] left the room, and Det. Curtis Walker entered, employing a different method of questioning by claiming to "work for God," App. 2 at 182 (12:38:17), and by directly accusing Mr. Estrada of "kill[ing] Stephanie today." App. 2 at 203 (12:56:27). To buttress this accusation, Det. Walker made the following points:

> [We're] looking at the people that were most likely to have a reason to hurt this person, **your name comes at the top of the list man.**

App. 2 at 199 (emphasis added) (12:53:50).

> What I can tell you is this and I want to give you a few things, okay 'cause I want to show you some of the **evidence that is piling up against you. . . . I have no doubt that you killed Stephanie today.**

App. 2 at 203 (emphasis added) (12:56:27).

> Q: Don't you think in a murder investigation that especially one in which you're the central figure, **do you have any doubt that you're the central figure?**
> A: **No, I don't**.
> Q: Okay. Don't you think **in a murder investigation, especially one in which you are the central figure** that you need to be honest about every single thing that went on[.]

App. 2 at 205-06 (emphasis added) (12:57:47).

> [W]e got freaking witnesses walking down the street that saw you. You know what I'll even give one more piece of information that in your mind should help to -- to let you guaranty that I've got people telling me what I'm telling you . . .

App. at 214 (1:03:53).

> You came in voluntarily to talk to us to try to . . . you know, remove that doubt from me or to try to, you know, give evidence one way or the other to the other detectives **to prove you didn't do it** or prove you did do it or whatever the situation. Me, I think you did.

App. 2 at 203 (emphasis added) (12:56:49).

> Because then it looks like I told you a while ago like you have no remorse . . . [o]r like you just don't, don't care. **You're a cold blooded killer**[.]

App. 2 at 207 (emphasis added) (12:58:41).

> But I can tell you that you've already lied about where you were at 1:00 . . . I showed a witness a picture, a piece of paper with six photos on it, the witness picked you out just like that . . . We got three witnesses put you at the scene and three or two witnesses put you at the scene and three witnesses put your car at the scene …. I can tell you how you walked out of the door [of the Sanchez home]. App. 2 at 208 (3:08: 15). A **witness picked you out of a lineup buddy** .... Well you can argue that [the witness had the wrong shirt color] when we go to trial . . . **You're done** dude.

App. 2 at 209-10 (emphasis added) (12:59:20-1:01:04).

> Okay so why don't you address some of these things that I'm bringing up. Why don't you tell me how it happens that we have witnesses who are putting you at the scene …. Why can't you tell us why you can't fill in the time gap . . . well of course . . I know why you can't fill in the time gap, you can't fill in the time gap because **you were at Stephanie's house . . . yeah you were and that's exactly … the, probable cause statement and the . . . arrest warrant will say.**

App. 2 at 211 (emphasis added) (1:01:43).

> That's exactly how it happened and let me tell you the other thing that's going to clinch this for us, you did us a huge favor. You used your cell phone all day today . . . And when I put you in the neighborhood with witnesses and with the cell towers **you're gonna spend a long time in jail. A long time. You're going to have a boyfriend** . . you know what I'll even give you one more piece of information that in your mind should help to --, to let you guaranty

> that I've got people telling me what I'm telling you, your freaking car was backed into the driveway.

App. 2 at 212-14 (emphasis added) (1:02:48). Det. Walker frequently raised his voice, gestured and pointed at Mr. Estrada, and smacked his fingers and hands on the table. State's Exhibit 2 at 12:57:17-1:04:27. When Mr. Estrada objected to these "pressure" tactics, Det. Walker forcefully insisted he could use them, and "just did." App. 2 at 210 (1:01:16).

After enduring Detective Walker's insistent and repeated murder allegations, Mr. Estrada said, "I've heard enough from you," and "I'm ready to leave." App. 2 at 214-15 (1:04:13). But Det. Walker did not relent or arrange for the ride that Det. Greiner had promised. App. 2 at 162 (11:48:10). Instead, Det. Walker asked, "Do you want to talk to Det. Greiner before you leave or something . . . ?" *Id.* at 215 (1:04:26). Mr. Estrada's unequivocal answer was: "**No.**" *Id.* (1:04:27) (emphasis added).

Mr. Estrada then again asked for the promised ride home. *Id.* at 215 (1:04:31). Rather than arranging it, Det. Walker passed Mr. Estrada off to Det. Greiner. When Det. Greiner reentered the interrogation room for fear that he would leave, 18 RR 23-24, Det. Walker explicitly told Det. Greiner, "Yeah, he's wanting to go home." App. 2 at 215 (1:04:43). There were then two possibilities. The detectives could have honored Mr. Estrada's request to go home, or they could have continued the interrogation. Despite Det. Greiner's earlier assurances that Mr. Estrada was "free to leave at any

time," 18 RR11, did not "have to talk to" them, App. 2 at 8, 15, had "the right to remain silent . . ." and did "not have to make any statement oral or written to anyone," App. 2 at 15 (10:06:20), they chose the latter course.

Thus, rather than taking Mr. Estrada to his mother or arranging for a ride, Det. Greiner first responded to Mr. Estrada's request to leave by saying, "Oh okay I, was coming in to tell him what she [Ms. [redacted] had to tell me." *Id*. (1:04:47). Mr. Estrada initially did not take the bait. Asked if he wanted to talk with Det. Greiner, he repeated his request to "go home." App. 2 at 216 (1:05:20). Undeterred, Det. Greiner sought again to continue the interrogation by asking, "You don't want to hear what she has to say?" App. 2 at 216-17 (1:05:23); 18 RR 16-17, 38. Thereafter, Mr. Estrada acquiesced and Det. Greiner resumed the interrogation that Mr. Estrada had asked to be stopped. In an attempt to get him to make an incriminating statement, Det. Greiner put the homicide allegations in a more positive light: "What happened? I really . . . listen to me, **you got to tell me**. I know you're a good guy. I, I think she pushed you to the limit **but tell me**." App. 2 at 223 (1:10:35). Mr. Estrada then made inculpatory statements.

Following the interrogation and statement, the police took Mr. Estrada to his sister's home to collect the shirt he had been wearing that day. App. 2 at 273, 275, 295; 18 RR 31-32. Once they collected that evidence, they took him home. 18 RR 32. For 3 hours, from approximately 2:00 am to 5:00 am, Mr. Estrada was home; then, the police returned to

formally arrest him. 18 RR 32-33. They returned him to the police station, and took another brief statement, expanding on some of the tangential details of the first statement. 29 RR State's Exhibit 4 (DVD); 18 RR 29-30.

8. The Police failed to scrupulously honor Adrian Estrada's invocation of the right to remain silent during custodial interrogation.

A. Mr. Estrada Unequivocally Invoked his Right to Remain Silent.

When Mr. Estrada said he did not want to speak with Det. Walker or Det. Greiner, he unambiguously invoked his right to remain silent. He invoked his right of silence when he stated that he wanted to leave the police station. Instead of honoring these repeated invocations, the police continued their interrogation. Accordingly, the resulting statements are inadmissible under Texas law, *Miranda v. Arizona,* and the Fifth Amendment because the State failed to scrupulously honor Estrada's right to remain silent during custodial interrogation.[133]

The police failed to scrupulously honor Adrian Estrada's numerous invocations of his right to remain silent. In addition to saying he wanted go home or leave at least four different times,[134] Mr. Estrada unambiguously invoked his right to remain silent during two additional exchanges:

Det. Walker:	We got freaking witnesses walking down the street that saw you . . . Your freaking car . . . was backed into the driveway.
Mr. Estrada:	You can sit here and tell me everything you want to --
Det. Walker:	Okay.
Mr. Estrada:	**That's fine. I've heard enough from you.**

App. 2 at 214 (1:03:53) (emphasis added).

[133] U.S. Const. amends. V, XIV; *Miranda v. Arizona*, 484 U.S. 386 (1966); Art. 38.22 §§ 6, 7.
[134] App. 2 at 214 (1:04:13) ("I'm ready to leave."); *id.* at 215 (1:04:21) ("I'm going to leave right now."); *id.* at 215 (1:04:25) ("they said they were going to take me home"); 216 (1:05:20) ("I just . . . go home.").

Det. Walker: Do you want to talk to Detective Greiner before you leave or something . . . ?
Mr. Estrada: **No.**

App. 2 at 215 (1:04:26) (emphasis added).[135]

Det. Walker understood Mr. Estrada's invocations of his right to remain silent: he told Det. Greiner that Mr. Estrada "want[ed] to go home." App. 2 at 215 (1:04:43). Det. Greiner already knew that – "that's why [she] went into the room." 18 RR 23-24. Yet the detectives never stopped their interrogation.[136]

Instead of ceasing the interrogation or arranging for Mr. Estrada's ride home, Det. Greiner concocted a ploy to extend his interview: she asked if he wanted to hear what his girlfriend had said. App. 2 at 215-16 (1:04:47). By continuing the interrogation and not "scrupulously honor[ing]" his invocation of his right to remain silent, the police violated *Miranda*, 384 U.S. at 479.

This Court's recent decision in *Ramos v. State*, 245 S.W.3d 410 (Tex.Crim.App. 2008), controls. There, the defendant told a San Antonio police detective that "he didn't want to talk to [the detective]. That he didn't want to talk about it anymore." *Id.* at 413. Subsequently, the police returned and told him that his girlfriend accused him in the crime and that "it would probably be better if he

[135] Although this invocation of Mr. Estrada's right of silence was made only to Det. Walker, knowledge of the invocation is imputed to Det. Greiner by law. *McCarthy v. State*, 65 S.W.3d 47, 51 (Tex.Crim.App. 2001) (holding that "courts impute knowledge of the invocation of any *Miranda* rights to all representatives of the State"). *See also Michigan v. Jackson*, 475 U.S. 625, 634 (1986); *Sterling v. State*, 800 S.W.2d 513, 520 (Tex.Crim.App 1990) (same). In addition, Det. Greiner knew that Mr. Estrada wanted to end the interrogation because she overheard what was happening in the room, 18 R 23-24, and was told specifically by Mr. Estrada that he wanted to "go home." App. 2 at 216 (1:05:20).

[136] Interrogation is police conduct or words "that the police should know are reasonably likely to elicit an incriminating response." *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

told us what really happened." *Id.* at 413. This Court rejected the State's argument that the cooperative defendant's statement meant only that he did not want to talk about a particular topic (what his girlfriend had said), *see id.* at 416, finding that any "ambiguity in appellant's other statement . . . that he did not want to talk about 'it' anymore, was, in context, entirely irrelevant." *Id.* at 419. Reversing the conviction, this Court further found that the police failed to scrupulously honor the defendant's decision to remain silent.[137]

Mr. Estrada asserted he did not wish to speak with Det. Walker[138] **or** with Det. Greiner, App. 2 at 214-15 (1:04:13-1:05:23) – "assertion[s] of his right" no reasonable officer would find "to be ambiguous." *Ramos,* 245 S.W.3d at 419. As in *Ramos*, his subsequent acquiescence was "irrelevant." *Id.* Once he invoked his right of silence, the police should have ceased interrogation. They did not.

Similarly, in *Hearne v. State,* 534 S.W.2d 703, 707 (Tex.Crim.App. 1976), the defendant said he did not wish to make a statement and the interrogating officer persuaded him to keep talking. *Id.* at 707. Just as the State argued below that Mr. Estrada agreed to keep talking to the police to hear what they had to say about his girlfriend, (18 RR 37-38), the State argued in *Hearne* that, upon hearing that his co-defendant confessed, the defendant expressed "a desire to 'get his part in too'" *Id*. Rejecting this argument, this Court found that the defendant's

[137] *Ramos,* 245 S.W.3d at 419 ("[T]he 'scrupulously honored' test is not met where the police . . . resumed questioning after a short interval during which custody continued." (citing 2 LaFave et al., CRIMINAL PROCEDURE § 6.9(f) at 839-840 (3d ed. 2007) (footnote omitted)).
[138] The court correctly found that Mr. Estrada said he did not wish to speak with Det. Walker. 2 CR 572.

"request to remain silent had not been honored." *Id.* [139]

The trial court stated that Mr. Estrada "indicated that he no longer wanted to talk to Detective Curtis Walker, but did want to continue talking to Detective Greiner." 2 CR 575; SCR1 at 5, ¶ 3. The court was absolutely correct that Mr. Estrada said he did not wish to talk to Det. Walker, but the court missed three crucial facts when it stated that Mr. Estrada "indicated" he wanted "to continue to talking to Detective Greiner." First, before Det. Greiner even entered the room, Det. Walker asked Mr. Estrada if he wanted to speak with **Det. Greiner instead**, and Mr. Estrada unequivocally said, "**No.**" App. 2 at 215 (1:04:27). Second, after hearing from Det. Walker that Mr. Estrada wanted to leave, Det. Greiner stated in Mr. Estrada's presence that she was "coming in to tell him what [Ms. [redacted] had to tell me . . . I'm a little shocked. . . . Your choice, do you want me to continue to talk to you? " App. 2 at 215-16. Third, even after hearing Det. Greiner's ploy, Mr. Estrada answered Det. Greiner's question whether he "want[ed] to talk with me," by reaffirming that he wanted "just [to] go home." App. 2 at 216 (1:05:20). In response, Det. Greiner prodded, "You don't want to hear what she has to say?" App. 2 at 216-17 (1:05:23). [140] It was only **after** this prodding that Mr. Estrada

[139] *See also Charles v. Smith*, 894 F.2d 718, 725-26 (5th Cir. 1990) (*Miranda* violation where officer continued asking questions after defendant said he did not want to make a statement and where officer claimed to use "'psychology' on defendant in asking about a hat and coat, hoping to get an admission"); *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989) (finding *Miranda* violation where police responded to invocation of right to silence by saying, "If you want to talk to us, now is the time to do it.").

[140] The trial court's findings of fact and conclusions of law, SCR1 1-5 – adopting *in toto* the "proposed" findings of fact apparently filed in the clerk's office by the prosecutor, 2 CR 571-76 – cite only to Det. Greiner's incomplete testimony at the hearing. *See* SCR1 3 (¶ 15); 2 CR 573 (¶ 15) (each citing **hearing** transcript (18 RR 16) in which Det. Greiner skipped these 3 crucial facts, rather than State's Exhibit 2 (the

ultimately stopped requesting to leave, saying, "Go ahead," and, "That's fine." App. 2 at 217 (1:05:30). In short, Mr. Estrada's invocation of his right to remain silent could not have been clearer, but Det. Greiner continued the interrogation by convincing Mr. Estrada that he should hear what Ms. [redacted] had said.

Mr. Estrada's invocation was unequivocal under any precedent. In *Watson v. State*, 762 S.W.2d 591 (Tex.Crim.App. 1988), this Court held that, "There is no talismanic word or phrase with which to invoke the right to remain silent. . . . *Miranda* makes clear that the interrogation must cease when the person in custody '**indicates in any manner**' that he wishes to remain silent."[141] In *Watson*, the defendant indicated his invocation of the right of silence by not answering the police's questions. This Court held the police "were put on notice their questioning should cease" because appellant "responded in the manner he was warned he could employ in exercising his right to silence . . ." *Id.* at 598.

As in *Watson* and the other decisions cited herein, here Mr. Estrada's invocations of his right to silence were plain, and should have been honored.[142]

DVD) which captures the **entire** exchange). Det. Greiner misleadingly testified that Mr. Estrada "did wish to continue speaking with me," but completely **left out** the three crucial intervening facts discussed above.

[141] *Watson*, 762 S.W.2d at 597 (quoting *Michigan v. Mosley*, 423 U.S. 96, 101-102 (1975) (emphasis added)). *See also United States v. Rambo*, 365 F.3d 906, 910 (10th Cir. 2004) (finding invocation of right to remain silent when suspect responded, "No," when officer asked, "[D]o you want to talk to me about this stuff?"); *United States v. Hernandez*, 574 F.2d 1362, 1369 (5th Cir. 1978) (finding that continuing interrogation in the face of a suspect's refusal to answer questions violates *Miranda*); *Simpson v. State*, 227 S.W.3d 855, 858 (Tex. App. Houston 2007, no pet.) (suppressing confession obtained when in-custody suspect, asked if he wanted to tell his "side," said "No, I don't even want to talk about it ...").

[142] Det. Greiner not only continued interrogation after Mr. Estrada invoked his constitutional right to cut off custodial interrogation, she also affirmatively pushed for a confession. She urged him to make a statement mitigating the accusations against him: "[T]his is the time you need to tell me, this is it. This is what I need to know what happened. If you tried to defend yourself which I feel probably happened, I need to know because then it makes sense to me. I really . . . listen to me, **you've got to tell me**. I know you're a good guy, I, I think she pushed you to the limit … **but tell me**." App. 2 at 222-23 (1:10). Here, again, Det.

B. Mr. Estrada Was in Custody in the Interrogation Room When the Police Failed to Scrupulously Honor His Right of Silence.

Custody occurs when the police "create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted." *Dowthitt v. State,* 931 S.W.2d 244, 255 (Tex.Crim.App. 1996).

No reasonable person would feel free to leave after being subjected to what Mr. Estrada was subjected to. He was: 1) transported by the police from his home, where his family was advising him to get an attorney, 2) abruptly cut off from telephone contact with a pastor seeking to protect his rights counsel, 3) read *Miranda* warnings and accused aggressively of murder, 4) told he would stand trial and go to prison, 5) denied his repeated requests to leave, 6) told he did not have to speak with the police, but then subjected to continuing interrogation when he said he did not want to speak with them, and 7) closely guarded at the police station and accompanied by officers to the bathroom. Thus, Mr. Estrada was in custody when the police failed to honor the invocation of his right to remain silent.

As this Court has long held, among the most important factors showing custody is when an "investigation has finally centered on the defendant" and there is probable cause to arrest,[143] provided that the investigatory focus has been communicated to the suspect. *Stansbury v. California*, 511 U.S. 318, 325 (1994).

Greiner's tactics violated Mr. Estrada's constitutional rights, and his subsequent statements must be suppressed. *McGraw v. Holland*, 257 F.3d 513, 518 (6th Cir. 2001) ("[W]hen [defendant] repeatedly said she did not want to talk about the rape, she should not have been told that she **had** to talk about it.") (emphasis added); *United States v. Szymaniak*, 934 F.2d 434, 438-39 (2d Cir. 1991) (suppressing confession obtained when officer "approached [appellant] on three or four occasions after [he] clearly established that he did not wish to speak . . . outside the presence of an attorney").

[143] *Ruth v. State,* 645 S.W.2d 432, 435 (Tex.Crim.App 1979) (citing *Newberry v. State*, 552 S.W.2d 457, 461 (Tex.Crim.App 1977); *Ancira v. State*, 516 S.W.2d 924, 927 (Tex.Crim.App 1974)).

Indeed, the *Miranda* Court made clear that custody – when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," 384 U.S. at 444 – is shown when "an investigation [has] focused on an accused." *Id.* at 444 n.4 (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).[144]

Moreover, "the mere fact that an interrogation begins as noncustodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation."[145]

Here, as a review of the DVD in evidence reveals, Det. Walker forcefully barked the following accusations at Mr. Estrada to make clear that Mr. Estrada would be going to prison for a long time, not home:

- Estrada was the top suspect and "central figure" in the investigation. App. 2 at 199 (12:53:50), 205 (12:57:47). He could make any arguments for himself "when we go to trial." App. 2 at 209 (12:59).
- Evidence was piling up against Estrada. App. 2 at 203 (12:56:27).
- Walker had no doubt Estrada did it. App. 2 at 203 (12:56:57).
- "Freaking witnesses" placed Estrada at the scene. App. 2 at 214 (1:03:53).
- "[Y]ou're a cold blooded killer . . ." App. 2 at 2:07 (12:58:41). "[H]e's already killed one woman today." App. 2 at 216 (1:05:16).
- Walker knew Estrada was lying and had three witnesses who placed him at the scene. App. 2 at 208 (12:59:20).
- A witnesses picked him out of the lineup. "You're done dude."

[144] *See also United States v. Wauneka*, 770 F.2d 1434, 1439 (9th Cir.1985) (custody where defendant told he matched description of rapist); *United States v. Turner*, 761 A.2d 845, 853 (D.C. 2000) (custody where police told defendant they had a warrant to seize his hair samples and bodily fluids).
[145] *Dowthitt*, 931 S.W.2d at 255 (citing *Ussery v. State*, 651 S.W.2d 767, 770 (Tex.Crim.App. 1983)). *See Ruth,* 645 S.W.2d at 436 (discussing escalation to custody status).

App. 2 at 210 (1:01).

- Police already had "probable cause" to arrest. App. 2 at 211 (1:01:43).

- Estrada could not account for his whereabouts. App. 2 at 211 (1:01:43).

- "[Y]ou're gonna spend a long time in jail. A long time. You're going to have a boyfriend . . . ." App. 2 at 213-14 (1:02:48).

Thus, whatever his custodial status before he was interrogated by Det. Walker,[146] Mr. Estrada was in custody by the finish of these intimidating accusations. Det. Walker made clear that, based on the evidence he already had, Mr. Estrada was going to prison, not home. He repeatedly accused Mr. Estrada of the crime and forcefully argued that he might as well confess and help himself because the police had the case against him "clinch[ed]." App. 2 at 212 (1:02:49). As numerous courts have held, a reasonable person, directly confronted by repeated police accusations of a serious crime, would not believe he could simply get up and walk away from the police station.[147] Clearly, no reasonable person would feel free to leave after facing the murder accusations Det. Walker leveled.

The police control of Mr. Estrada during the interrogation also

[146] Even before Walker's accusations and before the interrogation had commenced, the police zeroed in on Mr. Estrada as a prime suspect and seized his car. 29 RR State's Exhibit 1 at 4.

[147] *See United States v. Jacobs,* 431 F.3d 99, 107 (3d Cir. 2005) (finding custody where questioning was "confrontational and intimidating," and officer told defendant "that he thought she was guilty"); *United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (custody when an officer told suspect he matches the description of a drug courier); *Jones v. State*, 119 S.W.3d 766, 776 (Tex.Crim.App. 2003) (finding custody of already incarcerated inmate where he had been "taken to a small (approximately 8′ x 12') interview room to meet with two officers who informed him" that they had been told he was responsible for two murders); *Mansfield v. State*, 758 So. 2d 636, 644 (Fla. 2000) (finding custody where officers communicated that defendant was "the prime, if not the only, suspect"); *Jackson v. State*, 528 S.E.2d 232, 235 (Ga. 2000) (similar); *Buck v. State,* 956 A.2d 884, 908 (Md. Ct. Spec. App. 2008) (similar).

demonstrates that he was in custody.[148] The police controlled him by ending his phone call with his pastor who was telling him his rights, by determining who entered the interrogation room,[149] by sitting between him and the door to the room, by accompanying him to the bathroom, as in *Dowthitt*, [150] and by ignoring his request to be taken home. Moreover, Det. Walker frequently raised his voice, gestured and pointed at Mr. Estrada, and smacked his fingers and hand on a table, leaving no doubt that he was in control. State's Exhibit 2 at 12:57:17-1:04:27.

In addition, recitation of *Miranda* warnings is "synonymous" with arrest in our culture. *Houston v. State*, 185 S.W.3d 917, 921 (Tex. App. Austin – 2006). Det. Greiner's recitation of *Miranda* warnings, albeit nondispositive by itself, is another factor that would suggest to a reasonable person he was under arrest.[151]

Morever, where, as here, a suspect has been told by the police that he is not under arrest and can leave at any time, but police conduct has the effect of nullifying that advice, the advice "will not carry the day." 2 LaFave et al. CRIMINAL PROCEDURE § 6.6 (d) at 737 n.57 (3d ed. 2007). "Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is 'not under arrest' is sufficient to end the inquiry into whether the

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[148] *See, e.g., Dowthitt*, 931 S.W.2d at 257 (custody based in part on "factors involving the exercise of police control over appellant (accompanying appellant at restroom breaks, ignoring requests to see his wife)") (parenthetical in original); *Miranda*, 384 U.S. at 445 (describing "police-dominated atmosphere" much like here); *Buck*, 956 A.2d at 908 (finding custody where interrogation "lasted for about five hours, during which time Buck was not allowed to move about unescorted and was at all times being watched").

[149] For example, when Mr. Estrada asked if his mother was going to come in the interrogation room, Det. Greiner responded, "We'll make sure she's comfy on the couch." App. 2 at 11 (10:04).

