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In the

Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
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No. 0620074
In the 228th District Court
Harris County, Texas

WILLIAM MICAHEL MASON
Appellant
V.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

PATRICK F. MCCANN
700 Louisiana, Suite 3950
Houston, TX 77002
Telephone: (713) 223-3805
Fax: (713) 226-8097
State Bar No. 00792680
writlawyer@justice.com

MANDY MILLER
2910 Commercial Ctr. Blvd., Ste. 103-201
Katy, TX 77494
(832) 900-9884
Fax: (877) 904-6846
State Bar No. 24055561
mandy@mandymillerlegal.com

APPELLANT REQUESTS ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested to aid this Court in determining numerous important constitutional issues, including some issues that appear to be of first impression. The jury assessing punishment in this case was influenced by the knowledge that appellant had previously been sentenced to death. Additionally, appellant challenges the special issues, as they apply to appellant's specific factual circumstances.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

Appellant or criminal defendant:

William Michael Mason

Counsel for the State:
1201 Franklin, Ste. 600
Houston, TX 77002

Devon Anderson
District Attorney of Harris County

Lance Long and Katherine McDaniel
Assistant District Attorneys at trial

Trial counsel for Appellant:
2900 Smith Street #220
Houston, TX 77006

Terrance Geiser, Robert Scott, and Kurt Wentz
Counselors at trial

Appellate counsel:
700 Louisiana Ave., Ste. 3950
Houston, TX 77002

Patrick F. McCann and Mandy Miller
Counselors on appeal

Trial Judge

Hon. Marc Carter

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT 2
IDENTIFICATION OF THE PARTIES 3
TABLE OF CONTENTS 4
INDEX OF AUTHORITIES 6
STATEMENT OF THE CASE 11
STATEMENT OF FACTS 11
SUMMARY OF THE ARGUMENT 16
APPELLANT'S FIRST POINT OF ERROR 18
I. STANDARD OF REVIEW 20
II. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE JURY LEARNING THAT APPELLANT HAD PREVIOUSLY BEEN SENTENCED TO DEATH 21
APPELLANT'S SECOND POINT OF ERROR 24
I. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT INFORMED THE VENIRE MEMBERS THAT APPELLANT HAD PREVIOUSLY BEEN SENTENCED TO DEATH 26
II. THIS COURT CANNOT BE ASSURED, BEYOND A REASONABLE DOUBT, THAT THE ERROR DID NOT CONTRIBUTE TO APPELLANT'S DEATH SENTENCE. 27
APPELLANT'S THIRD POINT OF ERROR 28
APPELLANT'S FOURTH POINT OF ERROR 30
I. STANDARD OF REVIEW 33
II. THE JURY CHARGE WAS ERRONEOUS 34
III. APPELLANT WAS EGREGIOUSLY HARMED BY THE JURY-CHARGE ERROR 35
APPELLANT'S SIXTH POINT OF ERROR 37

I. STANDARD OF REVIEW 47

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGE FOR CAUSE 48

III. HARM 48

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 52

CERTIFICATE OF SERVICE 52

INDEX OF AUTHORITIES

CASES

Almanza v. State,
686 S.W.2d 157 (Tex. Crim. App. 1984) 34, 40

Andrews v. State,
159 S.W.3d 98 (Tex. Crim. App. 2005) 21

Ball v. LeBlanc,
792 F.3d 584 (5th Cir. 2015) 43

Barefoot v. Estelle,
463 U.S. 880 (1983) (J. Blackmun, dissent) 40

Bone v. State,
77 S.W.3d 828 (Tex. Crim. App. 2002) 21

Buchanan v. Angelone,
522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) 31

Cain v. State,
947 S.W.2d 262 (Tex. Crim. App. 1997). 25

Caldwell v. Mississippi,
472 U.S., at 336, 105 S.Ct., at 2643. 22

California v. Brown,
479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) 32

Chaffin v. Stynchcombe,
412 U.S. 17 S.Ct. 1977, 36 L.Ed.2d 714 (1973) 22

Comeaux v. State,
445 S.W.3d 745 (Tex. Crim. App. 2014) 49

Cordova v. State,
733 S.W.2d 175 (Tex. Crim. App. 1987) 48

Cortez v. State,
469 S.W.3d 593 (Tex. Crim. App. 2015) 33

Davenport v. DeRobertis,
844 F.2d 1310 (7th Cir. 1988) 42

Davis v. State,
329 S.W.3d 798 (Tex. Crim. App. 2010) 48

Davis v. State,
No. AP-76,521, 2013 WL 5773353 (Tex. Crim. App. Oct. 23, 2013)
(not designated for publication) 23

Eddings v. Oklahoma,
455 U.S. 104 S.Ct. 869, 71 L.Ed.2d 1 (1982) 31, 35, 39

Elledge v. Florida,
525 U.S. 944, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) 45

Ex parte Gonzales,
945 S.W.2d 830 (Tex. Crim. App. 1997) 20

Ex parte Granviel,
561 S.W.2d 503 (Tex. Crim. App. 1978) 28

Feldman v. State,
71 S.W.3d 738 (Tex. Crim. App. 2002) 47

Foster v. Florida,
537 U.S. 990, 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) 45

Garcia v. State,
No. 71,417, 2003 WL 22669744 (Tex. Crim. App. Nov. 12, 2003) 23

Gardner v. State,
730 S.W.2d 675 (Tex. Crim. App. 1987) 40, 47, 48

Gregg v. Georgia,
428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) 44

Guidry v. State,
9 S.W.3d 133 (Tex. Crim. App. 1999) 23

Hill v. Colorado,
530 U