[150] Det. Greiner stated, "[You] need to go to the bathroom, I'll make sure no one's there, and I'll get one of the guys to walk you down the hall." App. 2 at 268-69 (1:46). An unidentified male police officer entered the room a few moments later to escort Mr. Estrada to the bathroom. *Id.* (1:51).

[151] *See Sprosty v. Buchler*, 79 F.3d 635, 642 (7th Cir. 1996) (citing *Miranda* warnings as factor tending to demonstrate custody); *United States v. Bautista*, 145 F.3d 1140, 1148 (10th Cir. 1998) (similar).

suspect was 'in custody' during an interrogation." *United States. v. Colonna*, 511 F.3d 431, 435 (4th Cir. 2007). Courts have repeatedly so held.[152] Here, nullifying their statements to Mr. Estrada that he would be permitted to leave and that the police would arrange for a ride, App. 2 at 162, 215, the police conduct – hurling murder accusations at him, closely monitoring him in the police station, ignoring his request to leave, App. 2 at 214-15 (1:04:13-1:05:20, [153] and overriding his attempts to stop the interrogation, App. 2 at 214-17 (1:04:13-1:05:20), even after assuring him he could remain silent, App. 2 at 8, 15 – would certainly have communicated to any reasonable person that he was not free to leave.

That the police ultimately took Mr. Estrada home – allowing him to stay there for a mere 3 hours in the middle of the night, 18 RR 32-33 – did not

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[152] *See People v. Horn,* 790 P.2d 816, 819 (Colo. 1990) (custody despite that police told suspect he was "free to leave," where he was also told "charges would be filed against him" and interview was "accusative from the outset" and "highly confrontational"); *Buck,* 956 A.2d at 908 ("Buck was told three times over a six-hour period that he was not under arrest and was free to leave . . . . A reasonable person in [his] situation would not think, however, based on the conduct of the officers, that he had the freedom to break off contact with the police."); *State v. Zancauske*, 804 S.W.2d 851, 859 (Mo. Ct. App. 1991) (custody where suspect confronted with accomplice's confession, even though "he was not under arrest and was free to leave regardless of the outcome of the interrogation"); *Bunton v. Commonwealth*, No. 1157-99-1, 2000 WL 1486569, *4 (Va. Ct. App. Oct. 10, 2000) (unpublished) (custody where suspect asked police for a ride home from, eventually confessed to murder after asking to go home seven times, and police repeatedly told him he was not under arrest, he could leave, and changed the subject each time, and citing *Wass v. Commonwealth*, 359 S.E.2d 836, 840 (Va. Ct. App. 1987) ("informing a suspect that he is not in custody and is free to leave does not necessarily mean that he is not in custody")). *See also Ramos*, 245 S.W.3d at 415 (finding *Miranda* violation in similar Bexar County case in which the State argued that the defendant was "clearly told that he was not in custody and that he knew that," although lower courts' custody determination was not reviewed by this Court). *Cf. United States v. Sadosky*, 732 F.2d 1388, 1392-93 (8th Cir. 1984) (finding seizure for 4th Amendment purposes in similar circumstances). *See also United States v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992) ("We acknowledge that there may be situations in which the defendant is informed that he is not under arrest but where the circumstances suggest otherwise.").

[153] When Mr. Estrada said he wanted to leave, Det. Walker did not release him, drive him home, or cease the interview. Instead, he made statements that Mr. Estrada could leave, asked if he wanted to talk to Det. Greiner (to which Mr. Estrada answered, no), handed him off to Det. Greiner anyway, and did not tell him he would arrange for a ride or direct him to his mother in the police station. App. 2 at 214-15 (1:04). His statements did not release Mr. Estrada from custody. If anything, Det. Walker's statements and conduct – telling Mr. Estrada he could leave but not arranging for the ride he had been promised – would reinforce a reasonable person's belief that he is not free to leave.

retroactively transform the previous custodial encounter into a non-custodial one. "[J]ust because an officer lets a suspect leave after he or she has gotten all the desired incriminating evidence does not mean the officer would have let the suspect leave (or, to be more precise, it does not mean the officer made the suspect believe she or he could leave) during the questioning." *Jacobs*, 431 F.3d at 107 (parenthetical in original).[154] Where, as here, contemporaneous police conduct would indicate to a reasonable person that he is not free to leave, custody is established and the inquiry is complete. As one appellate court has explained, "Regardless of what the detectives said about [a suspect's] not being under arrest and being free to leave, and their efforts to create an interrogation that could be labeled non-custodial by the use of catchphrases and by going through the motions of taking [him] home before formally arresting him, any reasonable person in [his] situation . . . would have thought he was in police custody and did not have the freedom to cut off his interactions with the detectives." *Buck*, 956 A.2d at 908.[155]

Absolutely no reasonable person would feel free to leave after being: 1) transported by the police from his home, where his family was advising him to get an attorney, 2) abruptly cut off from telephone contact with a pastor seeking to protect his rights to counsel, 3) read *Miranda* warnings and accused aggressively of murder, 4) told he would stand trial and go to prison, 5) denied his repeated

[154] *See also Xu v. State*, 100 S.W.3d 408, 414-15 (Tex. App. – San Antonio 2002) (finding custody despite San Antonio detectives' attempt to avoid *Miranda*'s dictates by taking suspect home before arresting him).
[155] *Cf. Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (plurality) ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by [police] training instructions what [we have] held Congress could not do by statute.").

requests to leave, 4) told he did not have to speak with the police, but then subjected to continuing interrogation when he said he did not want to speak with them, and 6) closely guarded and accompanied by officers to the bathroom.[156]

* * *

In short, Adrian Estrada was in custody during the police interrogation. The police failure to scrupulously honor his invocation of his right to remain silent means that the ensuing statements must be suppressed. *See* State's Exhibit 2 (1:05:23 – 2:30) (statement after invocation of right to remain silent); State's Exhibit 4, the tainted fruit of unconstitutionally-obtained State's Exhibit 2.[157]

9. The Detectives' misleading statements about Adrian Estrada's right to counsel rendered his waiver unknowing, involuntary and unintelligent.

When Det. Greiner advised Mr. Estrada of his right to counsel, he asked, "Why do people like ask to defend me." App. 2 at 9 (10:02:1). She responded, "[e]xactly," and then resumed interrogation. *Id.* Her misleading answer – suggesting that the right to counsel depended on the willingness of an attorney to represent him – rendered any waiver of Mr. Estrada's right to counsel unknowing

[156] *See Yarborough v. Alvarado*, 541 U.S. 652, 664-65 (2004) (finding following factors would weigh towards finding of custody: being transported to police station by police, police focus on allegations against defendant instead of mere investigation, police threatening prosecution, and interview lasting two hours); *Buck*, 956 A.2d at 908 (similar catalogue of factors weighing toward custody finding).

[157] *See State v. Hartley*, 511 A.2d 80, 96-97 (N.J. 1986) (suppressing first statement taken in violation of *Miranda*, where the police **failed to scrupulously honor invocation of right to remain silent** during custodial interrogation (as distinguished from cases where police merely failed to provide *Miranda* warnings) and suppressing subsequent statement, preceded by warnings, as fruit of first one). *Cf. Seibert,* 542 U.S. at 616-17 (suppressing first statement obtained during custodial interrogation without *Miranda* warnings, and suppressing second statement, preceded by warnings because, *inter alia*, it "would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before . . "). If this Court reverses and orders suppression of the statement in State's Exhibit 2, but disagrees with this argument concerning State's Exhibit 4 or is unable to decide its admissibility, its order should state that this issue remains unresolved and/or direct the trial court to rule on this issue after a complete hearing on the issue.

and unintelligent.[158] As the Supreme Court has held, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda*, 384 U.S. at 476. *Cf. Seibert*, 542 U.S. at 613-14 n.5 (forbidding misleading tactics).[159]

Det. Greiner's highly misleading and prejudicial statements about Mr. Estrada's right to counsel rendered any purported waiver unknowing, involuntary, and unintelligent in violation of Mr. Estrada's rights. U.S. Const. amends. V, XIV. Thus, the trial court erred in failing to suppress his ensuing statements.

10. The Police Violated Adrian Estrada's Fifth Amendment and Due Process rights by coercing a confession.

To be voluntary, a confession must be "the product of an essentially free and unconstrained choice." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). *See also* U.S. Const. amends. V; XIV. To determine voluntariness, courts look to the totality of the circumstances surrounding the statement.[160] The totality of the circumstances here demonstrate that Adrian Estrada's statements were coerced.

When he made the statements, he: 1) was 22 years of age and had never before been arrested; 2) was told he had the right to remain silent, App. 2 at 15 (10:26:20), but was subjected to continued interrogation even after he invoked

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[158] Det. Greiner was no stranger to stratagems: she obtained consent to DNA testing by misleading Appellant about the privacy of the results. *See* Point, 41, *infra*; App. 2 at 122 (11:16), 131-32 (11:27:37).
[159] When faced with an ambiguous or equivocal statement regarding an attorney, a police officer may "clarify whether or not he actually wants an attorney," **or** continue questioning him. *Davis v. United States*, 512 U.S. 452, 460-61 (1994). *See also Thompson v. Wainwright*, 601 F.2d 768, 770, 772 (5th Cir. 1979) (disapproving of misleading tactics in response to ambiguous invocation); *Russell v. State*, 727 S.W.2d 573, 577 (Tex.Crim.App 1987) (citing *Thompson* and holding that "an interrogating officer may not use the guise of clarification in order to coerce or intimidate the accused into making a statement"). No case allows the State to employ misleading tactics in response to an ambiguous invocation.
[160] *Penry v. State*, 903 S.W.2d 715, 748 (Tex.Crim.App. 1995).

that right, App. 2 at 214-15 (1:04:13);[161] 3) asked about his right to counsel but was misled by Det. Greiner into thinking no one would defend him; 4) was misleadingly told his statement could be used **against** him or **for** him, a factor this Court has held bears on the voluntariness of a statement;[162] 5) maintained his innocence of the crime during four hours of interrogation; and 6) was exposed to the emotional turmoil of his girlfriend accusing him of impregnating another woman and killing her before he made his statement, resulting in Mr. Estrada crying. App. 2 at 173-77 (12:34:43-12:35:18).[163]

The totality of circumstances demonstrates that Mr. Estrada's will was overborne. His confession, thus, must be suppressed.

11. The trial court committed reversible error by admitting Appellant's oral statements in violation of Article 38.22 § 6 and 38.21.

As this Court recently stated, "the potential 'involuntary' fact scenarios encompassed by Articles 38.21 and 38.22[164] are broader in scope than those covered by the Due Process Clause or *Miranda*." *Oursbourn v. State,* 259 S.W.3d

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[161] *United States v. Bautista*, 145 F.3d 1140, 1150-51 (10th Cir. 1998) ("If the authorities are free to tell a suspect that he has the right to appointed counsel, but could, while continuing to interrogate him, refuse to provide such counsel on the grounds that the suspect was not actually in custody, the suspect would be led to believe that no request for counsel would be honored. . . . [L]aw enforcement officers are not free to give the *Miranda* warning and then blatantly ignore a suspect's attempt to invoke any right thereunder.").

[162] Dets. Greiner and Walker repeatedly suggested to Mr. Estrada that his actions could have been justified and that making a statement would help him. App. 2 at 156, 201-203, 206, 22-24. *See Creager v. State*, 952 S.W.2d 852, 856 (Tex.Crim.App. 1997) (finding that although such a comment does not make a statement inadmissible per se, it is a factor bearing on the voluntariness of a statement).

[163] *See Culombe,* 367 U.S. at 630-31 (finding confession coerced and citing as one factor that the defendant's wife "was permitted-indeed asked-to confront her husband and tell him to confess," and his "thirteen-year-old daughter was called upon in his presence to recount incriminating circumstances," resulting in defendant being "choked up" and citing *Spano v. New York*, 360 U.S. 315 (1959) (finding confession coerced in light of various factors, including exploitation of bond of decade-long friendship between interrogator and defendant)).

[164] Article 38.21 states simply: "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." Article 38.22 is a much longer statute, which proscribes the introduction of statements in various scenarios, unless several statutory and constitutional rules are followed.

159, 173 (Tex.Crim.App. 2008).[165] In the event that this Court does not suppress Mr. Estrada's statements as a violation of *Miranda* or the Due Process clause, they are barred under Texas law based on the same factors cited above, which are incorporated herein. Perhaps most importantly, even if this Court somehow finds that Mr. Estrada was not in custody, he was **told** he had a right to remain silent. App. 2 at 15 (10:06:20). At 22 years of age and with no experience in the criminal justice system, his attempts to effectuate that right were trampled by the police, who continued to interrogate him. App. 2 at 214-17 (1:04:13-1:05:23). The resulting statements were inadmissible under Texas law.

12. The trial court committed reversible error by admitting Appellant's oral statements in violation of Article 38.22 §§ 2-3.

Article 38.22 § 3 (a)(2) prohibits the admission of oral statements obtained through custodial interrogation unless the accused makes a knowing, intelligent and voluntary waiver of his right to remain silent, his right to an attorney, his right to an appointed lawyer if he cannot afford an attorney and his right to terminate the interrogation at any time. The waiver can be either explicit or, if it possesses the requisite indicators under Texas law, implicit.[166] Because Mr. Estrada's oral

[165] As this Court stated in *Oursbourn*, "Under Articles 38.21 and 38.22 and their predecessors, fact scenarios that can raise a state-law claim of involuntariness (even though they do not raise a federal constitutional claim) include the following: (1) the suspect was ill and on medication and that fact may have rendered his confession involuntary; (2) the suspect was mentally retarded and may not have 'knowingly, intelligently and voluntarily' waived his rights; (3) the suspect 'lacked the mental capacity to understand his rights'; (4) the suspect was intoxicated, and he 'did not know what he was signing and thought it was an accident report'; (5) the suspect was confronted by the brother-in-law of his murder victim and beaten; (6) the suspect was returned to the store he broke into' for questioning by several persons armed 'with six-shooters.'" 259 S.W.3d at 172-73 (notes omitted).

[166] Interpreting the waiver requirement for written statements under Article 38.22 § 2 (b), this Court in *Garcia v. State*, 919 S.W.2d 370, 384-8 (Tex.Crim.App 1994), permitted the introduction of a confession without explicit waiver language in the statement itself only due to the following demonstration of a valid

statements lack an explicit waiver of his rights under this statute (and *Miranda*) **or** any of requisite indicators of an implicit waiver under Texas law, *see* 29 RR State's Exhibits 2, 4, they were inadmissible under Art. 38.22 §§ 2-3.

13. The Trial Court Denied Mr. Estrada a Fair Trial By Failing to Instruct the Jury on Voluntariness and the Attendant *Miranda* Issue.

Article 38.22 § 7 states that trial judges "**shall**" instruct the jury that the prosecution must prove beyond a reasonable doubt that the defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights, if the issue is raised by the evidence. *See*, *e.g., Oursbourn,* 259 S.W.3d at 175-76. Similarly, whether requested or not, a voluntariness instruction under article 38.22 § 6 is also required "where a question is raised." *Id.* at 178. Here, where the evidence raised questions about the voluntariness of Mr. Estrada's statement and about the legality of his *Miranda* waiver, and where the trial judge held hearings and made findings with respect to each of these issues, SCR1 1-5, these sections of 38.22 constitute the "law applicable to this case." *Id.* at 179. Thus, the instructions under these sections were mandatory. *Id.* Reversal is required because the trial court failed to instruct the jury on voluntariness and the *Miranda* issue,[167] and prejudice ensued.

Miranda Instruction. Trial counsel requested a *Miranda*/38.22 § 7 instruction by asking for an instruction on the "custodial issue" and the "waiver

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waiver: defendant initialed each of the written art. 38.22 warnings, signed each page underneath, averred he had read each page of the confession, was not coerced, did not request a lawyer, did not request termination of the interview, was not prompted to say anything, and that the statement was true and correct.

[167] The court instructed that the jury could disregard evidence obtained in violation of Texas law, the Texas Constitution, or the U.S. Constitution, but did not tell the jury that it could disregard the statement if it found the statement involuntary or if it found that Mr. Estrada did not "knowingly, intelligently, and voluntarily waive[ ]" his "right to terminate the interview at any time." Art. 38.22 § 2 (a)(5), (b).

issue" on the grounds that the evidence showed Mr. Estrada tried to "terminate that statement . . ." by saying "'I'll go home.'" 21 RR 116. Defense counsel also requested an "[article]38.23 charge." Thus, defense counsel preserved the issue both under arts. 38.22 and 38.23. Indeed, that is how the prosecution understood the defense request, stating the prosecution would not "object to a 38.22 or .23 charge as long as it is properly worded and is incredibly specific to those two issues, the issue of waiver and the issue of termination." 21 RR 116. Thus, the claim is preserved both under articles 38.22 and 38.23 and reversal is required because the error certainly caused "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1985).

To the extent that this Court finds a lack of preservation, however, the instructional error caused "egregious harm." *Id.* The *Miranda* issue was exceedingly close, *see* Point 8, *supra*, incorporated herein, and the confession formed the lynchpin of the State's case. Even if the Court finds no *Miranda* violation, *but see id.*, a jury could find that a reasonable person would not feel free to leave after being aggressively accused of murder and told he would go to prison.[168] App. 2 at 199-215 (12:53:50-1:04:43). Similarly, a jury could easily

[168] *See Dowthitt*, 931 S.W.2d at 255 (setting forth custody requirement). Under Texas law, the jury decides the *Miranda* issue through Texas's statutory counterpart, Art. 38.22 §§ 2, 3, when it is raised by the evidence. *See Oursbourn*, 259 S.W.3d at 175-76 (discussing Art. 38.22 § 7). The jury's *Miranda* decision includes a determination whether the defendant was in custody. *Id.* at 176 n.61 (citing as an example of the jury charge on this issue quoted in *Mendoza v. State*, 88 S.W.3d 236, 238 n.1 (Tex.Crim.App. 2002) ("You are further instructed that under our law a confession of a defendant made **while the defendant was in jail or other place of confinement or in the custody of an officer** shall be admissible in evidence" if the defendant has been read *Miranda* warnings), and waived the rights thereunder) (emphasis added)). In other states where *Miranda* is also a jury issue, the law makes the custody issue a jury question. *See*, *e.g.*, http://www.nycourts.gov/cji/1General/CJI2d.Confession.pdf (last visited Nov. 24, 2008).

find that when Mr. Estrada repeatedly said he wanted to go home, he was unambiguously invoking his right to remain silent. *Id*. at 214-17. *See Ramos*, 245 S.W.3d at 419. By taking this issue from the jury, the trial court prevented a crucial and powerful defense argument – that the key evidence in this case could be disregarded if the police failed to comply with *Miranda*. Thus, the instructional error meets both the "some harm" and "egregious harm" tests.

Voluntariness Instruction. The trial court erred by failing to instruct on voluntariness. TEX. CODE CRIM. PROC. arts. 38.22 § 6 and 38.23. Counsel preserved this issue by citing "38.23" in this request. 21 RR 115-16. In any event, reversal is required because the error caused both "some" and "egregious" harm.

Mr. Estrada was 22 years of age and had never before been arrested when the police interrogated him. He maintained his innocence during four hours of interrogation before claiming responsibility; he was told he had a right to remain silent, but was subjected to continued interrogation even after he invoked that right; police misled him about his right to counsel when he asked about that right; and he was misleadingly told his statement could be used **for** him or against him based on a theory of justification. App. 2 at 156, 201-203, 206, 22-24. These facts clearly raised the issue of the voluntariness of his confession,[169] and given the central importance of the confession to the State's case, both "some" and "egregious" harm resulted when this crucial issue was taken away from the jury.

[169] *See Oursbourn*, 259 S.W.3d at 181 (finding voluntariness issue raised by evidence that defendant was lied to about evidence against him, was in pain, and was vulnerable due to bipolar disorder).

In sum, the Court committed reversible error and constitutional error by failing to provide the voluntariness and *Miranda* instructions discussed above.[170]

OTHER ERRORS OCCURRING DURING GUILT PHASE

Background Law and Facts Pertaining to Points 14&15:
Improper Introduction of Inflammatory 911 Call & Photographs

Factual: The court erred by admitting irrelevant, inflammatory, and unduly prejudicial evidence, including several fetal autopsy photographs and a recording of a chaotic and emotional 911 call. Cause of death was never in dispute. The victim died from strangulation and stab wounds, 20 RR 79, established by the medical examiner and never challenged by the defense. *See*, *e.g.*, 22 RR 29-30; 38-39 (conceding this fact). Accordingly, the only purpose the 911 call and fetal photographs served was to inflame the passions of the jury.

Legal: To be admitted, evidence must be relevant by having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. *See Wyatt v. State*, 23 S.W.3d 18, 29 (Tex.Crim.App. 2000).

Even relevant evidence is inadmissible when "its probative value is substantially outweighed by the danger of unfair prejudice … [and] needless presentation of cumulative evidence." TEX. R. EVID. 403.[171]

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[170] *See* U.S. Const. amends. V (rights to due process and to be free from self incrimination), VI (jury trial right), VIII (cruel and unusual punishment proscription), XIV (right to due process).

[171] *See Long v. State*, 823 S.W.2d 259, 271 (Tex.Crim.App. 1991) (citing *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex.Crim.App. 1991)); Unfair prejudice is defined as the "undue tendency [of the evidence] to suggest [a] decision on an improper basis." *Rogers v. State*, 991 S.W.2d 263, 266 (Tex.Crim.App. 1999).

The evidence addressed in Points 14-15 utterly failed to pass the relevance and Rule 403 bars. And its admission denied Mr. Estrada his rights to due process, a fair trial, and to be free from cruel and unusual punishment. *See* U.S. Const. amends. VI, XIV; VIII. Accordingly, his conviction must be reversed.

14. The State's Unnecessary Introduction of an Inflammatory and Repetitive 911 Recording Denied Appellant a Fair Trial.

Over defense objection, the prosecution introduced into evidence an irrelevant, grossly prejudicial and inflammatory audiotape of the victim's family member's telephone call to 911 upon discovering her body.[172] State's Exhibit 5 is charged with emotion. On it, family members can be heard screaming and crying uncontrollably about the victim's bloody body. *Id.* There are also screams that the father of the victim is "going crazy," unintelligible screaming and weeping by several people in the background, and emphatic appeals to family members to attempt to administer first aid. Furthermore, the evidence took nearly seven minutes to play for the jury. 19 RR 22. The court's introduction of this irrelevant and inflammatory evidence was reversible error.

The information relayed on the 911 call was irrelevant. Adrian Estrada never contested the cause of Stephanie Sanchez's death. *See*, *e.g.*, 22 RR 38-39 (conceding this fact). The recording does little to relate the injuries sustained by Ms. Sanchez; the speakers only say that she is bleeding and that there is blood coming out of her mouth. 29 RR State's Exhibit 5. Most of the recording relates

[172] 18 RR 45-47 (arguments against introducing this evidence); 19 RR 22 (erroneous introduction of evidence); 29 RR State's Exhibit 5 (compact disc recording of 911 call).

to attempts by one of Ms. Sanchez's relatives to administer first aid. *Id*.

The State asserted this would be "the only piece of evidence that will show that blood [was] coming out of [her] mouth," a fact consistent with the autopsy findings that she was stabbed in the lung. 18 RR 47. Of course, Appellant conceded this fact, in his statement and at trial. 22 RR 29-30; 38-39; App. 2 at 226-27. Moreover, the assertion that the 911 call would be the only evidence of blood flow from her mouth misrepresented the facts. After the 911 call was admitted, the State called Jonathan Vargas, one of the speakers in the recording (and the victim's brother), who testified to all of his observations immediately preceding, during, and after the 911 call, 19 RR 63-72 -- **including that his sister was bleeding from the mouth**. 19 RR 72. The State's rationale for introducing this inflammatory evidence was wholly insufficient to admit the evidence.[173]

Furthermore, the evidence was more prejudicial than probative, and needlessly cumulative. *See Erazo v. State*, 144 S.W.3d 487, 496 (Tex.Crim.App. 2004) (reversing due to introduction of evidence "substantially more prejudicial than probative"). As discussed above, the 911 recording had no probative value. Furthermore, the screaming and chaos related by the recording is precisely the sort of "inflammatory emotion that would be calculated to cause the jurors to act on emotion rather than on the evidence." *Munoz v. State*, 932 S.W.2d 242, 244 (Tex. App.-Texarkana 1996, *no pet*.). Finally, as noted above, in direct contradiction to

[173] *See Blakeney v. State*, 911 S.W.2d 508, 513-14, 517 (Tex. App.-Austin 1995, no pet.) (reversing based on admission of irrelevant, highly prejudicial evidence). *Compare with Anderson v. State*, 15 S.W.3d 177, 186 (Tex. App.—Texarkana 2000, *no pet.*) (upholding admission of 911 recording because it contained an eyewitness identification of the defendant as the killer).

its argument before the trial court, the State did not need the evidence contained in the 911 call because the same evidence came through Mr. Vargas's testimony.

For these reasons, the prejudicial value of the 911 call substantially outweighs any probative value. The erroneous admission of State's Exhibit 5 denied Adrian Estrada a fair trial at the guilt-innocence stage, and at the sentencing stage, where this highly inflammatory yet irrelevant evidence undoubtedly influenced the jury's discretionary decision[174] in a very close case.

15. The State's Unnecessary Introduction of Gruesome Fetal Autopsy Photographs Denied Appellant a Fair Trial.

After the medical examiner offered undisputed testimony that the victim was approximately 13 weeks into its development and the pregnancy was normal, the State introduced five pages of documents recounting the medical treatment Ms. Sanchez received for her pregnancy. 19 RR 113; 30 RR State's Ex. 53. The State also introduced three ultrasound photographs of Ms. Sanchez's unborn child taken on November 17, 2005. 19 RR 152-53; 29 RR State's Exhibit Exhibit 44A.

The State also introduced three photographs depicting Ms. Sanchez's uterus and unborn fetus.[175] The defense objected that these photographs were unfairly prejudicial because Mr. Estrada did not contest that the fetus was healthy at the time of Ms. Sanchez's death. 20 RR 66-68. The three color photographs were admitted, enlarged and displayed for the jury over these objections. 20 RR 116-

[174] A capital sentencing jury may consider all of the evidence before it, including that introduced during the guilt-innocence phase. *Brooks v. State*, 990 S.W.2d 278, 284 (Tex.Crim.App. 1999).

[175] 20 RR 116-22 (State's Exhibit 73 (color photograph of bloody uterus removed from Ms. Sanchez's body on a red backdrop), State's Exhibit 74 (color photograph of embryonic sac, placenta, and umbilical cord where fetus is visible through embryonic sac), State's Exhibit 75 (same with ruler)).

22. Their admission was reversible error.

To be admitted, a photograph must be "probative of some **disputed** fact concerning the murder victim's death."[176] These prejudicial, inflammatory, and gruesome fetal autopsy photographs failed to address any disputed fact: Appellant conceded that the fetus died when Ms. Sanchez died (20 RR 68), and argued only that he lacked the requisite intent for capital murder of the fetus. 19 RR 21, 21 RR 102-04, 22 RR 30-40. When the sole discernible purpose for introducing a photograph is to arouse the jury's emotions, the photograph is inadmissible.[177] Because Appellant conceded that the fetus died when Ms. Sanchez died, and never contested the fact that he caused Ms. Sanchez's death, the fetal autopsy photographs were irrelevant.[178]

Moreover, the photographs' prejudicial effects substantially outweighed any probative value, and were needlessly cumulative.[179]

As in *Erazo* and *Reese*, note 179, *supra*, the three photographs of fetuses

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[176] *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).

[177] *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.").

[178] *See Fuller v. State,* 829 S.W.2d 191, 206 -207 (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); *Petruccelli v. State*, 174 S.W.3d 761, 765 -766 (Tex. App.-Waco 2005, *pet. ref'd*) (upholding admission of ten photographs that did not depict blood or bloody wounds as more probative than prejudicial because they contradicted defendant's explanation for the injuries).

[179] *See e.g*, *Erazo*, 144 S.W.3d at 496 (finding error in admission of photograph of fetus removed from murder victim's womb during autopsy at the sentencing phase as it violated Rule 403); *Reese v. State*, 33 S.W.3d 238, 241-44 (Tex.Crim.App. 2000) (finding error to admit photograph of murder victim and unborn child in a casket).

were more prejudicial than probative, and needlessly cumulative. *Id.* Mr. Estrada never contested that the fetus was healthy and died only as a result of the death of its mother, and the medical examiner and treating physician for Ms. Sanchez testified to these facts. 20 RR 117-22, 21 RR 16-17. The State did not need to introduce three fetal autopsy photographs to prove these facts. As in *Erazo*, "the photograph[s] of the [dead] fetus had almost no probative value," "[a]mple and adequate [other] evidence of these facts existed," and, "[a]s a result, this factor weighs strongly in favor of exclusion." *Erazo*, 144 S.W.3d at 492, 496. Their admission denied Mr. Estrada's rights under the Texas rules of evidence, Texas case law, and the U.S. Constitution. In a close case such as this, the jury's decision between life and death was undoubtedly influenced by a photograph showing "a small and vulnerable unborn child." *Id.* at 495.

16. The State's Failure to Redact from Appellant's Recorded Interrogation References to the Age of [redacted] Denied Appellant a Fair Trial.

Despite an agreement by the parties that all references to Ms. [redacted] age would be redacted from the interrogation, 18 RR 48-49, the interrogation admitted in the guilt phase contained references to the fact that she was sixteen years old. 20 RR 13-16 (citing State's Exhibit 2A at 1:26:03; 1:57:04). Ms. [redacted] age was completely irrelevant to any issue at the guilt-innocence stage – a fact the State conceded in promising to redact this evidence. It was unduly prejudicial for the jury to hear during the guilt-innocence stage of the trial that [redacted]

whom Mr. Estrada was dating, was sixteen years old at the time of the offense.[180] This error denied Mr. Estrada a fair trial and requires reversal.

17. The Prosecution Deprived Appellant of a Fair Trial Through Repeated Misconduct in Opening and Closing Statements at the Guilt-Innocence Phase.

The State's guilt-innocence phase summation and opening statement inflamed the jury's passions and prejudices, attacked constitutionally protected activity and relied on blatant speculation, improper and irrelevant victim impact evidence, burden shifting, mischaracterizations of the law and defense theory of the case, and usurpation of the jury's role. Both singularly and combined, these impermissible tactics deprived Adrian Estrada of his constitutional right to due process and a fair trial[181] by repeatedly straying far from permissible bounds[182] into a mine field of inflammatory ones. Reversal is required.[183]

Summation is not for counsel to "testify" to material outside the record.[184] Here, the prosecution misleadingly testified to a hypothetical conversation without a scintilla of record support. It argued: "If he could have got her to get another abortion … Maybe that's what they were talking about that day and that's what she refused to do and that's why he killed her." 22 RR 52-53. The prosecution

[180] *Daggett v. State*, 187 S.W.3d 444, 454-55 (Tex.Crim.App. 2005) (finding error in permitting jury to consider evidence that defendant in sexual assault case had sexual relations with a different teenager).
[181] *See* U.S. Const. amends. V, VI, XIV.
[182] *See Gallo v. State*, 239 S.W.3d 757, 767 (Tex.Crim.App. 2007), (noting permissible jury argument), *cert. denied*, 128 S. Ct. 2872 (2008).
[183] Although the defense did not properly object to the prosecutor's repeated instances of prosecutorial misconduct in summation, these errors are preserved for appellate review because the prosecution's argument was "so egregious that no instruction to disregard could possibly cure the harm." *Willis v. State*, 785 S.W.2d 378, 385 (Tex.Crim.App. 1989). Moreover, as discussed in Point 40, *infra*, trial counsel was ineffective for failing to object to these blatantly improper arguments.
[184] *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978).

presented no evidence from which such a conversation could be inferred.[185] This highly prejudicial speculation regarding motive denied Appellant a fair trial.

The State further erred by relying on constitutionally protected acts to attempt to prove intent to kill the fetus.[186] The State presented evidence that Mr. Estrada had driven the victim to a clinic for an abortion almost a year before the incident at issue in this case. 21 RR 8-9. The prosecution then argued that Appellant "knowingly killed the baby" because "he already got rid of one baby" when he "took her down there for the abortion." 22 RR 52.[187] Mr. Estrada's transporting of Ms. Sanchez for an abortion, of course, had no legal relevancy to whether he intentionally killed the fetus, and the prosecution argued that it did solely to inflame the passions and prejudices of the jury. In addition, the State may not discourage or retaliate against a person's exercise of a constitutional right,[188] and the right to abortion carries such constitutional protections.[189] As surely as a woman has a right to go to the abortion clinic, her attendant has a right to transport her there.[190] The prosecution below was not permitted to use Mr.

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[185] In fact, the State's own evidence contradicted its summation. State's Exhibit 2 detailed the dealings between Appellant and Ms. Sanchez that day, and says nothing about a disagreement about an abortion.
[186] *See, e.g., Street v. New York*, 394 U.S. 576, 594 (1969) (Conviction may not rest "on a form of expression, however distasteful, which the Constitution tolerates and protects."). *See also Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (finding constitutional error in capital sentencing proceeding where petitioner's "First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case . . ."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (stating that an aggravating circumstance is invalid if "it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected").
[187] "So how do we know he knowingly killed the baby? Well, he already got rid of one baby, didn't he? He took her down there for the abortion" 22 RR 52.
[188] The state cannot dissuade persons from exercising their constitutionally protected rights by creating burdens that discourage them from doing so. *See Powell v. Alexander*, 391 F.3d 1, 6 (1st Cir. 2004).
[189] *See Roe v. Wade*, 410 U.S. 113 (1973).
[190] Similarly, a State can no more interfere with a person who drives a friend to church than it can interfere directly with the act of church attendance.

Estrada's earlier assistance to the victim in obtaining an abortion to prove his intent to kill the fetus. The prosecution's argument impermissibly relied on constitutionally protected activity to obtain a guilty verdict. The State committed this same prejudicial misconduct in its openings statement.[191]

The denied Appellant a fair trial by speculating how the victim felt.[192] Such extremely prejudicial speculation was irrelevant to any guilt-phase issue.

Similarly, the prosecution improperly asked the jury to draw speculative and inflammatory inferences.[193] With no evidentiary basis whatsoever – and sprawling himself on the floor in a fictional reenactment – the prosecutor repeatedly asserted that the stab wounds in the neck were "for mom," and the second set were for "baby." 22 RR 55-56. The only pertinent evidence establishes that no stab wound killed the fetus or injured it.[194] The prosecution's argument constituted nothing but an egregious and highly distasteful tactic used to stir the passions of the jury and misdirect its attention from the real issues.[195]

Additionally, the prosecutor relied on irrelevant, impermissible, and highly

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[191] The State's opening should have been limited a statement of "the nature of the accusation and the facts which are expected to be proved by the State in support thereof." Art. 36.01 § (a) (3). In addition to the misconduct in opening noted above, the State contended that Mr. Estrada was "a wolf in sheep's clothing," 19 RR 10, using inflammatory and fear-inducing rhetoric that is clearly not permitted by this statute.
[192] 22 RR 15 (stating the victim's "[l]ast moments [were] filled with fear, torture, pain and terror as she looked into the eyes of the man she loved ... [a]nd what she saw in those eyes scared her to death. It was a hate, there was cold hate").
[193] *See Rodriquez v. State*, 520 S.W.2d 778, 780 (Tex.Crim.App. 1975) (finding prosecutor's improper argument not harmless as it placed new and harmful facts to the jury that were not in evidence).
[194] *See* 20 RR 117 (establishing that nothing caused death of the fetus but mother's death itself); State's Exhibits 71, 72 (showing photos of stab wounds in upper back, under the right shoulder blade).
[195] *See Borjan v. State*, 787 S.W.2d 53, 57 (Tex.Crim.App. 1990) (because arguments outside of the evidence are often "designed to arouse the [jury's] passion and prejudices," they are highly inappropriate).

prejudicial victim-impact evidence.[196] The prosecution ignored the bar against irrelevant victim-impact evidence at guilt phase by referring to the victim's home as "filled with the dreams and hopes of a 17-year-old mother to be," 22 RR 22, and by improperly referring to the victim on other occasions.[197] These remarks obviously stirred the jury's passions but spoke nothing to any fact of consequence, thus depriving the Appellant of his due process right to a fair trial.

Reversal is further required because the State impermissibly shifted the burden of proof to Mr. Estrada and commented on his failure to testify. It argued, "not once did you hear him say, 'I didn't mean to kill her. I didn't mean to kill the baby."[198] Because the detectives never asked about these issues, the prosecutor's arguments were wholly misleading and shifted the burden to Appellant to testify and to establish that he did not intend to kill the fetus. These arguments were completely improper, and denied Mr. Estrada a fair trial. 22 RR 26-28.[199]

The state misstated the law when it advised the jury that it was not to consider evidence of self defense.[200] While the defense did not pursue an

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[196] *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).

[197] The prosecution described the victim as a "17-year-old girl with graduation, senior trip, motherhood, and mission work ahead of her, [with] an unborn baby that never got to see the mother or the grandmother who so desired to hold her in their arms." 22 RR 14-15. The prosecutor also impermissibly stated that the fetus's "grandparents" "never even knew that their grandchild was being killed." 22 RR 19, 7-9.

[198] 22 RR 20. *See also* 22 RR 45 ("But Adrian doesn't mention anything in his four-hour confession … that he never intended to kill the baby.").

[199] Because the detectives never asked about his intent with respect to the fetus, Mr. Estrada's only opportunity to discuss that intent would have been at trial. The State therefore necessarily improperly commented on his exercise of his 5th Am. right not to testify. *Griffin v. California*, 380 U.S. 609 (1965) (forbidding such comment); *Livingston v. State*, 739 S.W.2d 311, 337 (Tex.Crim.App. 1987) (same).

[200] The prosecution stated "[the defense] got up and started to argue some about self-defense…just to hope to throw it out there. But you're not to consider it because it's not in the charge." 22 RR 42. Contrary to the prosecutor's argument, the jury must consider **all** the evidence to make a determination of guilt or innocence. *Gibbs v. State*, 819 S.W.2d 821, 831 (Tex.Crim.App. 1991).

affirmative self-defense theory, it did argue that the evidence of self defense negated the intent to kill.[201] Because evidence of defensive acts in excess of that needed for self defense can support a conviction for the lesser-included offense of manslaughter,[202] the prosecution's argument misstated the law.

Furthermore, the State's summation completely mischaracterized Appellant's lack-of-intent defense as a self defense claim.[203] The prosecutor implied that defense counsel had presented a "bogus self-defense claim" to the jury, likening Appellant to a "35-year-old healthy man who claimed that in self-defense he strangled an 85-year-old wheelchair-bound woman." 22 RR 16-17. But Mr. Estrada was not relying on self defense. *Id.* at 27-28. Because self-defense was not an issue – and this case did not involve the strangling of an 85-year old wheelchair-bound woman – the State's argument served solely to inflame the jury's passions, was completely improper, and irreversibly tainted the trial.

Finally, the prosecution intimidated the jury and violated due process by claiming that it would be a crime to return a verdict of anything but capital

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[201] 22 RR 27-28. In his statement, Mr. Estrada said he was "scared for his life" when Ms. Sanchez came at him with a knife. App. 2 244 (1:27-1:29:00).

[202] The jury received a manslaughter charge. 22 RR 8. If the jury had determined that Mr. Estrada sought to protect himself but in doing so "recklessly caused the death of an individual," PENAL CODE 19.04 (manslaughter definition), it could have convicted him of manslaughter instead of capital murder. *See*, *e.g.*, *Tidmore v. State*, 976 S.W.2d 724, 730 (Tex. App.-Tyler 1998, *pet. ref'd*) (finding, in case where defendant charged with murder but convicted of manslaughter, sufficient evidence under theory that the jury found that defendant "was defending himself but his use of deadly force was unjustified"); *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996) (reversing where trial court refused to give manslaughter instruction under "imperfect self defense" theory that defendant intended to protect himself but not to kill anyone). Here, the State's improper remarks foreclosed a verdict based on this theory of the defense.

[203] *See United States v. Dorr*, 636 F.2d 117, 121 (5th Cir. 1981) (granting new trial where prosecutor referred to "nonexistent defense theory" in closing argument).

murder. 22 RR 56.[204] An effort to intimidate the jury to return a verdict favorable to the State, this argument served absolutely no legitimate purpose.[205]

The prosecution's improper summation comments were far too extensive to be harmless. Under any standard of harmless error review, reversal is required.[206]

18. The Court Denied Adrian Estrada a Fair Trial By Failing to Include in the Jury Charge the Statutory Definition of "Death" of an Unborn Child.

A trial court's jury charge must set forth the law applicable to the case. Art. 36.14. Thus, the court must instruct the jury on each element of the offense charged, and **must** include in its charge each statutory definition that affects the meaning of an element of the offense. *Arline v. State*, 721 S.W.2d 348, 352 n.4 (Tex.Crim.App. 1986); *McIlroy v. State*, 188 S.W.3d 789, 797-98 (Tex. App.-Fort Worth 2006, *no pet.*). The "death" of an unborn individual is an element of the capital murder charged in this case. 22 RR 5-7. Because the "death" of an unborn individual is an unfamiliar and counterintuitive concept,[207] the legislature defined it as follows: "'Death' includes, for an individual who is an unborn child, the failure to be born alive." TEX. PENAL CODE § 1.07 (49). The trial court's jury charge, however, omitted this mandatory statutory definition. *See* 22 RR 5-6. This was egregious error and denied Mr. Estrada's rights under Texas law and to

[204] *See United States v. Cook*, 592 F.2d 877, 879 (5th Cir. 1979) (finding error where prosecutor attempted to intimidate jurors in closing argument). *See also Brewer v. State*, 704 So. 2d 70, 72 (Miss. 1997) (noting it is improper to purposely appeal to the fears of the jury in an effort to sway their deliberations).
[205] *See Anderson v. State*, 724 So. 2d 475, 479 (Miss. Ct. App.1998) (finding prosecutor's closing remarks to "serve no useful purpose but to intimidate the jury into returning a verdict favorable to the State").
[206] *Chapman v. California*, 386 U.S. 18, 24 (1967); *Anderson v. State*, 182 S.W.3d 914, 918-19 (Tex.Crim.App. 2006).
[207] "Death is the opposite of life, it is the termination of life, and death cannot be caused when there is no life." *Evans v. People*, 49 N.Y. 86, 90 (N.Y. 1872).

due process of law and a fair trial.[208]

Furthermore, reversal is required because this error caused "egregious harm." Whether Appellant "knowingly or intentionally" caused the "death" of the fetus was the key issue in this case.[209] As demonstrated below, the State offered virtually no proof on this issue, but argued that Mr. Estrada knowingly or intentionally causing the death of the pregnant woman would suffice to establish that he knowingly or intentionally caused the death of the fetus.

The prosecution relied heavily on Mr. Estrada's statement to demonstrate his guilt, but the statement says and proves nothing about his intent with respect to the fetus. Nor was such proof in the medical evidence, which showed that Ms. Sanchez had stab wounds in the back and neck, not in the abdomen. 20 RR 91-92; State Exs. 69, 71. If anything, the medical evidence rebuts the theory that Mr. Estrada was trying to kill the fetus. Possessing no evidence of intent, the State asked the trial judge for an instruction on transferred intent, which would have allowed conviction for murder of the fetus if Mr. Estrada merely intended the death of the pregnant woman. 21 RR 107-09, 130, 136-38. The requests were denied. *Id.* Undeterred, the State argued to the jury that "when you kill mom, you

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[208] *Arline*, 721 S.W.2d at 351-52. *See also* U.S. Const. amends. VI; XIV; *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (acknowledging defendant's right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"). Because the trial court's failure to define "death" did not meet with objection by constitutionally-ineffective trial counsel, *see* Point 40, *infra* (arguing this as one of many instances of ineffectiveness), this error is reviewed for "egregious harm." *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex.Crim.App. 1994).

[209] 21 RR 102-03 (arguing in directed-verdict motion that state failed to prove intent with respect to fetus, rather than recklessness or negligence); 22 RR 40-41 (same in summation). The State argued transferred intent to overcome this argument for a directed verdict. 21 RR 103. Curiously, although the court later denied the State's request for a transferred intent charge, 21 RR 136-38, the court overruled the defense motion for a directed verdict, answered only by the State's transferred intent theory. 21 RR 104.

kill the baby." 22 RR 19. According to the State, death of the fetus equaled death of the mother. Given these facts, it was crucial for the jury to know that Texas law states that death of the "mom" is not the same as the death of the fetus.

In this unfair trial, the jury was ignorant of the law that required that it find more than that Appellant knowingly or intentionally killed the "mom" to convict him on the capital murder charge – the jury also had to find that he knowingly or intentionally caused the fetus to fail "to be born alive." TEX. PENAL CODE § 1.07 (49). With Appellant's intent with respect to the fetus a hotly-contested issue, this statutory definition formed a vital – and missing – ingredient of a fair trial.

Death is not a uniform concept under Texas law.[210] Rather, the Texas Legislature specifically defined what the death of an unborn child means. TEX. PENAL CODE § 1.07 (49). The State's theory that the death of a pregnant woman equals the death of a fetus is consonant with traditional beliefs that "the unborn child [i]s a part of the mother." *See*, *e.g.*, *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884) (Holmes, J.). Therefore, it was a plausible theory the jury likely adopted in the absence of an instruction of correct law. But it was also a theory that the Texas Legislature declined to adopt when enacting § 1.07 (49).

Because the trial court's failure to provide the jury with the statutory

[210] *See*, *e.g.*, *Grotti*, 2008 WL 2512832, at *6 (pointing out that "[d]eath ... is defined in the Penal Code only as it relates to an unborn child not being born alive" and adopting definition of death under TEX. HEALTH & SAFETY CODE §§ 671.001(a), (b), for prosecution against doctor for negligent homicide). *See also* 16 Am. Jur. Proof of Facts 2d *Time of Death: Medicolegal Considerations* § 2 (2008) (stating that the traditional legal definition of death was the cessation of cardio-pulmonary function); Alexander Morgan Capron and Leon Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal,* 121 U. Pa. L. Rev. 87, 89 (1972) ("Courts and physicians can no longer assume that determining whether and when a person has died is always a relatively simple matter.").

definition of death of a fetus caused Mr. Estrada egregious harm and violated his rights under Texas law and his constitutional rights to due process and to a fair trial, reversal of the conviction is required. In the alternative, his death sentence, which is predicated on the killing of two persons in one transaction, must be set aside because this error rendered the capital murder statute unconstitutionally vague under the Eighth Amendment. *See* Point 39, *infra*, incorporated herein.

19. Without Evidence that Appellant Knowingly or Intentionally Killed the Fetus, the Conviction Lacks Support by Legally and Factually Sufficient Evidence and Violates Due Process.

To prove capital murder, the State had to show that Appellant knowingly or intentionally caused the fetus's death. 2 CR 525. Unsupported by such evidence, the conviction should be reversed for legal and factual insufficiency.[211]

The primary evidence in this case, Appellant's statement, says and proves nothing about his intent with respect to the fetus. The medical evidence demonstrated that Ms. Sanchez had stab wounds in the back and neck, not in the abdomen where the fetus was carried. 20 RR 91-92. If anything, the medical evidence rebutted the theory that Mr. Estrada was trying to kill the fetus. Nor could Mr. Estrada have **known** that his actions would result in the **death** of a non-quickened, pre-viable fetus – carried by a woman who had previously miscarried, 21 RR 7-9; as a lay person, he could not know he was causing the death of a fetus

[211] *See* U.S. Const. amend. XIV; *Jackson*, 443 U.S. at 319, 326; *Marshall v. State*, 210 S.W.3d 618, 625 (Tex.Crim.App. 2006), *cert. denied*, 128 S. Ct. 87 (2007).

he because could not know if it was living or not.[212] Without any evidence of such knowledge or intent, the State repeatedly asked the trial judge for an instruction on transferred intent, which would have allowed conviction for murder of the fetus if Mr. Estrada merely intended the death of the pregnant woman. 21 RR 107-08, 130-31, 136-38. The trial court denied these requests. *Id.*

This Court may reverse a conviction based upon **legally** insufficient evidence, *Jackson*, 443 U.S. at 319, 326, or **factually** insufficient evidence. *Marshall*, 210 S.W.3d at 625. Reversal for legal sufficiency is required because, viewed in the light most favorable to the State, the record lacks a scintilla of evidence that Appellant knew or intended that his actions would cause the fetus's death. Neither Mr. Estrada's statement nor any other evidence says anything about his intent or his knowledge concerning the fetus. Instead, the conviction relies on the theory that Mr. Estrada intended to kill the pregnant woman. Even in the light most favorable to the State, the evidence, including choking and stabbing the victim's back and neck, shows only recklessness or negligence with respect to the fetus's death. This evidence is legally insufficient.

In the alternative, this Court should act as a "13th juror" and reverse for factual insufficiency. *Watson v. State*, 204 S.W.3d 404 (Tex.Crim.App. 2006). When a conviction is "manifestly unjust" or "clearly wrong" because the "great weight and preponderance of the (albeit legally sufficient) evidence contradicts the

[212] The jury heard autopsy evidence suggesting that there had been no miscarriage, 20 RR 118-19, but there is absolutely no evidence that Mr. Estrada knew whether this pre-viable, non-quickened fetus still had life.

jury's verdict," a new trial must be ordered. *Id*. Here, conceding that Mr. Estrada had no intent with respect to the fetus itself, the State could only answer his directed-verdict motion by arguing transferred intent, a theory which the trial court found unsupported by the law, and not at issue. 21 RR 107-08, 130-31, 136-38.[213] For these reasons, this is the rare case warranting factual insufficiency.

20. By Purposefully Intruding Into Mr. Estrada's Attorney-Client Relationship, The State Violated His Sixth-Amendment Right To Counsel.

The State violated Mr. Estrada's Sixth Amendment right to counsel by purposefully intruding into his attorney-client relationship when it deliberately seized and reviewed attorney-client privileged material from Mr. Estrada's jail cell pertaining to his trial strategy.[214] The defense filed a motion to dismiss the prosecution or recuse the prosecutor's office because of the violation of his right to counsel. 2 CR 424-431. At a pre-trial evidentiary hearing on the motion, a corrections officer testified that he searched Mr. Estrada's cell at the direction of the District Attorney and that he likely seized material in an envelope labeled

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[213] Appellant can find no Texas decision applying transferred intent when conduct intended to kill a woman results in the death of a fetus. Even if this Court were to sets forth such a rule now, the right to a jury trial would prevent this Court from affirming on this new legal theory because Mr. Estrada is "constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991) (citing right to jury trial); U.S. Const. amends. VI; XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (holding that the 14th Amendment requires all elements of an offense to be submitted to a jury, and proven beyond a reasonable doubt); *Grissam v. State*, __ S.W.3d. __, 2008 WL 4149703, at *1 (Sept. 10, 2008) (acknowledging that conducting legal sufficiency analysis under a legal theory in "'complete absence' . . . "from the charge may present constitutional problems") (quoting *Malik v. State*, 953 S.W.2d 234, 238 n.3 (Tex.Crim.App. 1997) ("We recognize that due process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury.")). *But see Malik* 953 S.W.2d at 240 (stating that legal sufficiency is measured by hypothetically correct jury instruction). *See also* Tex. Penal Code § 6.04 (b)(2) (requiring, for transferred intent liability, a jury finding that "the only difference between what actually occurred [death of fetus] and what he desired [death of pregnant woman], contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected").

[214] *See Weatherford v. Bursey*, 429 U.S. 545, 557-58 (1977); *United States v. Morrison*, 449 U.S. 361, 365-66 (1981).

"legal." 6 RR 9-10, 14. After reviewing the material, he knew that multiple documents were "questionable," yet in consultation with a supervising officer, he decided to give the material to the District Attorney to review and make the determination about whether it was privileged. 6 RR 13-14.

At least one attorney in the District Attorney's office, involved in the prosecution of Mr. Estrada, read the privileged legal material and tabbed one of the documents as an "important" document for trial, before turning the document over to defense counsel. 6 RR 26 (tabbing the document as important); 6 RR 18-19 (discussing the return of "several" privileged documents to defense counsel). The tabbed document was a "document that Mr. Estrada prepared specifically at [counsel's] direction with reference to certain issues about his relationship with the victim." 6 RR 30. At the conclusion of the hearing, the State argued that no remedy was required because Mr. Estrada failed to prove prejudice. 6 RR 32. The trial court denied the motion to dismiss or recuse without explanation. 8 RR 4.

The trial court erred by not finding a Sixth Amendment violation. Disclosure of "important" and privileged trial strategy about Mr. Estrada's relationship to the victim was sufficient to demonstrate prejudice. *Cf. Weatherford,* 429 U.S. at 558 (finding "no communication of defense strategy to the prosecution" and no violation). Furthermore, even if this Court finds insufficient prejudice, his Sixth Amendment rights were violated and reversal is required because the incursion into his right to counsel was purposeful. By deliberately disclosing "legal" material that the guards knew to be, at best,

"questionable," and then by deliberately reviewing that material, the State actors in this case intentionally intruded on Mr. Estrada's protected right to counsel.

Although courts consistently require prejudice in the case of an inadvertent intrusion into the attorney-client relationship, federal and state courts are divided over whether a showing of prejudice is required for purposeful intrusions.[215]

This Court should conclude that the intentional intrusion into a defendant's attorney-client relationship violates the Sixth Amendment, and order appropriate relief, including reversal of his conviction with an order directing the trial court to dismiss the indictment or, at a minimum, to require the District Attorney's recusal.

ERRORS OCCURRING DURING SENTENCING PHASE

21. The Trial Court Violated Appellant's Right to Present Mitigation Evidence.

As the only witness who knew Adrian Estrada since his birth, Weir Labatt was a key sentencing phase witness. 23 RR 137-45. The trial court violated Mr. Estrada's rights under Texas law and under the U.S. Constitution by denying admission of two important parts of Mr. Labatt's mitigation testimony. *See* U.S. Const. amends. VI, VIII, XIV[216]; TEX. R. EVID. 803 (3).

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[215] *Compare Shillinger v. Haworth,* 70 F.3d 1132, 1139 (10th Cir. 1995) "[W]e hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed."); *United States v. Levy*, 577 F.2d 200, 208-209 (3d Cir. 1978) (same); *Howard v. State,* 611 S.E.2d 3, 8 (Ga. 2005) (same); *with United States v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003) (requiring prosecution to show that there has been no prejudice to the defendant); *Murphy v. State,* 112 S.W.3d 592, 602-03 (Tex.Crim.App. 2003) (collecting cases and adopting a rule that requires a showing of prejudice, but not discussing whether it matters that the violation was intentional).

[216] The **standard of review** for the preclusion of mitigation evidence, a constitutional and legal issue not involving a credibility determination, is *de novo*. *Moff*, 154 S.W.3d at 601; *Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App. 1997).

The United States Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[217] Violating this basic Eighth Amendment jurisprudence, and the rights to due process and a fair jury trial, the trial court sustained prosecution hearsay objections to Mr. Labatt's testimony concerning: 1) Mr. Estrada's life dream to become a firefighter; and 2) Mr. Estada's telephone call conveying his condolences when Mr. Labatt's mother-in-law died. 23 RR 140-41.

First, under Texas law, both Mr. Estrada's life dream and his condolences were admissible under the hearsay exception for "then existing [] mental [or] emotional condition." TEX. R. EVID. 803 (3). The exception permits a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health)." *Id.*[218] Second, even if this Court were somehow to find these statements hearsay, rigid application of the hearsay rule cannot be used to block relevant mitigation evidence.[219] Thus, it is clear that Mr. Estrada had a right under Texas

[217] *Lockett*, 438 U.S. at 604. Under the Eighth Amendment, the accused has a right to offer "any relevant circumstance that could cause [the sentencer] to decline to impose the [death] penalty." *McCleskey*, 481 U.S. at 306. A "State cannot preclude the sentencer from considering any relevant mitigating evidence," proffered in support of a life sentence. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004).
[218] *See, e.g., Martinez v. State*, 17 S.W.3d 677, 688 (Tex.Crim.App. 2000) (permitting statement showing declarant's fear); *Martinez v. State*, 186 S.W.3d 59, 67 (Tex. App. - Houston 2005, *pet. ref'd*) (permitting statement showing declarant's plan to leave defendant).
[219] *Wiggins*, 539 U.S. at 536 (rejecting hearsay argument against report in mitigation in context of finding ineffective assistance of counsel); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (reversing due to trial court's preclusion of "highly relevant" hearsay evidence at sentencing phase of capital trial).

law and the U.S. Constitution to introduce this crucial mitigation evidence. The trial court erred in excluding it. 23 RR 140-41.

This Court should hold under the federal constitution that the preclusion of relevant mitigation evidence in a capital sentencing hearing is structural error and can never be harmless. *See Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006).[220] *See also* U.S. Const. amends. VIII; XIV. In the alternative, because the State cannot prove beyond a reasonable doubt that the jury would have sentenced Mr. Estrada to death but for this error in this close case, *see* Point 1, 2 CR 544-45, his death sentence must be set aside. *Chapman*, 386 U.S. at 24.

22. The Court Committed Reversible Error by Permitting Well More than a "Quick Glimpse" of Victim Impact Evidence.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court ruled that the State may not be prevented from introducing evidence constituting "'a quick glimpse of the life' which defendant 'chose to extinguish.'" *Id.* at 822 (quoting *Mills*, 486 U.S. at 397 (Renqhuist, J., dissenting)). *Id.* at 839 (O'Connor, J., concurring) (same). Such evidence is commonly known as "victim impact" evidence. *Ex parte Lewis*, 219 S.W.3d 335, 376 (Tex.Crim.App. 2007). Over Appellant's objection, 23 RR 103-04, CR 231-33, the trial court admitted

[220] *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, 149 (1993); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. Crim. L. & Criminology 283, 316-326 (1991) (explaining that *Lockett* violation can never be harmless). *See also State v. Kleypas*, 40 P.3d 139, 272-73 (Kan. 2001) (similar), *overruled on other grounds*, *State v. Marsh*, 102 P.3d 445 (Kan. 2004), *rev'd on other grounds*, *Kansas v. Marsh*, 548 U.S. 163 (2006). Although this Court recently indicated that the preclusion during the sentencing phase of relevant mitigation evidence can be harmless, *Halprin v. State*, 170 S.W.3d 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*, *supra*, and not *Halprin,* should be followed.

extensive victim impact evidence. The evidence included a friend's testimony about the victim's relationship with an intermittent friend, a reading from the victim's journal about Appellant and their relationship, testimony about her family missing her, testimony that the victim "pampered" her mother, photographs of her bedroom, the victim's father's anger and inability to hold a job, the father's mistreatment by his church, and the anger of the victim's siblings. 23 RR 106-116. This evidence was far more than a "quick glimpse" and its introduction was error. *Payne*, 501 U.S. at 822; U.S. Const. amends. VI, VIII, XIV. In a close case such as this, *see* Point 1, *supra*, the State cannot prove that this constitutional error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24

23. The prosecution violated Adrian Estrada's constitutional rights through repeated instances of misconduct during its sentencing phase summation.

Texas law forbids prosecutors from misleading jurors regarding future dangerousness by asking them to assume that a capital murderer, if not executed, "would be living in the freeworld." *Berry*, 223 S.W.3d at 863-64. Nor may the prosecution misstate the law. *See*, *e.g.*, *Whiting v. State*, 797 S.W.2d 45, 48 (Tex.Crim.App. 1990). Moreover, while reasonable inferences from the record may be argued, a "chain of inferences" becomes impermissible when it "contains too many gaps." *Jordan v. State*, 646 S.W.2d 946, 948 (Tex.Crim.App. 1983). In its sentencing-phase summation, the prosecution violated each of these rules and

Mr. Estrada's constitutional rights. *See* U.S. Const. amends. VI, VIII, XIV.[221]

The State violated the proscription against falsely suggesting a capital murderer will live in the free world to prove future dangerousness. *See Berry*, 223 S.W.3d at 863. It asked the jury to find that Mr. Estrada posed a threat of future danger by contending that he would have posed a danger to [redacted] **had he not been arrested** and if other contingencies had occurred:

> And when you ask yourself is there a probability that the Defendant will commit criminal acts of violence, ask yourself this: **What if Adrian Estrada had not been caught?** What if the neighbor didn't see him over there and he stuck to his story and said, "I wasn't there," and he never did confess. But then he was guilty and then he told his new -- the new Stephanie about it? Then later on, their relationship falls apart as he moves on to someone else and she says, "Well, I'm going to tell about what you told me about killing Stephanie Sanchez." Is there any doubt – not a reasonable doubt - **is there any doubt in your mind that her life would then be in danger? Is there? Is there really any doubt?**
>
> I mean, if you feel in your hearts or your head or your gut, whichever you use to make your decisions, that, no, her life wouldn't be in danger in that circumstance, this was just life [sic] isolated incidents, then you should answer no. **But if you know in your gut, in your heart, in your head that in those circumstances she could have been the next murder, then the answer is yes.**

24 RR 12-13 (emphasis added). Thus, the State based its future-danger argument on speculation of what Mr. Estrada **would have done if free and not caught**.

Berry teaches that this type of outside-the-record, unsupported, speculative,

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[221] Instead of articulating a standard of review, this Court has reviewed allegations of prosecutorial misconduct in summation by analyzing whether the challenged comment fits within one of four permissible areas of argument. *See*, *e.g.*, *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex.Crim.App. 2000) (noting that permissible prosecution argument is limited to (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement). Where the challenged comments are "so egregious that no instruction to disregard could possibly cure the harm," they are preserved as a matter of law. *Willis v. State*, 785 S.W.2d 378, 385 (Tex.Crim.App. 1989).

irrelevant and inflammatory argument is completely improper. In *Berry*, where the defendant was convicted of killing her infant and had previously left a different infant for dead on the side of a road, the prosecution posited in summation that the defendant would become pregnant again, and be a threat to her next child, if not executed. *See Berry*, 223 S.W.3d at 862-63. This Court found that argument improper because "Appellant was, without doubt, going to be 'locked up,' either on death row or in the general prison population for a minimum of forty calendar years." Therefore, this argument "both misstated the law and misdirected the attention of the jury away from a determination of whether she would be a continuing danger in the actual circumstances in which she would be living (prison) and toward a determination of her continuing dangerousness in circumstances in which she most assuredly would not be (the free world)." *Id.*[222]

Here, too, the State's speculative contention that Mr. Estrada would have harmed [redacted] if certain contingencies had occurred in the free world "misstated the law and misdirected the attention of the jury away from a determination of whether [he] would be a continuing danger in the actual circumstances in which [he] would be living (prison)." *Id.* Had he not been sentenced to die, Mr. Estrada would have been sentenced to life imprisonment without release, Art. 37.071 § 2(g), **where he would never be able to harm**

[222] In *Berry*, this Court condemned this type of argument and emphasized its significance where the evidence of future dangerousness was legally insufficient, 223 S.W.3d at 863-64, even though Appellant's brief had not mentioned this part of the summation or raised the improper argument as a point of error. *See* Brief for Appellant, *Berry v. State*, 2005 WL 5981255 (Tex.Crim.App. 2005) (No. AP 74,913). For clarification, the relief in *Berry* was based on legal insufficiency, not the improper argument this Court discussed. 223 S.W.3d at 862-63.

[redacted] The prosecution violated *Berry* in other parts of its summation as well, inflammatorily claiming that Mr. Estrada posed a threat of danger to **children** and to **the jurors** themselves.[223]

The State prejudicially "misstated the law" in other instances, too. *Berry*, 223 S.W.3d at 863. Defense counsel stated in summation: "We are not trying to make excuses. We are not trying to diminish the wrongness of what he did . . . ." 24 RR 23. Yet, during its rebuttal summation, the State argued for death because the killing was not an accident in self defense. 24 RR 37. The law clearly does not require the establishment of such defenses (which would result in acquittal)[224] for the jury to find "there is a sufficient mitigating circumstance or circumstances to warrant" a life sentence. Art. 37.071 § 2 (e)(1).[225]

The prosecutor told the jury not to feel "guilt and angst and concern" over sentencing to death Mr. Estrada, "as he sits here today," but to "take pride in following the law" by doing so. 24 RR 39. The State again misstated the law. Texas law did not **require** a death sentence for capital murder. Rather, it provides for two appropriate punishments – death and life imprisonment without parole. Art. 37.071 § 2(g). Moreover, compassion for the defendant "as he sits here

[223] 24 RR 9-10 ("And that type of danger is a danger that parents can't protect their children from. There's obvious things as parents that you know that you don't expose your kids to."); 24 RR 40 ("And he is, most assuredly, a future danger to every one of us . . .").
[224] *See, e.g.*, TEX. PENAL CODE ANN. § 9.32 (Deadly Force in Defense of Person).
[225] "Mitigating or extenuating facts or circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame." *Davis v. State,* 340 S.E.2d 869, 882 (Ga. 1986) (setting forth the commonly-used instruction in Georgia). *See also* John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 78 (2003) ("'Mitigation is not a defense to prosecution, [nor] an excuse for the crime, ... [rather] it is evidence of a disability or condition which inspires compassion, but which offers neither justification, nor excuse for the capital crime.'" (quoting Russell Stetler, *Mental Disabilities and Mitigation*, 23 CHAMPION 49, 50 (Apr. 1999)).

today" constitutes classic mitigation. 24 RR 39.[226]

Comparing the jury's life and death decision to a protest about high gas prices, the prosecution also argued for Mr. Estrada's death as follows:

> You need to set a price that's too high so that the next time someone is in a relationship with a pregnant girl and they are sick of that relationship and they want to get out of it, they say, "You know what? The price is too high if I kill this girl." And if you set this price too high, you may prevent another murder in the future. So I'm asking you to consider those special issues and go back and deliberate and set the price too high.

24 RR 14-15. This inflammatory argument bears no relevance to the jury's task, which was to decide if the State demonstrated that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and, if so, if "there is a sufficient mitigating circumstance or circumstances to warrant" a life sentence. Art. 37.071 § 2 (b), (e)(1). Moreover, the Eighth Amendment requires an "individualized determination" whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879 (collecting Supreme Court precedents).[227] The prosecution's highly debatable deterrence argument[228] has absolutely nothing to do with the circumstances of the crime or Mr. Estrada's character.

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[226] *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654, 1665 n.8 (2007) (citing importance of mitigating factors invoking jury's "'compassion[]'" for defendant) (quoting *Woodson*, 428 U.S. at 303-04).

[227] *Cf. Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (limiting a defendant's right to introduce mitigating evidence to "'any aspect of a defendant's character or record and any of the circumstances of the offense"') (internal citations and quotation marks omitted). Deterrence, thus, is not only irrelevant in aggravation, but also fails to rebut mitigation evidence.

[228] *Compare Bazes*, 128 S. Ct. at 1547 (Stevens, J.) (concurring) (arguing that studies fail to show death penalty deters) *with id.* at 1553 (Scalia, J.) (concurring) (pointing to studies which may show a deterrent).

Weak on evidence of future dangerousness, the State improperly asked the jury to assume Mr. Estrada would pose such a threat through a tenuous chain of unsupported inferences. *Jordan*, 646 S.W.2d at 948. The State began with the premise that Mr. Estrada acted to protect his good reputation in the church and community. 24 RR 33-34. Then it argued that its expert stated that "the most important currency in prison is your reputation." 24 RR 34. The prosecution then posited that prison respect is earned by causing others "hurt and harm and fear without flinching." 24 RR 34. According to the State, then, because Mr. Estrada worried about his reputation (like many people in society), and because reputation is currency in prison, and because some inmates purportedly "hurt and harm" to maintain such a reputation, Mr. Estrada would hurt and harm people, thereby posing a threat of future danger. This argument was far too attenuated to constitute a reasonable deduction from the evidence.[229] Whatever the State's expert claimed some inmates did, there was neither proof that Mr. Estrada would care about his "reputation" as a tough or threatening inmate nor that he would hurt or harm anyone to maintain such a reputation, nor evidence from which the jury could reasonably infer such contentions. To the contrary, Mr. Estrada was in jail for a year before his trial and never hurt or harmed anyone. 23 RR 123, 127.

Attempting to inflame the jury's passions, the State also claimed that the victims' "blood alone cries out for justice in this case." 24 RR 30. This argument

[229] *Compare Jordan*, 646 S.W.2d at 948 (forbidding the use of a "chain of inferences" when it "contains too many gaps") *with Wesbrook*, 29 S.W.3d at 115 (permitting reasonable deductions).

could "serve 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."[230]

In this extraordinarily close case, *see* Point 1, 2 CR 544-45 (deadlock note), any inflammatory argument for death that should not have been made could have tipped the scales from life to death. Accordingly, Appellant's death sentence must be set aside under both the state and federal harmless error standards. Whether viewed singularly or cumulatively, there is more than "a reasonable possibility" that these improper prosecution "argument[s] … might have contributed to appellant's … punishment." *Orona v. State*, 791 S.W.2d 125, 128 (Tex.Crim.App. 1990). And the prosecution's violation of Estrada's constitutional rights was certainly not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

INSTRUCTIONAL ERRORS AT SENTENCING

24. The jury instructions violated Mr. Estrada's constitutional rights by impermissibly interfering with the jurors' ability to consider and give effect to mitigating evidence and by coercing the jury into reaching a verdict.

A.The Misleading Jury Instructions In This Case Impermissibly Interfered with the Jurors' Ability To Consider and Give Effect To Mitigation

The jury instructions erroneously informed the jury that a majority of ten votes is necessary for jurors to find the presence of mitigating circumstances. When the jury submitted a question asking if they could disagree on this point, the trial court committed additional constitutional error by failing to inform them of

[230] *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987) (reversing due to admission of inflammatory opinions of the victim's family about the crime, the defendant, and the appropriate sentence), *overruled on other grounds by Payne v. Tennessee,* 501 U.S. 808, 830 n.2 (1991).

their authority to make individual determinations regarding mitigation, and instead ordering continued deliberations. These instructions, and the unconstitutional statute upon which they are based, violated Mr. Estrada's constitutional rights to be free of cruel and unusual punishment, to have his jury consider and give effect to his mitigation, to fair and individualized sentencing, to a fair jury trial, and to due process of law. U.S. Const. amends. VI, VIII, and XIV.[231]

Texas jurors must answer two questions[232] at the penalty phase of a capital trial: (1) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (herein "future dangerousness"); and (2) "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" (herein "mitigation catchall"). Art. 37.071 § 2(e)(1). This statute segregates one type of mitigation, lack of future dangerousness, from all other mitigation.[233] A death sentence may be imposed only if the jury answers yes to the future dangerousness question and

[231] **Standard of review and preservation, subpoint A:** Because this error involves the application of a statute that would be unconstitutional "in any trial" it is preserved for appellate review irrespective of whether counsel objected. *Jimenez v. State*, 32 S.W.3d 233, 237 n.12 (Tex.Crim.App. 2000) (citing *Rose v. State*, 752 S.W.2d 529, 52-53 (Tex.Crim.App.1987), *superseded on other grounds*, *Oakley v. State*, 830 S.W.2d 107 (Tex.Crim.App. 1992)). *See also Rabb v. State*, 730 S.W.2d 751, 752 (Tex.Crim.App. 1987) (permitting constitutional challenge to statute for first time on appeal). Constitutional harmless error analysis applies. *Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex.Crim.App. 1988) (applying constitutional harmless error analysis to instruction based on unconstitutional statute, even without objection). In addition, counsel objected to this unconstitutional aspect of the statute. 1 CR 55-60; 8 RR 5.

[232] In cases where the defendant has been convicted under law of the parties, the jurors must answer a third question not pertinent here. Art. 37.071 §2(b)(2).

[233] Art. 37.071 § 2(e)(1)*; see also McKoy,* 494 U.S. at 441 (describing evidence that the defendant "would pose no undue danger to his jailers or fellow prisoners" as mitigation) (*quoting Skipper v. South Carolina*, 476 U.S. 1, 7 (1986)); *id*. at 5 (under Eighth Amendment, "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating").

no to the mitigation catchall question. Art. 37.071 § 2(g). In the event that a jury cannot agree and is "unable to answer" either of these issues, the trial court must sentence the defendant to a sentence of life imprisonment without parole. *Id*.[234]

Unfortunately, the jury is never presented with this straightforward (and constitutional) explanation of the rules. Instead, pursuant to the Texas statute, the jury is falsely instructed that it must reach a ten person majority in order to find the presence of mitigation. Art. 37.071 § 2(d), (f). For example, with respect to the future dangerousness finding, the statute provides that the jury must be charged that "it may not answer … 'yes' unless it agrees unanimously and it may not answer . . . 'no' unless 10 or more jurors agree." Art. 37.071 § 2(d)(2). This mandatory language directs that there are only two acceptable verdicts from the jury: a unanimous verdict in favor of a finding of future dangerousness and no sufficient mitigation, or a 10 person majority verdict against a finding of future dangerousness or sufficient mitigation. The trial court instructed the jury in this case with the erroneous and misleading instructions from the statute. 24 RR 4-9.

By these instructions, Mr. Estrada's jury was erroneously informed that it could find future dangerousness, or conclude that the sufficient mitigation existed, only if ten or more jurors agreed. The Supreme Court has repeatedly affirmed that death penalty statutes cannot erect barriers to consideration of mitigating

[234] The statute reads: "[i]f the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life imprisonment without parole." Under a previous statute, if a jury failed to agree on a special issue the result was a mistrial and a new trial on both guilt and penalty phase issues. *See Eads v. State,* 598 S.W.2d 304, 308 (Tex.Crim.App. 1980).

evidence.[235] This fundamental principle extends to the protection of the individual assessment of each juror: the Constitution demands that "each juror be permitted to consider and give effect to mitigating evidence." *McKoy,* 494 U.S. at 442-43.

In *Mills*, the Supreme Court considered a scheme similar to the Texas one: the Maryland statute required jurors to answer specific mitigation questions with a "ye" or "no" answer. 486 U.S. at 370. The Maryland appellate court conceded that this structure could pose constitutional problems, but advanced a "savings" interpretation: the appellate court postulated that jurors knew that they could disagree and leave the mitigating questions blank. *Id*. at 372-73, 381-82. Under this interpretation, jurors could give effect to mitigation without unanimous agreement. *Id*. The Supreme Court rejected Maryland's savings interpretation, concluding that the risk was too high that the jurors in fact "may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id*. at 384.

In *Lawton v. State*, 913 S.W.2d 542 (Tex.Crim.App. 1995), this Court considered a capital defendant's challenge to the Texas 10 majority instruction. The *Lawton* court dismissed the argument that the misleading jury instructions are unconstitutional because they imply to the jury that at least 10 jurors have to agree in order for a juror to vote for mitigation. 913 S.W.2d at 558-59. The Court reasoned, "every juror knows that capital punishment cannot be imposed without

[235] *Smith v. Texas*, 543 U.S. 37, 43-44 (2004); *Mills,* 486 U.S. at 374-75*; McKoy v. North Carolina,* 494 U.S. 433, 435 (1990)*; Lockett,* 438 U.S. at 604-05; *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

the unanimous agreement of the jury on [both] special issues." *Id.* at 559. Under this reasoning, every juror knows that a death sentence is not possible if the jurors fail to unanimously agree on future dangerousness – and accordingly, that it need not find a majority of 10 people to defeat the death sentence. *Id*.

This case demonstrates the fallacy of the *Lawton* court's theory that reasonable jurors know that unanimous agreement is required for a death sentence. *See Francis v. Franklin*, 471 U.S. 307, 315-316, (1985) ("The question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning."). Unlike in *Lawton,* and even unlike in *Mills*, 486 U.S. at 381 ("no extrinsic evidence of what the jury . . . actually thought"), here, there is actual record evidence that indicates that the jurors did not agree and did not know how to proceed.

The deliberating jurors submitted the following note to the trial court: "What happens if we can't come to a decision on issue #1?" 24 RR 41-42; 2 CR 544-45. This question confirmed that the jury did **not** know that capital punishment could not be imposed without unanimous agreement, contrary to the *Lawton* Court's "savings" interpretation, and accordingly did not know they need **not** agree on mitigation. *Compare,* 913 S.W.2d at 559. The jury likely believed[236] that they must reach a majority of 10 before finding the mitigating factor of lack of future dangerousness or finding sufficient mitigation. There is an intolerably high

[236] *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (holding that the proper inquiry is "whether there is a reasonable likelihood that the jury … applied the challenged instruction" unconstitutionally).

risk that the jury believed what it was told and declined to report that some number of jurors (less than 10) found mitigation, since it was never told that disagreement could be an option. *See Mills*, 486 U.S. at 383 (jurors unlikely to hang on mitigation special question unless informed of the possibility).

Rather than curing this constitutional flaw, the trial court's response to the jury made the situation worse. The court did not inform the jury that they did not have to agree on mitigation, as constitutionally required under *McKoy* and *Mills*.[237] Instead, the court instructed the jurors that "you have all the law" and to "continue your deliberations." 24 RR 41; 2 CR 540-41. The Court's response invited the very danger that the Supreme Court feared in *Mills* – that the jury would not know that it need not agree and jurors would be forced to compromise individual assessments of mitigation. *Mills,* 486 U.S. at 383-84.

B. The Trial Court's Supplemental Charge Was Unduly Coercive

These unconstitutional instructions were compounded here by the trial court's coercive supplemental charge.[238] In response to the jury's question about what would happen if they could not agree on future dangerousness, the trial court ordered the jury to "continue deliberations," without informing them that they need not agree if it meant surrendering their own conscientiously held belief. 24

[237] In *Jones v. United States*, 527 U.S. 373, 381-82 (1999), although the Court rejected an argument for an anticipatory deadlock instruction, the jury instructions and verdict allowed for a single juror to find the presence of mitigation and, accordingly, did not run afoul of *Mills* and *McKoy*. 527 U.S. at 378-79.

[238] **Standard of Review and Preservation, subpoint B**: Because there was no objection to the court's supplemental charge, review is for "egregious harm." *Abdnor*, 871 S.W.2d at 731-32. The "egregious harm" standard also applies where, as here, counsel states she has no objection to the charge. 24 RR 41. *See Bluitt v. State*, 137 S.W.3d 51, 53 (Tex.Crim.App. 2004) (holding that stating "no objection" to charge does not preclude review for egregious error). To the extent that the Court finds this error unpreserved, counsel was constitutionally ineffective. *See* Point 40, *infra*.

RR 41, 2 CR 540-41.[239] Combined with the instruction's mandatory language -- the jury "shall" answer "yes" or "no" on the verdict form -- this response was unduly coercive and violated Mr. Estrada's rights to be free of cruel and unusual punishment, to have his jury consider and give effect to his mitigation, to fair and individualized sentencing, to a fair jury trial, and to due process of law.[240]

When it appears that the jury has difficulty agreeing on a verdict, courts have long recognized that it may be appropriate to give a supplemental charge. *See, e.g., Allen v. United States,* 164 U.S. 492, 501 (1896). The supplemental charge, however, must acknowledge that the goal of consensus cannot come at the price of abandonment of conscientiously held beliefs by even a single juror.[241] The charge must be evaluated in its "context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

In this case, the trial court did not remind the jurors of the fact that no juror is required to abandon his or her conscientious belief or that they could fail to reach an agreement, and did not inform the jury of the effect of their failure to reach an agreement. At best, the jury may have believed that a mistrial would have been ordered. This option is unduly coercive because it could have erroneously persuaded the jury members that it was their duty to avoid the expense

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[239] According to counsel's motion for a new trial, the jury's death verdict followed in 30 minutes. SCR2 3.
[240] *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration.").
[241] *See Smalls v. Batista*, 191 F.3d 272, 279 (2d Cir. 1999) (requiring "admonish[ment] . . . not to surrender . . . conscientiously held beliefs."); *see also Howard v. State,* 941 S.W.2d 102, 124 (Tex.Crim.App. 1996) (approving instruction to "debate the issue in good faith, to reconsider their own views and **to change such views only if this could be done without violence to the juror's individual conscience**") (emphasis added); *Martinez v. State*, 131 S.W.3d 22, 41 (Tex. App.-San Anton. 2003, *reh'g overruled*) (similar).

and emotional costs of a re-trial. At worst, the jury believed that it **had** to reach a decision, either a unanimous no or a ten-majority yes. This second possibility is the far more likely effect of the court's order to continue deliberations, particularly in the context of the mandatory language of the instructions. Under either scenario, there is too high a risk that at least one juror was forced to abandon his or her views on the future dangerousness question. Reversal is required.

Points 25-28: Application of Unconstitutional Statute in Sentencing Instructions

Review Applicable to Points 25-28: Appellant's Points 25-28 demonstrate constitutional error in Article 37.071's requisite jury charge. U.S. Const. amends. VI, VIII, XIV. Because these errors involve the application of a statute that would be unconstitutional in "any trial," they are preserved for appellate review irrespective of whether counsel objected.[242] Moreover, as constitutional errors, they are subject to ordinary constitutional harmless error analysis except when structural error, which requires reversal irrespective of harm.[243]

25. The Trial Court Committed Reversible Error by Charging the Jurors that They Had Discretion to Decide Whether a Circumstance was Mitigating.

The trial court instructed the jurors that it "shall consider mitigating evidence to the extent that a juror **might regard** as reducing the defendant's moral blameworthiness." 24 RR 7 (emphasis added). The capital statute is nearly

[242] *Jimenez v. State*, 32 S.W.3d 233, 237 n.12 (Tex.Crim.App. 2000) (citing *Rose v. State*, 752 S.W.2d 529, 552-53 (Tex.Crim.App.1987), *superseded on other grounds*, *Oakley v. State*, 830 S.W.2d 107 (Tex.Crim.App. 1992)). *See also Rabb*, 730 S.W.2d at 752; *Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex.Crim.App. 1988) (requiring application of constitutional harmless error analysis to instruction based on unconstitutional statute, even without objection).
[243] *See id.*; *Rodriguez*, 758 S.W.2d at 788.

identical, requiring an instruction that the jury "shall consider mitigating evidence to be evidence that a juror **might regard** as reducing the defendant's moral blameworthiness." Art. 37.071 § (2)(f)(4) (emphasis added). Both the statute and the trial court's instruction violate the Eighth Amendment because the jury is **not** entitled to decide whether proffered mitigating evidence is, in fact, mitigating.

The Eighth Amendment gives 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 v. South Carolina*, 476 U.S 1, 5 (1986)) (emphasis added)). Here, Appellant presented evidence of his good jail conduct as well as other inherently mitigating factors such as his good nature, willingness to help, thoughtfulness, caring, and good job performance. 23 RR 123, 127, 132-35, 139-141.

The statute requires trial courts to **misinform** jurors that they can refuse to treat mitigating evidence as mitigating, resulting in structural constitutional error requiring reversal. *See Nelson*, 472 F.3d at 314-15 (rejecting harmless error analysis where jury precluded from giving full effect to mitigating evidence), *cert. denied*, 127 S. Ct. 2974 (2007); *see also* note 220, *supra* (collecting other authorities); U.S. Const. amends. VI, VIII, XIV. In the alternative, in a close case

such as this, where the jury could easily have reached a life verdict if properly instructed, the State cannot show the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 23-24. Reversal is required.

26. The Trial Court Committed Reversible Error by Statutorily Charging the Jury on Special Issue One (i.e., future dangerousness).

The trial court erred by overruling Appellant's objection to the statutory charge requiring proof beyond a reasonable doubt of 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). *See* 1 CR 268-72. Appellant correctly argued that this instruction diluted the reasonable doubt standard.[244]

In *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), the Supreme Court held that jury instructions violate due process when they dilute the state's burden of proving every element beyond a reasonable doubt. In *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), the Court held that the proper inquiry is whether there is a reasonable likelihood that the jury applied the challenged instruction unconstitutionally.

Thus, the question is whether there is a reasonable likelihood that the jury applied the challenged instruction in a manner that diluted the State's burden. There clearly is. 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

[244] See U.S. Const. amends. VI, VIII, XIV. The State was constitutionally obligated to prove this special issue beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476-477; *Ring*, 536 U.S. at 609. 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).

familiar 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 trial court erred by overruling Appellant's objections to this statutory instruction. The constitutional error is structural and not subject to any harmless error review.[245] In the alternative, given the paucity of evidence of future dangerousness, *see* Point 1, *supra*, the State cannot show this error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 23-24. Reversal is required.

27. Applying an Unconstitutional Statute, the Trial Court's Instruction Presuming a Death Sentence Constituted Reversible Error.

Tracking the statute, 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."[246] 2 CR 555 (tracking Art. 37.071 §

[245] *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (refusing to apply harmless error where the jury was improperly instructed on the burden of proof at the guilt/innocence phase).
[246] Although not required for preservation, counsel objected to this unconstitutional aspect of the statute in pretrial motions. 1 CR 88-90; 2 CR 391, 441.

2(e)(1)). The statute violates the Eighth Amendment by requiring the defendant to disprove a death sentence is warranted. 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."[247] 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 State cannot prove the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 23-24. This Court should reverse.

28. Applying an Unconstitutional Statute, the Trial Court Committed Reversible Error by Instructing the Jury to Consider Mitigating Evidence in its Future Danger Decision.

In accordance with the statute, Art. 37.071 § 2 (d)(1), the trial court instructed the jury, in its decision on future dangerousness, to "consider all of the evidence admitted at the guilt or innocence phase and the punishment phase, including **evidence of the defendant's background or character or the circumstances of the offense that mitigate[] for or mitigates against the imposition of the death penalty**." 24 RR 5 (emphasis added). The future dangerousness issue is distinct from the mitigation issue. Although a lack of future dangerousness can constitute mitigating evidence, *McKoy,* 494 U.S. at 435, not all mitigating evidence bears on future dangerousness. By instructing the jury

[247] *Walton v. Arizona*, 497 U.S. 639, 686 (1990) (Blackmun, J., dissenting), *overruled by Ring*, 536 U.S. at 589; *see also Kansas v. Marsh*, 548 U.S. 163, 203-11 (2006) (Souter, J., dissenting) (similar); U.S. Const. amends. VI, VIII, XIV. *But see Matchett v. State*, 941 S.W.2d 922, 935-36 (Tex.Crim.App. 1996) (rejecting this argument and relying on *Walton* majority).

to consider such evidence in connection with this special issue, the Court injected confusion and the strong possibility that the jury factored any perceived lack of mitigation evidence into its future dangerousness inquiry. Thus, the instruction renders unreliable the future danger inquiry used to narrow the class of murders eligible for the death penalty,[248] producing an arbitrary, capricious, and disproportionate result. U.S. Const. amends. VI, VIII, XIV. In this close case on future dangerousness, *see* Point 1, *supra*, the State cannot prove harmlessness beyond a reasonable doubt. *Chapman*, 386 U.S. at 23-24. Reversal is required.

Points 29-32: The Trial Court's Unconstitutional Jury Instructions

29. The trial court committed reversible error by refusing to charge on residual doubt as mitigating evidence.

The court erred by refusing Appellant's request for a charge that the jury could consider any residual doubt about his guilt as a mitigating circumstance. 1 CR 275-76. 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 (2006).[249] Given "abundant evidence accumulated in recent years" of exoneration of death-row inmates,[250] "the evolving standards of

[248] *See, e.g.*, *Kennedy,* 128 S. Ct. at 2661 (citing "future dangerousness" inquiry as narrowing function).
[249] This Court has cited the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164, 167 (1988), for the proposition that the "federal constitution does not require reconsideration by capital sentencing juries of 'residual doubts' about a defendant's guilt." *Blue v. State*, 125 S.W.3d 491, 502 (Tex.Crim.App. 2003) (citing *Franklin*). 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.
[250] *See Baze*, 128 S. Ct. at 1551 (2008) (Stevens, J., concurring) ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

decency that mark the progress of a maturing society," *Roper*, 543 U.S. at 561, demand that jurors be permitted to consider residual doubt before imposing the ultimate sentence. *See* U.S. Const. amends. VI, VIII, XIV. 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 in a Texas sentencing proceeding, and the jury should have been so instructed. *Skipper*, 476 U.S. at 5 n.1.

Moreover, as Appellant argued below, 1 CR 275-76, he had a right under Texas law to this instruction.[251] This Court should find as a matter of state law that capital defendants have a right to a residual doubt instruction.[252] 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.

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[251] *See* Tex. Const. art 1, §§ 10, 13, 19, 29; 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").

[252] 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); *United States v. Davis,* 132 F. Supp. 2d 455 (E.D. La. 2001) (same); *State v. Webb*, 680 A.2d 147, 188-189 (Conn. 1996); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) *State v. Hartman*, 42 S.W.3d 44, 53-57 (Tenn. 2001) (reversing defendant's death sentence due to preclusion of residual doubt evidence). *See also* Recommendation VII, *Mandatory Justice: Eighteen Reforms to the Death Penalty, The Constitution Project*, (judge should instruct jury that it may consider lingering doubt as mitigating factor) (http://pewforum.org/deathpenalty/resources/reader/23.php3) (last visited Oct. 29, 2008); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (demonstrating that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact'" for juries considering a death sentence).

By blocking consideration of mitigation evidence, the trial court committed structural error. *Nelson*, 472 F.3d at 314-15.[253] In the alternative, reversal is required under the "some harm" test applicable when there has been an objection. *Abdnor*, 871 S.W.2d at 731-32. The jury's consideration of residual doubt here was key. Lacking evidence that Mr. Estrada intended to kill the fetus, the evidence of guilt of capital murder in this case was weak. *See* Points 19, 20. Permitting the jury to consider residual doubt concerning Mr. Estrada's guilt may well have tipped the scales in this close case to life. This Court should reverse.

30. The Court Committed Reversible Error by Charging that Mr. Estrada's Prior Bad Acts Pertained to the Mitigation Special Issue.

The court instructed that "in determining the answers to the **issues** in this case . . ." the jury could "consider … evidence" that "the Defendant may have committed offenses or other acts of misconduct." 24 CR 7-8 (emphasis added). Because other offenses or misconduct bear no relevance to the mitigation special issue, this instruction violated the Eighth Amendment and Art. 37.071 § 2(e)(1). The mitigation special issue asks if there are "sufficient mitigating circumstance[s] . . . to warrant . . . life imprisonment without parole rather than a death sentence. . . based on the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." Art. 37.071 § 2(e)(1)). The existence and sufficiency of such mitigating factors, however, bear no relation to Mr. Estrada's other bad acts.

[253] Structural error is immune from the ordinary harmless error rules, which depend on whether there was an objection. *See Jimenez*, 32 S.W.3d at 237 n.12; *Mendez v. State*, 138 S.W.3d 334, 340-41 (Tex.Crim.App.2004) (stating that structural error may be raised for first time on appeal).

Aggravating and mitigating factors exist independent of one another. In other words, proof of aggravating factors – here, prior misconduct or offenses admitted to prove future dangerousness – in no way diminishes the existence of mitigating factors or their weight.[254] *See Lockett*, 438 U.S. at 605 (holding that capital juries must be permitted to give "**independent** mitigating weight to aspects of the defendant's character and record and to circumstances of the offense **proffered in mitigation**") (emphasis added); Art. 37.071 § 2 (segregating future dangerousness special issue from mitigation special issue).

The trial court's instruction "transformed . . . a legislatively-mandated catch-all provision for considering a defendant's mitigating evidence into an additional punishment issue by making aggravating evidence relevant to the issue of mitigation."[255] This transformation defies "not only the meaning of mitigation itself, but also the language of Article 37.071."[256]

Mr. Estrada presented mitigating evidence of his peaceful, respectful, and cooperative jail record and professional and personal life. By blocking consideration of mitigation evidence with this instruction, the trial court committed structural error. *Nelson*, 472 F.3d at 314-15.[257] In the alternative, the instruction egregiously harmed Mr. Estrada by erroneously allowing the jury to

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[254] Rather than a justification or excuse, mitigating factors may "in fairness and mercy . . . be considered as extenuating or reducing the degree of moral culpability or blame." *Davis v. State,* 340 S.E.2d 869, 882 (Ga. 1986) (setting forth Georgia's commonly-used instruction) *See also* note 225, *supra.*

[255] *Ripkowski v. State*, 61 S.W.3d 378, 395 (Tex.Crim.App. 2001) (Meyers, J., dissenting & joined by Price, J., and Johnson, J.) (dissenting from decision permitting defense waiver of mitigation special issue).

[256] *Id.* (footnote omitted). *See also* U.S. Const. amends. VI, VIII, XIV. *But see Jackson v. State*, 992 S.W.2d 469, 478 (Tex.Crim.App.1999) ("aggravating circumstances may be relevant" to this special issue).

[257] *See also Jimenez*, 32 S.W.3d at 237 n.12. *See also Mendez*, 138 S.W.3d at 340-41 (stating that structural error may be raised for first time on appeal).

negate this mitigating evidence due to his sexual misconduct with teenage young women. 23 RR 14-23, 62. *Abdnor*, 871 S.W.2d at 731-32.

31. The Trial Court Committed Reversible Error By Instructing the Jury it Could not Rely on Sympathy to Reach a Life Sentence.

Over Mr. Estrada's objection, 1 CR 260, the trial court instructed the jury that "in answering the Issues submitted to you, the jury must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings." 24 RR 5. By forbidding the jury from acting on sympathy or sentiment for the defendant, this instruction violated Mr. Estrada's constitutional right to a sentencing jury accorded the authority "to exercise its mercy to spare the defendant's life."[258] The instruction caused Mr. Estrada both some harm and egregious harm. *Abdnor*, 871 S.W.2d at 731-32. Despite his capital murder conviction, Mr. Estrada's respectful, peaceful, and cooperative manner made him a sympathetic person, likely to evoke a jury's mercy. "When, however, a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be 'swayed' by sympathy well may arrest or restrain this humane response, with truly fatal consequences for the defendant."[259] Arresting the likely humane response in this case was reversible error.

32. The Trial Court Committed Reversible Error by Denying the Appellant's Written and Oral Objections to the Court's Charge and Verdict Form on the Ground that the Indictment did not Allege Special Issue One.

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[258] *California v. Brown*, 479 U.S. 538, 562 (1987) (Blackmun J., dissenting) (citing *Caldwell*, 472 U.S. at 331 (other citations omitted)); U.S. Const. amends. VI, VIII, XIV.

[259] *Brown*, 479 U.S. at 563 (Blackmun, J., dissenting). *But see Wheatfall v. State*, 882 S.W.2d 829, 842-43 (Tex.Crim.App. 1994) (rejecting this argument).

As Appellant objected below, 2 CR 388, his indictment was deficient because it did not contain grand jury findings of special issue one.[260] 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).[261] In *Ring*, the Court held that statutory aggravating factors making a defendant death eligible are elements of the charged capital offense.[262]

This Court must remand this case for imposition of a life sentence because the State's error in failing to obtain an indictment charging the special issue cannot be subject to harmless error analysis and, even if it can be, the State cannot prove it harmless beyond a reasonable doubt.[263] Alternatively, this Court should remand to allow the State to attempt to obtain a new indictment charging the requisite special issue, which, if successful, would allow for a new sentencing trial.

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[260] *Compare* 24 RR 5-7 (charging special issues) with 1 CR 18 (indictment without special issues charged). *See* Tex. Const. art I, § 10; *Ring v. Arizona*, *supra*; *Apprendi*, 530 U.S. at 476-77; *Blakely v. Washington*, 542 U.S. 296 (2004). *But see Russeau*, 171 S.W.3d at 886 (Tex.Crim.App. 2005) (rejecting this claim).

[261] 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*).

[262] In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003), the Court ruled that "if the existence of any fact . . . increases the maximum punishment that may be imposed on a defendant, that fact . . . constitutes an element, and must be found by a jury beyond a reasonable doubt." *See State v. Fortin*, 843 A.2d 974, 1033-35 (N.J. 2004) (requiring submission of aggravators to grand jury in a capital case under N.J. Const.).

[263] *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).

CONSTITUTIONAL CHALLENGES TO FETAL HOMICIDE STATUTE
Points of Error 33-39:
Common Background, Preservation and Relief Applicable to these Points

In 2003, the Legislature redefined "individual" as a live human being, "including an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE §1.07(a)(26). Another amendment defined "death" as including, "for an individual who is an unborn child, the failure to be born alive." *Id.* 1.07(a)(49).[264] Under the new law, ending the life of an embryo or fetus at any stage of development is murder. The Legislature exempted the following conduct:

> (1) conduct committed by the mother of the unborn child;
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;
> (3) a lawful medical procedure performed by a physician or other licensed health care provider . . . as defined by Section 160.102, Family Code[265]; or
> (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

TEX. PENAL CODE § 19.06**.** Appellant's capital murder conviction depended on these unconstitutional changes because he was charged with killing two people (Ms. Sanchez and their not-yet-viable, not yet quickened,[266] two and-a-half-month-old fetus) during the same transaction.[267] § 19.03(a)(7)(A).[268]

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[264] An individual was previously defined as "a human being who has been born and is alive." S.B. No. 319.
[265] Assisted reproduction under this provision includes: intrauterine insemination, donation of eggs, donation of embryos, in vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection. Tex. FAM CODE § 160.102 (2).
[266] Quickening occurs when the movements of the fetus are first observed, ordinarily between the 16th and 18th weeks of pregnancy. *Roe*, 410 U.S. at 132-33.
[267] The constitutional challenges and arguments made herein are distinct from those rejected in *Lawrence v. State*, 240 S.W.3d 912 (Tex.Crim.App. 2007), and *Flores v. State*, 245 S.W.3d 432 (Tex.Crim.App. 2008). In those cases, this Court rejected 14th-Amendment vagueness, due process, and Establishment Clause challenges to this statute. Appellant also raises challenges under these constitutional provisions, but presents new analyses and thus those decisions do not control. In addition, Appellant raises Equal

Preservation. A number of the claims raised herein were preserved by motion in the trial court. *See* 2 CR 377-84 (pre-trial motion raising Eighth Amendment, vagueness, due process, establishment clause, and equal protection challenges); 8 RR 10-13 (argument on motion). Additionally, this challenge to the constitutionality of a statute did not have to be preserved in the trial court in order to be considered on appeal even "if raised for the first time on appeal." *Rabb*, 730 S.W.2d at 752; *see also Holberg*, 38 S.W.at139 n.7.

Relief Pertinent to All Unconstitutional Feticide Statute Points. Each of the Constitutional errors raised herein requires reversal of either Appellant's conviction or death sentence These errors cannot be resolved by this Court rewriting the feticide statute in a constitutional manner because (1) this Court does not have the constitutional power to rewrite the statute to fix any of the numerous constitutional errors described below, including but not limited to rewriting it to exclude non-viable fetuses, non quickened fetuses, embryos, and/or non-implanted fertilized eggs from the definition of individual;[269](2) any such rewriting would violate Mr. Estrada's rights to due process and against Ex Post Facto

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Protection, due process, and 8th-Amendment vagueness challenges to the statute which this Court has never addressed on the merits.

[268] 2 CR 523 (jury charge instructing the jury that if it finds Mr. Estrada intentionally or knowing killed Ms. Sanchez and her "unborn child, . . . you will find the defendant guilty of capital murder . . .").

[269] For example, striking the exemption from criminal liability for pregnant women is within the exclusive domain of the Legislature, not the courts. *Grant v. State*, 505 S.W.2d 279, 282 (Tex.Crim.App. 1974). Texas courts have no authority to "add to or take from such legislative pains, penalties and remedies." *Ex parte Hughes*, 129 S.W.2d 270, 274 (1939). This Court may not sever the unconstitutional portion of a statute where such severance would broaden the statute's scope and violate legislative intent. *Howard v. State*, 617 S.W.2d 191, 192 n. 1 (Tex.Crim.App. 1979). Subjecting pregnant women to prosecution would violate the separation of powers doctrine by broadening the scope of the statute against the explicit legislative intent to exclude them from liability. *Id.* Tex. Const., art. II, § 1 (separation of powers).

punishment;[270]; and (3) in any event, Mr. Estrada is entitled to a new trial under any such reformulated statute to avoid violation of his constitutional rights.[271]

33. Texas Penal Code 1.07(a)(26) Violates the Due Process and Supremacy Clauses by Defining Fertilized Eggs, Embryos, and Fetuses as Persons.

Texas's statutory elevation of fertilized eggs, embryos and fetuses to "individuals" violates both the Due Process and Supremacy Clauses of the United States Constitution, including deeply rooted principles of justice stretching back for centuries. Accordingly, § 1.07(a)(26) is unconstitutional and Appellant's conviction must be reversed. *See* U.S. Const. Amend. XIV.

A state is free to define the elements of a crime as long as its definition does not offend some deeply rooted principle of justice.[272] Section 1.07(a)(26)'s equation of fertilized eggs, embryos, and fetuses with individuals – and their intentional extinguishment with murder – violates the Due Process Clause because "it offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[273]

By treating as murder the destruction of fertilized eggs, embryos, and fetuses neither quickened nor viable, Texas's statute flies in the face of centuries

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[270] *See* U.S. Const. art. I, § 9, cl. 3; amend. XIV; *Bouie v. City of Columbia*, 378 U.S. 347, 354, (1964) (holding that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law existing prior to the conduct in issue).

[271] U.S. Const. amends. V, VI, VIII, XIV. *See, e.g.*, *Apprendi*, 530 U.S. at 476 (requiring, under 14th amend., that all elements of an offense to be submitted to a jury, and proven beyond a reasonable doubt).

[272] *See Speiser v. Randall,* 357 U.S. 513, 523 (1958). *See also Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975) (finding Due Process violation where state statute violated important doctrine stretching back to the "inception of the common law of homicide").

[273] *Speiser*, 357 U.S. at 523. *See also McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986) (applying test asking how law had "historically been treated 'in the Anglo-American legal tradition'"); *Mullaney*, 421 U.S. at 696 (looking to the "inception of the common law of homicide").

of common law, including the law in force at the time of our Nation's founding and when the Fourteenth Amendment was ratified. Never in this Nation's common law history did the killing of a non-viable, non-quickened fetus constitute *any* crime, much less murder.[274] Lord Coke's "born alive" rule became the common law for **quickened** fetuses, and states:

> "If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive."[275]

Under this rule, intentional acts against a quickened fetus resulting in the death of a child born alive constitute murder, but acts resulting in a stillbirth constitute a lesser crime.[276]

The born alive rule was applied in the U.S. as early as 1791,[277] and was almost universally applied until recent legislative amendments.[278] Meanwhile in the nineteenth century, abortion laws proliferated, but the abortion of non-quickened fetuses was punished leniently, if at all. *Roe*, 410 U.S. at 138-39. In the latter part of the 19th century, abortion statutes began

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[274] *Keeler v. Superior Court*, 470 P.2d 617, 620 nn.6, 7 (Ca. 1970) (exhaustively tracing development of common law and finding history of crimes **only** for quickened fetuses). *See also Roe*, 410 U.S. at 132-33 (same with respect to abortion of non-quickened fetus), 136 n.27 (collecting cases establishing this point).
[275] *Comm. v. Morris,*142 S.W.3d 654, 656-57 (Ky. 2004) (quoting Sir Edward Coke, 3d Inst. 50-51 (1644)).
[276] Blackstone stated that the killing of a quickened child (not born alive) was a "heinous misdemeanor." *Keeler*, 470 P.2d at 620 n.6 (quoting 1 Blackstone, Commentaries 129-30 (1765)).
[277] Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U.L.REV. 563, 598 (1987) (citing *Comm. v. McKee*, 1 Add. 1 (Pa. 1791)). This ancient rule has been followed in Texas for *at least* 127 years. *See Wallace v. State*, 10 Tex.App. 255 (Tex.Ct.App. 1881). *See also Dietrich v. Inhabitants of Northampton,* 138 Mass. 14 (1884) (Holmes, J.) (similar result in civil case).
[278] *See Comm. v. Booth*, 766 A.2d 843, 849 (Pa. 2001) (collecting cases); *People v. Guthrie*, 293 N.W.2d 775, 778, n.1 (Mich. App. 1980) (finding "[n]o appellate court of the United States or England has ever, as a matter of common law definition, treated a fetus as a person for the purposes of criminal law").

to punish abortion more severely and the distinction between quickened and non-quickened fetuses vanished. *Id.* at 139. But never was the abortion of a fetus, whether or not quickened, ever treated as murder.[279]

More recently, several states abandoned the "born alive" rule, because medical science can now determine "the viability, health, and cause of a fetus's death . . ."[280] Under these state laws, viable fetuses are considered persons. Texas's statute, however, would violate due process even if viability had always been the touchstone. Texas law extends murder liability for the killing of the unborn back to before viability, before quickening, all the way to fertilization. It runs roughshod over centuries of deeply-rooted criminal-law principles and breaks well-established foundations of Anglo American law. Our Nation and its forbearers have only leniently punished for the killing of an embryo or a non-quickened, non-viable fetuses, if at all. It has **never** treated such killings as murder until Texas and a minority of state legislatures recently changed their long-standing laws.[281]

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[279] *Keeler*, 470 P.2d at 621-23 (recounting history of these laws); *Roe*, 410 U.S. at 139 (noting that the laws became *most* severe in the 1950's), 117-18 n.1 (noting Texas statute was similar to that "in a majority of the states," and setting forth punishment for abortion as 2-5 years, and double that for non-consensual abortion, and 5 years to life for the killing of an infant during childbirth).

[280] *Morris*, 142 S.W.3d at 659 (citing Note, *Hughes v. State: The "Born Alive" Rule Dies a Timely Death*, 30 Tulsa L.J. 539, 543 (1995); *Hughes v. State*, 868 P.2d 730, 732 (Okla.Crim.App.1994)).

[281] Ala. Code §§ 13A-6-1, 13A-6-2 (2006 statute); Ariz. Rev. Stat. Ann. § 13-1105 (C)(2005 statute); Ark. Code Ann. §§ 5-10-101, 5-1-102 (13)(B)(i)(a) (1999 statute); Idaho Code § 18-4001 (2002 statute); Kan. Stat. Ann. §§ 21-3401, 21-3452(b)(2) (2007 statute); Minn. Stat. Ann. §§ 609.266(a), 609.2661) (1986 statute); Miss. Code Ann. §§ 97-3-37(1), 97-3-19 (2004 statute); Mo. Ann. Stat. §§ 1.205 (3), 565.020 (2006 statute); N.D. Cent. Code §§ 12.1-17.1-01, 12.1-17.1-02 (punishing killing of embryos or fetuses equally with murder); Ohio Rev. Code Ann. §§ 2903.01, 2903.09(A) (1996 Statute); 21 Okl.St.Ann. §§ 691, 701.7, 63 Okla. Stat. Ann. § 1-730(2) (2006 statute); South Dakota C.L .§§ 22-16-4, 22-1-2 (31) (2005 statute); Utah Code § 76-5-201 (2002 statute); W. Va. Code §§ 61-2-1, 61-2-30 (2005 statute); Wis. Stat. Ann. §§ 939.75(1), 940.01(1)(b) (1997). 34 states have no such laws.

Texas's ability to protect "human life" is not in question in this appeal.[282] This appeal involves the unconstitutional elevation of embryos and fetuses to individuals, allowing convictions for **murder** when their "deaths" are knowingly or intentionally caused. Protecting human life by criminally punishing a third party for killing an embryo or fetus is one thing; ratcheting the "crime" up to murder is quite another.[283] Such punishment violates due process, which does not permit Texas's wholesale change to our Nation's foundational law. Because 1.07(a)(26) violates the Due Process Clause, Mr. Estrada's conviction under that statute must be reversed.

Section 1.07(a)(26)'s equation of fertilized eggs, embryos, and fetuses with individuals – and their intentional extinguishment with murder – also violates the Supremacy Clause of the U.S. Constitution.[284] In *Roe*, 410 U.S. at 156-57, the State of Texas argued that a "fetus is 'person' within the language and meaning of the Fourteenth Amendment." The Supreme Court roundly rejected that claim. *Id.* at 156 ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). The Court surveyed the multiple uses of person in the Constitution and found that "the use of the word is such that it has application **only** postnatally." *Id.* at 157 (emphasis

[282] *Lawrence*, 240 S.W.3d at 917 n.21 (quoting *Gonzales v. Carhart*, 555 U.S. 124, 127 S. Ct. 1619, 1626 (2007)).
[283] *See Mullaney*, 421 U.S. at 697-98 (noting that "criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly").
[284] The U.S. Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution **or Laws of any State** to the Contrary notwithstanding. *See* U.S. Const. art. VI, cl. 2 (emphasis added).

added). It also reasoned that "throughout the major portion of the 19th century [when the 14th Amendment was ratified] prevailing legal abortion practices were far freer than they are today," establishing that the Constitution's framers did not mean for "persons" to include embryos or fetuses. *Id.* at 158. Finally, the Court addressed the inherent inconsistencies between Texas's claim that an embryo or fetus is a person and a number of its statutory provisions. The Court pointed out that Texas did not treat the pregnant woman as a principal or accomplice to illegal abortions and asked: "If the fetus is a person, why is the woman not a principal or an accomplice?" *Id.* at 157 n.54. Noting that Texas law allowed abortions to save the woman's life, the Court asked, "[I]f the fetus is a person who is not to be deprived of due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear out of line with the Amendment's command?" *Id.* at 157 n.54. The Court also asked how abortion and murder penalties could be different if a fetus were a person. *Id.*

Roe controls here.[285] The Texas legislature has no authority to pass laws directly at odds with the Supreme Court's constitutional ruling in *Roe*

[285] *Lawrence v. State* does not. In *Lawrence*, this Court stated, "in the absence of a due process interest triggering the constitutional protections of [privacy and liberty women enjoy under] *Roe*, the Legislature is free to protect the lives of those whom it considers to be human beings." *Id. See also id.* at 918 n.24 (collecting similar decisions). 240 S.W.3d at 917-98. But, without the benefit of the arguments presented here, the *Lawrence* decision did not recognize that the Supreme Court in *Roe* decided that an embryo or *fetus was not a person*, irrespective of the relationship between the embryo or fetus and the rights of the woman carrying it. *Roe*, 410 U.S. at 157-59. In addition, the *Lawrence* Court ignored that in *Roe*, the Court explicitly observed that if Texas's fetal personhood argument were accepted, it would not only impact abortion, but would also call into question the State's homicide law. *Roe*, 410 U.S. at 157 n.54.

that an embryo or fetus is not a person.[286]

On the basis of either the U.S. Constitution's Supremacy Clause or Due Process Clause, *supra*, Section 1.07(a)(26) is unconstitutional.

34. Texas Penal Code § 1.07(a)(26) Violates the Establishment Clause by Defining Life as Beginning at Fertilization.

By defining life as including "an unborn child at every stage of gestation from fertilization until birth," the Texas legislature defined life in a manner that can only be justified on religious grounds and thus violates the Establishment Clause of the First Amendment to the United States Constitution and the Freedom of Worship Clause of the Texas Constitution. U.S. Const. amend. I; Tex. Const. art. 1, § 6. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set out the following three-pronged test to determine whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13. Section 1.07(a)(26)'s definition of "alive" fails this test and violates the Establishment Clause.

[286] Contrary to any attempts to cabin *Roe*'s decision on personhood to the context of a state's interest in human life in relation to women's liberty interests, courts have applied this aspect of the *Roe* holding in other contexts. *See, e.g.*, *Walker v. Firelands Cmty. Hosp.*, 869 N.E.2d 66, 73 (Ohio Ct. App. 2007) (finding that the trial court, as a matter of law, properly referred to *Roe* in determining the meaning of "person" in state statute forbidding unlawful possession of the body of a deceased person); *In re Guardianship of J.D.S.*, 864 So.2d 534 (Fla.Dist.Ct.App. 2004) (finding fetus and that "no Florida statute or case law that has determined a fetus to be a person," and citing *Roe* to show the "opposite is true")). *Matter of D.K.*, 497 A.2d 1298, 1302 (N.J.Super.Ct.Ch.Div. 1985) (similar to *In re J.D.S.*); *Roe v. Casey*, 464 F.Supp. 483, 487 (E.D.Pa. 1978) (same); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App.1st Dist. 1997) (same). *See also Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 312 n.9 (11th Cir. 1989) (holding that an "unborn fetus is not a 'person' or a 'citizen'" for purposes of civil rights law).

Section 1.07(a)(26) lacks a secular purpose and thus fails the *Lemon* test's first prong. The clearest signal that this statute is driven by a religious purpose is that it fixes the beginning of life at fertilization.[287] Thus, the law contrasts sharply with the medical consensus that pregnancy begins days later, at implantation.[288]

> [T]he American Medical Association (AMA) defines pregnancy as beginning with implantation rather than fertilization. The American College of Obstetricians and Gynecologists' Committee on Ethics similarly defines pregnancy as beginning with implantation, not fertilization. Indeed, the Committee defines pregnancy as occurring in the implantation stage because the embryo at the time of fertilization through implantation lacks a clear "biologic individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype."[289]

Texas's statute is consonant with the beliefs of some but by no means all Christian faiths. Justice John Paul Stevens declared a Missouri statute in which the legislature found that life begins at conception unconstitutional as "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths" that "serves no identifiable secular purpose."[290] As Justice Stevens demonstrated in *Webster*, there can be no secular reason for identifying fertilization rather than implantation or viability as the beginning of life; only

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[287] *See also* Proposed Amendment 1 to SB 319 (May 28, 2003), available at http://www.legis.state.tx.us/tlodocs/78R/ amendments/ html/ SB00319H31.HTM (proposing to amend statute to use viability rather than fertility); Rep. Farrar, House Session, May 28, 2003 (presenting the failed amendment and noting that SB 319 "is about legislating when life begins and when personhood begins. . . . We would essentially be adopting one religious position as the law for the rest of the state.").

[288] Mr. Estrada's conviction cannot be affirmed under a hypothetical statute deeming a person a fertilized and implanted egg. *See* note 269, *supra*.

[289] Nancy K. Kubasek et. al, *The Questionable Constitutionality of Conscientious Objection Clauses for Pharmacists*, 16 J.L. & Pol'y 225, 246-47 (2007); *see also Webster v. Reproduct. Health Serv.*, 492 U.S. 490, 563 (1989) (Stevens, J., concurring in part and dissenting in part) ("[S]tandard medical texts equate 'conception' with implantation in the uterus, occurring about six days after fertilization.").

[290] *Webster,* 492 U.S. at 566-67 (1989) (Stevens, J., concurring in part and dissenting in part); *see also*, Kubasek et al., at 247-48 (noting that many Christian faiths preach that life begins at conception, a belief other faiths do not share); Rep. Farrar, Senate Session, May 28, 2003 (noting that right to life organizations and the Christian Coalition made the Texas bill at issue their "top priority").

certain religious groups, and not the medical community, believe that life begins as early as fertilization. *Webster*, 492 U.S. at 563-71. Every single time this law, with its declaration that life begins at fertilization, is applied the state is furthering a religious purpose and violating the Establishment Clause.

Because section 1.07(a)(26) clearly lacks a secular purpose, it is a per se violation of the Establishment Clause.[291] Additionally, the statute fails the other two prongs of the *Lemon* test. It obviously has the effect of advancing religion. As described above, the belief that life begins at fertilization is the belief of only some faiths. The question of when life begins is a difficult and controversial issue, and by enshrining the creed of some faiths, the statute advances the religious agenda of those groups and becomes excessively entangled with those religious groups. Especially given that this law has no secular purpose, the legislature's decision to adopt the belief of some faiths as law can only be seen as the state advancing those religions and their views to the detriment of all others. Every time this law is applied in the criminal system it enshrines the belief of only some faiths, highlighting the state's adoption of an entirely religious position.

35. Texas Penal Code § 1.07(a)(26) is an Arbitrary Classification and Violates the Equal Protection Clause.

Texas Penal Code § 1.07(a)(26) violates the Equal Protection Clause. *See* U.S. Const. amend. XIV. It constitutes an irrational exercise of governmental power because it is not "necessary to the accomplishment of some permissible

[291] *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.").

state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). *See Cleveland B. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974) (same). Allowing criminal punishment for the "killing" of a non-implanted fertilized egg that medical authorities agree is not "human life," *see* note 289, and accompanying text, *supra*, this criminal statute's classification fails to meet Texas's interest in protecting human life. The statute impermissibly reflects the concerns of a handful of religions, instead of a legitimate state interest. *Oyler v. Boles*, 368 U.S. 448, 453 (1962) (forbidding prosecution based on religion). Reversal is required.

36. Texas Penal Code § 1.07(a)(26) permits the arbitrary imposition of the death penalty and violates the Eighth Amendment.

The Cruel and Unusual Punishments Clause of the United States Constitution prohibits punishments that are imposed arbitrarily. U.S. Const. amend. VIII; *Kennedy*, 128 S. Ct. at 2658. Section 1.07(a)(26) violates this fundamental precept because it allows the death penalty based on the arbitrary classification discussed in the previous point of error.

In *Zant*, 462 U.S. at 885, the Court held that due process prohibits states from designating as aggravating "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . race." *Zant* tracks the general constitutional rule that, where fundamental rights are at stake, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155. By protecting what some religions consider human life but what medical authorities agree is not, Texas's statute is drawn too broadly

to address its stated interest of protecting human life. Legislative infliction of the uniquely harsh penalty of death along the lines of such an irrational classification is arbitrary under the heightened standards of the Eighth Amendment.[292]

As shown above, this statute is arbitrary and violates the Due Process Clause. In addition, the statute violates the Eighth Amendment. The only aggravating factor found by Appellant's jury was that he killed more than one person in a single transaction. This finding depends on the statute calling non-implanted fertilized eggs individuals. Because no death sentence would be available in this case without this unconstitutional aggravating factor, the sentence violates the Eighth Amendment and must be vacated.

37. Appellant's Conviction Violates the Equal Protection Clause of the United States Constitution Because § 19.06 Discriminates on the Basis of Gender.[293]

Texas Penal Code § 19.06 lists four instances in which the criminal homicide chapter will not be applied to conduct causing "the death of an unborn child." Three exempt certain **lawful** medical acts from prosecution under the chapter, including medical abortion. *Id.* The other exemption provides the grounds for this challenge, and it reads as follows: "[The criminal homicide] chapter does not apply to the death of an unborn child if the conduct charged is: (1) conduct committed by the *mother* of the unborn child." *Id.* (emphasis added).

This Court should strike the law as unconstitutional because it contains an

[292] *See*, *e.g.*, *Gardner*, 430 U.S. at 357-58 (plurality opinion) ("From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."); *id.* at 362-64 (opinion of White, J.).

[293] For the purpose of this Point of Error and the subsequent one, each involving equal protection challenges to the statute, Appellant is represented solely by Attorney Cynthia Orr.

impermissible gender classification that violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Appellant acknowledges that the Supreme Court has held that not "every legislative classification concerning pregnancy is a sex-based classification." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). *Geduldig*, however, has been harshly criticized.[294] Congress passed the Pregnancy Discrimination Act in response to the decision. *See* Pub. L. No. 95-555, 192 Stat. 2076 (codified at 42 U.S.C. § 2000e (2000) (amending Title VII to grant protection against employment discrimination based on pregnancy, stating that sex-based discrimination includes discrimination based on "pregnancy, childbirth, or related medical conditions.").[295] And the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs* casts further doubt on *Geduldig*'s ongoing viability. 538 U.S. 721, 733 n.6 (2003) (suggesting that facially discriminatory laws, even if beneficial to pregnant women, can be unconstitutional if the medical or biological facts distinguishing pregnancy do not reasonably explain the discrimination).[296] As noted above, even on its own terms, *Geduldig* does not purport to apply to "every legislative classification concerning pregnancy is a sex-based

[294] *See* Gillian E. Metzger *Abortion, Equality, and Administrative Regulation,* 56 Emory L.J. 865, 866-68 (2007) (criticizing *Geduldig* and arguing and collecting commentators' arguments that pregnancy should be treated as a gender-based classification, as well as decision suggesting this framework); *See*, *e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (noting that criticizing Geduldig has become "a cottage industry" and that, as of then, over "two dozen law review articles have condemned both the Court's approach and the result").

[295] Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. at 984 (noting that the Pregnancy Discrimination Act was Congress's response to Geduldig and a subsequent decision following *Geduldig*'s rationale).

[296] *Cf. also Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983) (holding that "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex").

classification." 417 U.S. at 496 n.10.

To the extent that *Geduldig* is no longer good law or does not apply to the facts here,[297] the classification is sex-based and subject to heightened scrutiny.[298] Indeed, the United States Supreme Court and Texas Supreme Court have repeatedly found that statutes, such as this one, distinguishing between mothers and fathers contain gender classifications[299] demanding heightened scrutiny under the Equal Protection Clause.

The impermissible gender classification in § 19.06(1) cannot withstand heightened scrutiny. The burden of justifying this gender classification rests entirely on the state. *United States v. Virginia*, 518 U.S. at 531-33 ("The burden of justification is demanding and it rests entirely on the State…. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."). When applying heightened scrutiny, it is neither necessary or appropriate for the Court to hypothesize

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[297] To the extent *Geduldig* forecloses the application of heightened scrutiny, Appellant raises the claim now to preserve it in case the law changes while he continues to litigate the validity of his conviction and death sentence.

[298] The Supreme Court has instructed that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996).

[299] *See Nguyen v. I.N.S.*, 533 US. 53, 60-61 (2001) (applying intermediate scrutiny to a statute which treated unwed mothers and fathers differently); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (finding statute treating unwed mothers and fathers differently to be a "[g]ender-based distinction[]" and applying intermediate scrutiny); *In re T. E. T.*, 603 S.W.2d 793, 796-97 (Tex. 1980); *see also In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987) (finding statute treating mothers and fathers differently to "discriminat[e] solely on the basis of sex" in violation of the Texas Equal Rights Amendment). *See also See Westcott v. Califano,* 460 F. Supp. 737, 738 (D. Mass. 1978) (applying intermediate scrutiny to welfare regulation treating men and women differently as parents, including where the regulation treated them as parents only because the woman was pregnant). Although these decisions address the unequal treatment of mothers and fathers of children (i.e. born persons) they have equal application here, where the law designates embryos and fetuses as persons.

possible justifications. *See Shaw v. Hunt*, 517 U.S. 899, 908, n.4 (1996) ("As we explain below, a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification."). Instead, the Court's role is to judge the challenged provisions based on the legislature's articulated reasons.

Here, the legislature's stated reason for adopting the exemption for pregnant women was the need to reconcile the statute with *Roe v. Wade*, 410 U.S. 113 (1973). *See* http://www.house.state.tx.us/media/chamber/78.htm (providing links to floor debate in House and Senate on May 22, 26, and 28, 2003, in which need to reconcile right recognized by *Roe* is acknowledged, but no justification for the challenged exemption is offered or articulated) (last visited on Oct. 30, 2008). *See also* Texas House Research Organization bill analysis ("SB 319 would not infringe in any way on a women's constitutional right to abortion or the right to any other legal medical procedure to which the mother had consented.") (available at http://www.hro.house.state.tx.us/hrodocs/ba78r/sb0319.pdf) (last visited on Oct 30, 2008).

The constitutional right recognized by *Roe*, however, is adequately protected by the statute's other exemptions. TEX. PENAL CODE § 19.06 (2), (4) (exempting medical abortion and "the dispensation [or administration] of a drug in accordance with law . . . "). The State has not offered any independent justification for the exemption immunizing the individual, non-medical acts of a

pregnant woman. The statute is therefore unconstitutional regardless of whether the state's desire to treat pregnant women different in this or any other context could be justified on a different legislative record.

38. Appellant's Conviction Violates the Texas Equal Rights Amendment Because § 19.06 Discriminates on the Basis of Gender.

Article I, section 3a, of the Texas Constitution (the Equal Rights Amendment) provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." In the event that this Court overrules Appellant's preceding point of error, it should strike the feticide statute on Texas constitutional grounds because "the Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees." *In re McLean*, 725 S.W.2d at 697.

Rather than providing the protection of heightened scrutiny, the Equal Rights Amendment affords sex classifications "maximum constitutional protection." As the Texas Supreme Court held in *In re McLean*,

> The appropriate standard is thus one which recognizes that the Equal Rights Amendment does not yield except to compelling state interests. Further, it is not enough to say that the state has an important interest furthered by the discriminatory law. Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition. Under our model of strict judicial scrutiny, such discrimination is allowed only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest.

725 S.W.2d at 698 (citations omitted).

For judicial economy, Appellant incorporates by reference the arguments

stated in the previous point, which demonstrate that Texas's stated interest in enacting the exemption for pregnant women is adequately protected by the statute's other exemptions. The statute must fall under the Texas Constitution.

39. Texas Penal Code § 1.07(a)(26) is unconstitutionally void for vagueness under the 14th and 8th Amendments to the U.S. Constitution.

8th Amendment Vagueness: When the Texas legislature redefined "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth," it amended the capital murder statute which contains the word "individual" and "person" a number of times. *See, e.g.,* TEX. PENAL CODE § 19.03(a)(7)-(8). This redefinition was significant, for it allowed a capital murder prosecution in this case based on the killing of two people in a single transaction, when one of those "persons" was an embryo or fetus. TEX. PENAL CODE § 19.03(a)(7)(A). This Court has held that, under this statute, killing two people in a single transaction sufficiently narrows the class of persons subject to the death penalty, as required by *Furman*, 408 U.S. at 310. *See Vuong v. State*, 830 S.W.2d 929, 941-42 (Tex.Crim.App.1992) (citing *Jurek*, 428 U.S. at 276). As such this "eligibility" factor is subject to Eighth Amendment scrutiny. *See*, *e.g.*, *Brown v. Sanders*. 546 U.S. 212, 217 (2006).

The Supreme Court has distinguished between vagueness under the Due Process Clause and the Eighth Amendment. *See Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). The former concerns "lack of notice," and "may be overcome in any specific case where reasonable persons would know that their conduct is at

risk." *Id.* at 361. The latter involves a failure to "inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman.*" *Id.* Crucially, Eighth-Amendment analysis focuses on the vagueness of the "narrowing principle to apply to [the] facts," rather than an **application of the facts at hand to the law**. *Id.* at 363. Thus, in *Cartwright*, and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (on which it relied), the Court rejected prosecutorial arguments that "a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty."[300]

Texas's capital feticide statute runs afoul of *Cartwright,* 486 U.S. at 361-62, because it fails to guide juries' discretion as required by the Eighth Amendment. The statute defines "a human being [as one] who is alive, including an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE § 1.07(a)(26). A defendant who "intentionally or knowingly causes" a "death" of such an embryo or fetus commits murder -- and capital murder if that "person" is the second one knowingly or intentionally killed in a single transaction. TEXAS PENAL CODE §§ 19.02 (b)(1), 19.03 (a)(7)(A).

This statute is unconstitutionally vague because it provides the jury insufficient guidance concerning the knowing and intentional killing of embryos

[300] *Cartwright*, 486 U.S. at 363. *See also id.* at 361 (rejecting argument that statute can be saved "if there are circumstances that any reasonable person would recognize as covered by the statute").

or pre-viable fetuses.[301] The redefinition of individual allows a jury to impose a death sentence even where neither the defendant nor the woman knew that she was pregnant and even if the defendant did not know his actions would kill the embryo or fetus.[302] *See Lawrence*, 240 S.W.3d at 919 (Johnson, J., concurring) (noting constitutional concerns created by this problem).

Furthermore, before viability there is no way of determining whether the embryo or fetus will develop to a stage at which it could live independently outside the woman. Thus, a jury's decision whether the accused "caused" the death of such an embryo or non-viable fetus necessarily lacks the concrete guidance the Eighth Amendment requires. As in Appellant's case, before viability, the state cannot show that the pregnancy that was terminated would or could have resulted in a fetus capable of life independent of the woman. Here, the fetus was still dependent on the pregnant woman and incapable of any life outside her body. 21 RR 17; 20 RR 121-22. Whether an accused "caused" the "death" of an embryo or non-viable fetus that may or may not have matured to a living person is a matter of philosophy and personal opinion, and proves far too vague to satisfy the rigorous demands of the Eighth Amendment.[303]

Additionally, a lay person will not always know that his or her conduct is

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[301] Although not required under 8th Amendment vagueness, Appellant's facts fall under the impermissibly vague part of the statute. 21 RR 17 (medical evidence that fetus was not viable); 20 RR 121-22 (same).
[302] The statute also states that "death" includes, "for an individual who is an unborn child, the failure to be born alive." TEX. PENAL CODE § 1.07(a)(49). This definition of death does not in any way eliminate the vagueness of the statutory scheme. In any event, however, the jury was not provided with it. 22 RR 5-6. *See also* Point 18, *supra*. Eighth Amendment vagueness analysis concerns the "guidance" the jury actually received in the charge, not the statute at issue. *Maynard*, 486 U.S. at 363.
[303] *See, e.g.*, *Evans v. People*, 49 N.Y. 86 (1872) ("[D]eath cannot be caused when there is no life.").

going to harm a fetus or terminate a pregnancy, creating an additional dearth of guidance for a capital jury. Just as a defendant may not know that a woman is pregnant, he or she may not know that certain conduct will harm the embryo or fetus. *See Lawrence*, 240 S.W.3d at 919 (Johnson, J., concurring). The state acknowledged this fact at Appellant's trial. In order to explain to the lay jury, the state required the expert testimony of the medical examiner and the victim's physician to prove both that the fetus was alive at the time of the incident and that Appellant's alleged actions were the cause of the death of the fetus. *See* 20 RR 68, 116-121; 21 RR 15-17. An expert can testify only if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. The fact that experts were allowed to testify at Appellant's trial regarding whether the fetus was alive and whether the Appellant's alleged actions caused its death shows that these matters are outside the knowledge of normal lay people.[304] The admission of expert testimony on this point further proves that jurors, and other "ordinary people," cannot know what conduct would knowingly or intentionally cause the death of an embryo or fetus.

Thus, the statute is unconstitutionally vague under the Eighth Amendment.

14th-Amendment Vagueness: The feticide statute is also void for vagueness in violation of the Fourteenth Amendment of the U.S. Constitution. "The void-for-vagueness doctrine requires that a penal statute define the criminal

[304] *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("Expert testimony assists the trier-of-fact when the expert's knowledge and experience on a relevant issue are beyond that of the average juror and the testimony helps the trier-of-fact understand the evidence or determine a fact issue.").

offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement."[305] A successful claimant must show that the law is vague in all applications or as to his conduct. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

Texas defines embryos and fetuses as "persons" in direct contravention of the Supreme Court's decision in *Roe*, 410 U.S. at 157. The ambiguity in the law created by Texas's statute would cause a person of ordinary intelligence to wonder whether Texas's statute or the United States Constitution, as interpreted by the Supreme Court, controls.[306] In addition, Appellant incorporates by reference here the arguments in Point 19, *supra*, explaining why a lay person would not necessarily know what conduct would knowingly or intentionally cause the death of an embryo or pre-viable fetus. For each of those reasons, Appellant could not know what conduct would be prohibited by the statute. Reversal is required.

OTHER CONSTITUTIONAL ERROR

40. Appellant Was Denied the Effective Assistance of Counsel.

Mr. Estrada was entitled to the effective assistance of counsel at trial. *Strickland*, 466 U.S. at 687. U.S. Const. amends. VI, XIV. Where a preponderance of the evidence in the record demonstrates that there "is … no

[305] *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex.Crim.App. 2006) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

[306] Pertinent court decisions impact heavily on an ordinary citizen's reasonable view of the law. *See United States v. Lanier,* 520 U.S. 259, 271 (1997) (holding that while "general statements of the law are not inherently incapable of giving fair and clear warning, [] in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

plausible professional reason for a specific act or omission," ineffective assistance of counsel may be raised on direct appeal and sustained if there is sufficient prejudice. *See*, *e.g.*, *Andrews*, 159 S.W.3d at 101. Here, the totality of counsel's errors prejudiced Appellant's rights to a fair trial and requires reversal.

None of counsel's omissions and errors is supported by any "plausible professional reason." *Bone*, 77 S.W.3d at 836. Counsel repeatedly sat on her hands when advocacy was required, and sat by idly when objectionable evidence, instructions, and argument occurred. As demonstrated below, counsel's inaction caused prejudice and denied Mr. Estrada a fair trial. *Strickland*, 466 U.S. at 694.

Ineffective In Allowing The State To Present "Rebuttal" Evidence Falling Far Outside The Narrow Scope Of Mr. Fitzgerald's Testimony

By presenting irrelevant and highly prejudicial testimony through Officer Merillat far outside the scope of rebuttal, the State painted a vivid – and inaccurate – picture of a dangerous, uncontrolled, and violent prison system. Officer Merillat gave hyperbolic accounts of violent incidents in which Texas inmates gruesomely sawed off a chaplain's hand, 23 RR 195, sent Officer Merillat a hand-made bomb, 23 RR 196, escaped from Harris County Jail on a bench warrant. 23 RR 192. The clear but erroneous implication was that such incidents were common.

This Court's precedent limits prosecution rebuttal evidence to that which "tends to refute the defensive theory of the accused and the evidence introduced in support of it." *Laws v. State*, 549 S.W.2d 738, 741 (Tex.Crim.App. 1977). Also forbidden is the State's introduction of evidence on a collateral matter that does

not rebut a defensive theory. *See Flannery v. State*, 676 S.W.2d 369, 370 (Tex.Crim.App. 1984). Moreover, the rules of evidence permit only introduction of relevant evidence. TEX. R. EVID. 401. And 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).

Notwithstanding these bars to Officer Merillat's purported "rebuttal," counsel sat idly by without objecting as he spouted highly-prejudicial claims about some of the most notorious incidents of prison violence in Texas history.

Officer Merillat's testimony was inappropriate in rebuttal given that defense expert Fitzgerald confirmed that the opportunity for crime exists in prison. 23 RR 166-67. At no time did the defense or Mr. Fitzgerald suggest it would be impossible to commit crime in prison; instead, they presented evidence to show that violence in the TDCJ system was relatively rare, 23 RR 166, as indeed it is.[307]

Instead of "refut[ing this] defensive theory," *Laws*, 549 S.W.2d at 741, Officer Merillat's testimony served only to associate Mr. Estrada with Texas's most violent and notorious offenders, many of whom had extensive criminal records prior to their arrests on capital murder charges, had gang affiliations, committed murder against multiple victims, and necessarily would be a greater

[307] The prison population neared 157,000 at the time of Mr. Estrada's trial. 23 RR 154. As an example, there were only 62 serious staff assaults, and 1,020 serious offender on offender assaults in TDCJ in 2006. *Id*. at 155-56. Since 1850 – 156 years preceding the time of Mr. Estrada's trial – TDCJ had witnessed only 21 murders of correctional officers. *Id.* at 157.

risk of future danger than Mr. Estrada.[308] Due only to a lack of objection by ineffective counsel, the State was allowed to present this irrelevant and highly prejudicial evidence. Moreover, by associating Mr. Estrada with the violent acts of others, Officer Merillat's testimony violated the foundational principle of the modern death penalty jurisprudence which mandates **individualized** sentencing determinations and **heightened** reliability. *See Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 303-304. Defense counsel ineffectively failed to object.

According to Officer Merillat, no young offender could enter prison without choosing violence: "we do see a lot of crimes committed by younger inmates because . . . [n]o matter the choice that's made, it's going to be bad." 23 RR 187. Mr. Estrada, twenty-three years old at the time of his trial, would necessarily be in this category of young prisoners condemned to bad choices. Counsel should have vigorously objected to and thoroughly addressed on cross-examination such sweepingly overbroad, speculative and irrelevant testimony.

Officer Merillat practically assured that they would conclude that **anyone** entering the prison system as a capital murderer represented a continuing threat to society. For defense counsel to allow the sentencing trial to be infected by these irrelevant, melodramatic, and unreliable accounts of TDCJ life and fail to challenge their admissibility on the ground of improper rebuttal was utterly

[308] Officer Merillat's claims regarding violence on death row, *see, e.g.,* 23 RR 188, 192, were particularly inappropriate, and should have been challenged by defense counsel. The jury needed only to evaluate whether Mr. Estrada will be a continuing threat in prison society **outside of death row**. Juries for death row inmates necessarily found future dangerousness. Officer Merillat's claims 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.

ineffective. Defense counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *Andrews*, 159 S.W.3d at 101.

Ineffective Failure to Object to Court's Supplemental Instruction

Defense counsel failed to object to the trial court's supplemental jury instruction in response to the jury's question, "What happens if we can't come to a decision on issue # 1[the future dangerousness issue]?" 2 CRR 544. The trial court ordered the jurors to "continue your deliberations," without informing them that they were not required to agree if it meant surrendering any of their own conscientiously held beliefs. 24 RR 41. *See* Point 24, *supra*. When a jury note telegraphing the jury's needs arrives, it is time for counsel to stand and advocate, not to sit on her hands. Counsel did the latter, 224 RR 41, failing to object to this instruction on the meritorious grounds that jurors need not surrender his or her own conscientiously held beliefs to agree.[309] No reasonably competent attorney would have failed to object – thereby increasing the likelihood of a life sentence, if sustained, or preserving a meritorious appellate issue, if overruled.[310]

Failure to Object to Victim Impact Evidence at the Guilt Phase

"Victim impact" evidence is evidence about the loss incurred as a result of a crime. *Miller-El*, 782 S.W.2d at 895. Although permitted to a limited degree in the sentencing phase of a capital trial, it is never permitted in the guilt phase

[309] *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."); *Martinez v. State*, 131 S.W.3d 22, 41 (Tex.App. San Antonio – 2003, *reh'g overruled*) (approving supplemental instruction where it reminded jurors that "no juror is expected to yield a conscientious conviction").

[310] *See Ex parte Varelas*, 45 S.W.3d 627 (Tex.Crim.App. 2001) (finding ineffectiveness for failure to request two instructions to which defendant entitled to under state law); *Ex parte Zepeda*, 819 S.W.2d 874 (Tex.Crim.App. 1991) (similar).

because it is irrelevant to guilt or innocence. *Id.* Notwithstanding this clear rule, defense counsel sat idly by as the prosecution introduced irrelevant victim impact evidence at the **guilt** phase of the trial.[311] Only after the State elicited a catalogue of improper victim-impact evidence, did counsel finally object, and the objection was sustained. 19 RR 159. No reasonably competent attorney would have let this prejudicial victim-impact testimony go on as long as counsel did.[312] As counsel's eventual successful objection demonstrated, *see id.*, counsel had everything to gain – excluding this prejudicial evidence -- and nothing to lose by objecting.

Ineffective Failure in Permitting Erroneous Guilt Phase Charge

Defense counsel did not object to the trial court's failure to charge the jury on the statutory definition of an unborn child.[313] As previously demonstrated, *see* Point 19, *supra*, incorporated herein, counsel successfully opposed the State's attempt to garner a transferred intent instruction. 21 RR 107, 130, 136-389. Having succeeded in blocking that improper instruction, counsel sat on her hands when the court committed this charge error, enabling the prosecutor to argue – incorrectly – that "when you kill mom, you kill the baby." 22 RR 19. Evidence of intent to kill the fetus was tenuous, if even sufficient. *See* Points 19, 20, *supra*.

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[311] The victim-impact evidence included the victim's irrelevant senior class photograph, 29 RR State's Ex. 13; the victim's mother's testimony identifying the photograph as "my beautiful daughter," 19 RR 155, stating that her daughter had already completed all the credits she needed for graduation and was "doing a work program," id., describing her daughter's place of employment and her excitement at working there and earning money, 19 RR 156, her plans for a "senior trip," 19 RR 158, and her plans to become a missionary. 19 RR 158-59.

[312] Indeed, counsel objected to such testimony on these grounds in motions *in limine* filed before trial, 1 CR 231-234, 1 CR 235-38, but ineffectively did not urge those grounds (or any objection) when the testimony was introduced at trial. *See Geuder v. State*, 115 S.W.3d 11, 15 n.11 (Tex.Crim.App. 2003) (requiring objection at the time improper evidence introduced).

[313] *See* Point 18, *supra* (incorporated herein)*; See* 22 RR 5-6 (charge); TEX. PENAL CODE § 1.07 (49) (statutory definition).

Had the jury known that the death of the fetus is different from the death of mother, *see* TEX. PENAL CODE § 1.07 (49), and therefore that the intent to cause a fetus's death is also different from the intent to cause a pregnant mother's death, there is more than a reasonable probability that it would have acquitted.

Ineffective Failure to Object to Erroneous and Unconstitutional Jury Instructions

As demonstrated in Point 24, *supra*, incorporated herein, counsel repeatedly fell down on the job when it came time to request proper jury instructions and to object to improper ones.[314] Ignorance of the law was the only plausible reason for counsel's quiet acquiescence.[315] No valid strategic reason can exist for failing to request that a court instruct a capital jury in a manner that makes it less likely the defendant will win acquittal or a life sentence.[316]

Other Ineffectiveness: Counsel's failures were not isolated. Counsel failed to seek application of basic evidentiary rules requiring relevance and personal knowledge, and excluding improper character evidence and relevant evidence with a probative value outweighed by its unfairly prejudicial value.[317] Thus, counsel

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[314] Counsel failed to object to the court's erroneous charge: 1) that the jury could consider Mr. Estrada's bad acts in determining the answer to the mitigation special issue, 24 CR 7-8 (Point 30, *supra*); and 2) to the unconstitutional aspects of the capital sentencing statute set forth in Points 25-28, *supra*. *See also* Point 13, *supra* (*Miranda* & voluntariness instructions).

[315] *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).

[316] *See* note 310, *supra*, (setting forth two examples of ineffectiveness for failing to request appropriate instructions).

[317] *See* TEX. R. EVID. 401 (defining relevance as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence); TEX. R. EVID. 402 (excluding **all** irrelevant evidence); Tex. R. Evid. 403 (excluding unduly prejudicial evidence); TEX. R. EVID. 602 (requiring personal knowledge). There is an exception for

repeatedly failed to object to inadmissible evidence, including: 1) irrelevant, prejudicial and inadmissible guilt-phase character testimony that Det. Greiner believed Mr. Estrada to be "self centered," 20 RR 7-8; 2) speculative, irrelevant, and highly prejudicial testimony by the medical examiner that a person stabbed thirteen times would feel thirteen cuts, 20 RR 120; 3) irrelevant and highly prejudicial police testimony about **other** suspect statements in **other** cases, including claims that confessing murder suspects don't always tell the truth, "have actually lied," or were "concealing certain facts," 21 RR at 53-54;[318] 4) irrelevant and prejudicial testimony about damage to Ms. [redacted] hymen, 23 RR 86-878, even though she testified freely and in detail to her sexual relationship with Mr. Estrada 23 RR 38-50; and 5) victim impact evidence that exceeded the "quick glimpse" permitted under *Payne*, 501 U.S. at 822 (1991); *see* 23 RR 106-116. [319]

Moreover, counsel failed to pursue all available means of suppressing prejudicial evidence: 1) Counsel failed to raise the alternative meritorious argument that the police violated *Miranda* by not reading Mr. Estrada his *Miranda* warnings anew once he admitted to the crime of statutory rape, App. 2 at 217, a "pivotal admission establish[ing] custody."[320] 2) Counsel failed to follow through

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"experts," but they must testify within their expertise and their testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702.

[318] This inadmissible testimony was obviously meant to support the State's cynical theory that Mr. Estrada's statement was true when it helped the State's case, and false when it did not.

[319] Although Appellant asserts that counsel's objections preserved this issue, *see* Point 22, *supra*, if this Court finds otherwise, counsel was ineffective for failing to object with sufficient specificity.

[320] *Dowthitt*, 931 S.W.2d at 256. After this "pivotal admission," new warnings should have been given because the police ignored Mr. Estrada's earlier attempt to invoke his right to silence and to go home. App. 2 at 214-17. Fresh *Miranda* warnings were required because Mr. Estrada would have had absolutely no

on her motion to suppress identification testimony, 1 CR 139, by requesting a hearing or objecting to inadmissible identification evidence at trial, resulting in the admission of a blatantly suggestive photo lineup, 29 RR State's Exhibit 10,[321] as well as an in-court identification that was the fruit of the impermissibly suggestive procedure. 19 RR 43.[322] 3) Counsel failed to follow through on her motion to suppress physical evidence with a request for a hearing at which she could have established that, as shown in the State's interrogation video, Det. Greiner invalidly obtained Mr. Estrada's consent to DNA testing [323] and violated his Fourth-Amendment rights by falsely claiming that the test results would be private.[324]

Prejudice: But for counsel's repeated unprofessional errors, there is far more than a reasonable probability of either an acquittal or a life sentence. *Strickland*, 466 U.S. at 687. When the prejudice of counsel's errors is combined,

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reason to believe his (earlier-read) *Miranda* rights were still in effect once the police trampled his right of silence. *See Jones,* 119 S.W.3d at 773 n.13 (rejecting argument that prior warnings were sufficient).

[321] Ms. Valenzuela picked Mr. Estrada from a police lineup showing Appellant as the only participant wearing a collared striped polo shirt and the only one in his age group, 29 RR State's Exhibit 10, creating an unduly suggestive procedure that unfairly emphasized him and suggested to the identifier whom to choose. *See United States v. Wade*, 388 U.S. 218, 232-233 (1967) (A lineup is considered unduly suggestive if "other participants [are] grossly dissimilar in appearance to the suspect").

[322] Ms. Valenzuela's in-court identification was likely the product of the "memory . . . of the photograph." *Simmons v. United States*, 390 U.S. 377, 383-84 (1968). She said she saw, from across a street, a man coming out of the Vargas home while she was walking to her home with her children, and she never stopped escorting her children during the entire time. 19 RR 39-40, 42-43, 48-49. Her description was vague: "Hispanic male…wearing khaki pants and a white looking shirt." 29 RR State's Exhibit 1 (Rawson Police Report). It could have applied to vast numbers of people in the San Antonio area. Furthermore, over thirteen months had elapsed between the day of the crime and the day Ms. Valenzuela identified the Appellant in court. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (listing factors considered to determine if in-court identification is tainted by suggestive pretrial identification procedure, including opportunity to view culprit, degree of attention, accuracy of description, level of certainty, and time between event and trial); *Loserth v. State*, 963 S.W.2d 770, 773-74 (Tex.Crim.App. 1998) (same).

[323] Collecting a saliva sample for DNA analysis implicates the Fourth Amendment. *Kohler v. Englade*, 470 F.3d 1104, 1109 n.4 (5th Cir. 2006) (collection of saliva for DNA test is a "search" under the 4th Amend.).

[324] App. 2 at 121-22, 127, 131-32. This tactic convinced Mr. Estrada to give consent, *see id.* at 132-35, as required, *McGee v. State*, 105 S.W.3d 609, 615 n.12 (Tex.Crim.App. 2003), but clearly violated his Fourth Amendment right because the consent was not knowing and voluntary. *Cf. Hopkins v. Cockrell*, 325 F. 3d 579, 584 (5th Cir. 2003) (suppressing portions of confession after the officer deceptively assured suspect that the conversation was confidential).

it is even clearer that the "totality" of counsel's errors prejudiced Appellant's rights to a fair trial. *Ex parte Nailor*, 149 S.W.3d 125, 130 (Tex.Crim.App. 2004).

41. This Court should reverse due to the cumulative harm of the errors.

If the Court finds two or more errors harmless, Appellant is entitled to reversal due to the **cumulative harm** of the errors. *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)).

42. An Arbitrary, Freakish, Disproportionate Outlier, Entirely Unsupported by the Evidence, this Death Sentence Violates the 8th and 14th Amendments.

Mr. Estrada should not be on death row. In no logical or rational sense is his death sentence a reasoned, moral, or proportionate response to his character, background, and history, and the nature and circumstances of his crime. Rather, it is clearly an arbitrary and capricious, disproportionate outlier in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Mr. Estrada is the only person on death row who would not be there but for the killing of a woman pregnant with a non-viable fetus.[325] Moreover, although Texas requires a finding

[325] There are only two other known defendants on death row for the killing of a pregnant woman and her non-viable fetus: Rosendo Rodriguez in Texas and Maurice Harris in California. Unlike Mr. Estrada, both were convicted of additional aggravating circumstances which exposed them to the death penalty. Rosendo Rodriguez is on Texas's death row. *See* http://www.tdcj.state.tx.us/stat/rodriguezrosendo.htm (last checked Oct. 29, 2008). Media reports indicate that he was charged and convicted under two theories of capital murder: 1) murder of a pregnant woman, and her fetus and 2) murder committed in the course of a rape. *See* Logan G. Carver, *Rodriguez Set For Another Step Toward Death Row*, LUBBOCK AVALANCHE-JOURNAL, April 10, 2008, *available at* http://www.lubbockonline.com/stories/041008/loc_267031303.html (last visited Oct. 29, 2008). The sentencing jury also heard evidence that Rodriguez "confessed to killing . . . a Lubbock teen who went missing in 2004." *Id.* Maurice Harris was found guilty of attempted murder of one person and the murders of a woman and her fetus, committed under the special circumstances of felony-murder robbery, felony-murder burglary, and multiple murder. He received a death sentence for the woman's murder and life without parole for the fetus's murder. *People v. Harris*, 118 P.3d 545, 554 (Cal. 2005) (citations omitted).

of future dangerousness to support a death sentence, Mr. Estrada's crime, character, and record show not only that he does not pose a threat of future danger but that he is worlds apart (in terms of culpability, dangerousness, and other pertinent factors) from others sentenced to death in Texas and nationwide. This Court should reform the sentence to life imprisonment without parole.

The Eighth Amendment permits the death penalty for "the worst of the worst."[326] To guard against the execution of people who fall outside this category, the overwhelming majority of death penalty states require appellate review of proportionality and whether the death sentence is the product of passion, prejudice, or another arbitrary factor. Texas is one of the few states in the country that requires neither of these critical safeguards.[327] However, that the statute does not **require** such review by this Court does not preclude it.[328]

A. Passion, Prejudice, and Arbitrary Considerations

Mr. Estrada's death sentence can only be characterized as an arbitrary and

[326] *See*, *e.g.*, *Roper*, 543 U.S. at 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins*, 536 U.S. at 319)).

[327] Arizona, California, Indiana, Illinois, Oregon, and Texas are the only six states that require neither a proportionality review nor an arbitrariness, prejudice or product of passion review. *But cf.* 720 ILL. COMP. STAT. § 5/9-1(i) (West 2003) (requiring the Illinois Supreme Court to ask whether a death sentence is "fundamentally unjust" as part of its review). 19 require proportionality review. *See* note 90, *supra*. 9 have mandatory statutory review of whether a death sentence is the product of "passion or prejudice or any other arbitrary factor." *See* COLO. REV. STAT. § 18-1.3-1201(6)(b) (2004); CONN. GEN. STAT. § 53a-46b (b) (2007); IDAHO CODE ANN. § 19-2827(c) (2006); KAN. STAT. ANN. § 21-4627(c) (1994); MD. CODE ANN. CRIM. LAW § 2-401 (d)(2)(i) (West 2004); NEV. REV. STAT. § 177.055(2)(d) (2007); OKLA. STAT. ANN. tit. 21 § 701.13(c)(1) (2002); 42 PA. CONS. STAT. § 9711(h)(3) (2007); WYO. STAT. ANN. § 6-2-103 (d)(i) (2008). The Florida Supreme Court requires proportionality review under its state constitution. *See* note 90, *supra*. The Arkansas and Utah Supreme Courts require review for arbitrariness, prejudice, or result of passion under their state constitutions. *See Collins v. State*, 548 S.W.2d 106, 120 (Ark. 1977); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977). 13 states do not authorize the death penalty.

[328] *See United States v. Sampson*, 275 F. Supp. 2d 49, 96-97 (D. Mass. 2003) (federal death penalty's lack of statutorily-mandated proportionality review does not preclude federal appellate courts from performing such review); *Sinclair v. State*, 657 So. 2d 1138, 1142 (Fla. 1995) (finding proportionality review required by Florida constitution even though not required by statute).

freakish decision. It was obviously the result of the passion, prejudice and other arbitrary factors set forth *supra*, including but not limited to, the State's use of patently inaccurate testimony concerning the custody to which Mr. Estrada would be subjected if sentenced to life without parole (a key issue for the jury), the State's improper closing argument regarding Mr. Estrada's constitutionally protected role in assisting Ms. Sanchez with obtaining an abortion, its other improper and inflammatory jury arguments, and its introduction of a highly prejudicial 911 recording and gory photographs of Ms. Sanchez's fetus. *See* Points 2, 14, 15, 18, *supra*. Accordingly, his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution.

B. Unconstitutionally Disproportionate Death Sentence

Appellant's death sentence is also unconstitutional because it is disproportionate in relation to other cases in which the death penalty has been imposed and to other cases in which the death penalty has not been imposed. Although 13 states, including Texas, authorize the death penalty for the death of a non-viable fetus,[329] only two other inmates in the United States are on death row for killing a pregnant woman and a non-viable fetus expired without being born

[329] *See* ALA. CODE §§ 13A-6-1, 13A-6-2 (2008); ARIZ. REV. STAT. ANN. § 13-1105 (C) (2008); ARK. CODE ANN. §§ 5-10-101, 5-1-102 (13)(B)(i)(a) (2007); CAL. PENAL CODE §§ 187(a), 190.2(a)(3) (2008); IDAHO CODE ANN. § 18-4001 (2008); KAN. STAT. ANN. §§ 21-3401, 21-3452(b)(2) (2007); MISS. CODE ANN. §§ 97-3-37(1), 97-3-19 (West 2008); MO. ANN. STAT. §§ 1.205 (3), 565.020 (2008); OHIO REV. CODE ANN. §§ 2903.01, 2903.09(A) (West 2008); OKLASTAT.ANN. tit. 21, §§ 691, 701.7 (2007), OKLA. STAT. ANN. tit. 63, § 1-730(2) (2007); S. D. CODIFIED LAWS §§ 22-16-4, 22-1-2 (31) (2008); UTAH CODE ANN. § 76-5-201 (West 2008). The other 37 states do not authorize the death penalty for the death of a non-viable fetus.

alive.[330] *Cf. Atkins*, 536 U.S. at 316 (holding that rare use of capital punishment for an authorized class of cases in a minority of states makes it "truly unusual").[331]

Comparison to similar Texas cases makes the arbitrariness of Mr. Estrada's death sentence even more apparent. Of the known seven other men prosecuted under the new 2003 law, only one other received the death penalty, despite the fact that the majority of the other cases were significantly more aggravated.[332]

C. Constitutionally Required Appellate Review to Guard Against an Unconstitutional Death Sentence.

The appellate review requested here is consistent with this Court's constitutional and statutory authority as the court of direct appeal for capital cases. *See* TEX. CONST. art. 5, § 6.[333] To the extent that this Court disagrees and construes Art. 37.071 to preclude this Court from considering whether Mr. Estrada's death sentence is disproportionate **and** from determining whether Mr.

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[330] *Compare State v. Ard,* 505 S.E.2d 328, 331 (S.C. 1998) (upholding death penalty where defendant killed pregnant woman and fetus because State demonstrated that fetus was viable), *with Armstrong v. State*, 233 S.W.3d 627, 631 (Ark. 2006) (upholding conviction and life sentence of defendant convicted of capital murder for murder of woman and her 20 week-old-fetus).

[331] *Kennedy*, 128 S. Ct. at 2657 (same where there were "only two individuals now on death row in the United States for a nonhomicide offense"). Appellant does not contend that the death penalty for killing a woman pregnant with a non-viable fetus categorically violates the Eighth Amendment, only that the extremely rare instance of a death sentence for that crime is pertinent to proportionality analysis.

[332] *See Roberts v. State,* No. 06-05-00165-CR, 2007 WL 1702771, *1 (Tex. App.- Texarkana June 14 2007, *pet. granted*) (not designated for publication) (no death penalty for three defendants prosecuted and convicted of multiple capital murder counts, including the death of the "unborn child," where defendants invaded home and "unleashed a hail of bullets"). *See also Rogers v. State*, Nos. 05-05-00283, 05-05-00284, 2006 WL 475795 ,* 1 (Tex. App. – Dallas March 1, 2006, *no pet.*) (same crime); *Lawrence,* 240 S.W.3d at 914 (no death penalty for defendant who announced to his girlfriend his intention to kill another girlfriend, who was 4-6 weeks pregnant, thereby "tak[ing] care of the problem," by shooting her "three times with a shotgun, causing the death of both her and her approximately four-to-six-week-old embryo."); *Holmes v. State,* No. 01-06-00975-CR, 2008 WL 963021, * 1 (Tex. App. – Houston, April 10, 2008, *pet ref'd*) (not designated for publication) (no death penalty for defendant convicted of capital murder for the murder of his wife and her 20 week-old fetus). *But cf.* n.285, *supra*.

[333] *See Bigby v. State*, 892 S.W.2d 864, 874-75 (Tex.Crim.App. 1994) ("Clearly under either the statute or the constitution we are empowered to review a case both upon the law and the facts."); TEX. CONST. art. 5, § 6; TEX. CRIM. PROC. art. 44.25 (stating same rule set out in *Bigby*).

Estrada's death sentence was the product of passion, prejudice, or another arbitrary factor, the statute violates the Eighth and Fourteenth Amendments because it does not require meaningful appellate review.[334] The statute also violates these constitutional imperatives to the extent that this Court construes it to preclude either proportionality review[335] **or** review of whether Mr. Estrada's death sentence was the product of passion, prejudice, or another arbitrary factor.[336]

The decision in *Pulley*, 465 U.S. at 43, does not obviate the constitutional need for appellate review of this appellate review. In *Pulley*, the Court rejected the petitioner's argument that the Eighth Amendment contains an "invariable rule in every case" that a state appellate court, before it affirms a death sentence, compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. *Id*. at 43-44. In upholding California's statute, the Court relied on the statute's requisite appellate review.[337] The Court concluded that the statutory scheme included adequate "checks on arbitrariness,"

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[334] *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*). *But see Russeau,* 171 S.W.3d at 886 (rejecting this claim).

[335] The United States Supreme Court repeatedly has stressed that the penalty of death must be proportionate to the crime and the defendant. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) ("[i]t is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant'" (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Woodson*, 428 U.S. at 304; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (holding that death sentence must reflect a reasoned moral response to the defendant's background, character, and crime) *But cf. Pulley v. Harris*, 465 U.S. 37, 43 (1984) (discussed below); *Hughes v. State*, 897 S.W.2d 285, 294 (Tex.Crim.App. 1994) (relying on *Pulley* to reject claim under the Eighth and the Fourteenth Amendments).

[336] *See Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*) (holding that arbitrary and capricious death sentences violate the Eighth Amendment); *see also Walker v. Georgia*, __ U.S. __, 129 S. Ct. 453 (2008) (Stevens, J., statement respecting the denial of the petition for writ of certiorari). Given this Eighth Amendment protection, obviously the statute may not **prohibit** reversal of death sentences that are arbitrary and capricious or appellate consideration of such a claim.

[337] Under the statute, the trial court is required to "make[] an 'independent determination as to whether the weight of the evidence supports the jury's findings and verdicts.'" *Id*. at 53 (citation omitted). If the result is a death sentence, the appellate court is required to review it. *Id*.

id. at 51, because it "'serve[d] to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.'" *Id*. at 53 (quoting *People v. Frierson*, 599 P.2d 587, 609 (Cal. 1979)).

Here, Mr. Estrada seeks only a determination whether **his** death sentence is disproportionate and/or the product of passion, prejudice, or other arbitrary factors. Without such review, there can be no assurance that there is a sufficient check on the arbitrariness of this sentence. *Id.* at 51. Nothing in *Pulley* permits denial of this request. "A holding that the Constitution does not require a state to undergo a particular type of appellate review differs substantially from a holding that the Constitution does not provide relief for one whose sentence, by definition, is grossly disproportionate to sentences from similar cases."[338]

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.[339] *See Sampson*, 275 F. Supp. 2d at 96-97.[340]

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[338] Penny J. White, *Can Lighting Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 839 (1999).

[339] *See* Art. 37.071, §2 (a)(1) ("In the 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 or the circumstances of the offense that mitigates against the imposition of the death penalty."); *Gentry v. State*, 770 S.W.2d 780, 792 (Tex.Crim.App. 1988) ("While it is true that evidence of extraneous offenses not resulting in conviction, but offered for enhancement purposes is normally inadmissible under 37.07, § 3(a), *supra*, the rule pertaining to admission of extraneous offenses during the punishment phase in capital murder cases is altogether different. Capital cases fall within the purview of Article 37.071(a)….").

[340] 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.

Proportionality review is also required under the Due Process and Equal Protection Clauses, claims *Pulley* did not address.[341] U.S. Const. amend. XIV.

Adrian Estrada asks this Court to engage in the judicial review outlined in *Jurek, supra,* and hold that his sentence of death is wanton and freakish.[342]

D. Legally Insufficient Basis for Death Penalty Violates Due Process

Mr. Estrada'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* Points1, 5, Statement of the Facts, *supra*, incorporated herein.[343] Furthermore, no rational trier of fact could have possibly found that, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the

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1996) (Clinton, J., dissenting) (similar).

[341] *Cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (holding punitive damages award "grossly excessive" under substantive due process). *But see Morris v. State*, 940 S.W.2d 610, 616 (Tex.Crim.App. 1996) (rejecting comparative proportionality review as required by due process but acknowledging higher due process required for a death sentence).

[342] *Jurek*, *supra*, requires relief on this claim. The decision, which rejected a facial challenge to the Texas capital sentencing statute, is premised on this Court engaging in meaningful appellate review to safeguard against the type of arbitrary, freakish, and disproportionate outlier that Mr. Estrada's sentence represents. The controlling opinion specifically expressed their understanding that the statute's promise of "prompt judicial review of the jury's decision in a court with statewide jurisdiction" would result in the promotion of "evenhanded, rational, and consistent imposition of death sentences under law," and would "serve[] to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed...." 428 U.S. at 276 (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)). To the extent that *Pulley* and/or *Jurek* permit this Court to decline to determine whether Appellant's death sentence is proportionate and/or whether it is the product of passion, prejudice, or other arbitrary factors, the cases were wrongly decided under the Eighth Amend. for the reasons set forth in Justice Brennan's dissent in *Pulley* explaining why the Constitution mandates proportionality review as an invariable rule. *See Pulley*, 465 U.S. at 59-74 (Brennan, J., dissenting).

[343] Although Texas law requires factual sufficiency review resulting in a new trial if a verdict is "manifestly unjust" and "shocks the conscience," *Grotti v. State*, 2008 WL 2512832, at *4 (Tex.Crim.App. June 25, 2008) (not designated for publication), it does not apply that review standard with respect to the central jury finding required for a death sentence – future dangerousness. *McGinn*, 961 S.W.2d at 169. *But see* Point 5, *supra* (arguing that *McGinn* should be overturned). Thus, in Texas, a legally sufficient finding of future dangerousness can stand even if it is "manifestly unjust" or "shocks the conscience." That rule clearly denies a capital defendant meaningful review of his death sentence to ensure it is not wanton or freakish.

defendant," 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." Art. 37.071.

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. Numerous other state courts have considered similar claims,[344] and this Court should, too, for the reasons those state courts have delineated. Additionally, its refusal to do so would violate Appellant's Eighth Amendment rights, including his right to meaningful appellate review and his due process rights as enunciated in *Jackson v. Virginia*, *supra* (extending the constitutional requirement of the beyond a reasonable doubt standard to appellate review). Nevertheless, this Court must determine whether the jury's negative answer to the mitigation issue violated *Jackson v. Virginia, supra*.[345] This Court should vacate the death sentence because mitigating circumstances warrant a life sentence.

In short, Appellant's death sentence is intolerably disproportionate to his

[344] *See, e.g., State v. Tenace*, 847 N.E.2d 386, 403 (Ohio 2006) (vacating death sentence because aggravators did not outweigh mitigators); *People v. Thompson*, 611 P.2d 883 (Cal. 1980) (imposing life imprisonment because of insufficiency of special circumstances); *State v. Thompson*, No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *1 (Tenn. Crim. App. April 25, 2007) (not designated for publication) (death sentence disproportionate); *Williams v. State*, 991 S.W.2d 565, 571 (Ark. 1999) (reviewing sufficiency of aggravators and weighing against mitigators); *State v. Cole*, 155 S.W.3d 885, 906 (Tenn. 2005) (reweighing aggravators and mitigators); *State v. Elledge*, 26 P.3d 271, 279 (Wash. 2001) (similar). Indeed, "[a] number of state courts require a somewhat greater showing of sufficiency of evidence in death penalty cases." Hon. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 1000 n.94 (1993) (citing *Kimbrough v. State*, 352 So. 2d 512, 516 (Ala. 1977), *West v. State*, 485 So. 2d 681, 688 (Miss. 1985), and *State v. Ramseur*, 524 A.2d 188, 291, n.84 (N.J. 1987)). *See also People v. Thompson*, 853 N.E.2d 378, 397-98 (Ill. 2006) (subjecting death sentence "to intense scrutiny").

[345] *But see Williams v. State*, 2008 WL 2355932, at *16-18 (Tex.Crim.App. June 11, 2008) (not designated for publication) (stating mitigation is a defensive issue). *Cf. Harris v. Phelps*, 550 F. Supp. 2d 551, 555, n.4 (D. Del. 2008) (presuming, "in an abundance of caution, that petitioner's insufficient evidence claim regarding the Superior Court's rejection of his renunciation defense constitutes a claim cognizable in this proceeding").

character and background, and the nature and circumstances of the crime. It was clearly the product of passion, prejudice, and other arbitrary factors. Accordingly, this Court should reform the sentence to life imprisonment without parole.

43. An Arbitrary, Freakish, Disproportionate Outlier, Entirely Unsupported by the Evidence, this Death Sentence Violates the Texas Constitution.

Mr. Estrada's death sentence is also constitutionally disproportionate under the Texas Constitution. The broader language of Article 1, § 13 of the Texas Constitution, prohibiting the infliction of cruel **or** unusual punishment provides more protection than the Eighth Amendment. *See*, Point 7, *supra*, incorporated herein. The textually explicit prohibition against unusual punishments requires proportionality review because "clearly [it] is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper."[346] Given this protection against "unusual" punishments, this Court should now hold that proportionality review is required under Article 1, § 13.[347] For the reasons discussed above in Point 42, *supra*, incorporated herein, Mr. Estrada's death sentence is arbitrary and disproportionate, and accordingly, violates Article 1, § 13 of the Texas Constitution.

44. 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,

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[346] *Tillman*, 591 So.2d at 169. *See also State v. Fain*, 94 Wash.2d 387 (1980) (adopting a broader proportionality rule than that provided by the 8th Amendment under Washington's Constitution).

[347] *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").

Art. 37.071. Few Texas counties purport to have such standards, and Bexar County is not among them.[348] The trial court erred by denying Appellant's motion to preclude application of the death penalty on equal protection, due process, and Eighth Amendment grounds.[349] 1 CR 46-64; 2 CR 388-392.

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, 102, 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 359 (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.[350] With no "abstract proposition" or a "starting principle," *id*. at 106, Texas does just that. The result is disparate treatment of similarly-situated defendants across Texas. *See* Point 42*, supra.*

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[348] *See* Lena Roberts, *All Over the Map: How an Accident of Geography Turns Texas' Death Penalty Scheme into a Lethal Lottery* 36-37 (April 2003) (analyzing responses of 79 Texas district attorneys, including Bexar County, concerning charging decisions in death-eligible cases) (on file with Appellant's counsel). In Bexar County, District Attorney Susan Reed admitted recently that geography plays a role in her decision to seek death: "Reed explained she agreed to the lesser punishment [of life without parole] after 'considering all the circumstances, considering all the evidence, considering the defendant's age, and **considering the jurisdiction we've been transferred to.**'" Lomi Kriel & David Saleh Rauf, *Mom Accepts Life Sentence*, SAN ANTONIO EXPRESS-NEWS, Aug. 1, 2008, at A1 (emphasis added).

[349] *See* U.S. Const. amends. V, VI, VIII, XIV. *But see Threadgill v. State*, 146 S.W.3d 654, 672 (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).

[350] 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).

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). 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 to 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.'"[351] In *Gregg*, Justice White asserted that prosecutors would not exercise standardless discretion 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 clear that geography, more

[351] *DeGarmo v. Texas*, 474 U.S. 973, 974-975 (1985) (Brennan, J., dissenting from denial of cert.).

than the nature of the offense or the State's proof, is the most indicative factor that a prosecutor will seek the death penalty.[352]

Because of the lack of standards governing this discretion, the death penalty continues to be imposed in an arbitrary, freakish, and discriminatory manner and violates the U.S. Constitution. Based upon the evidence of unconstitutional prosecutorial discretion in Mr. Estrada's case, this Court should reverse.

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

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:

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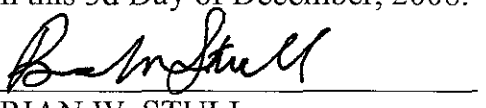
On this 3d Day of December, 2008.



BRIAN W. STULL

[352] *See* Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at A1 ("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.").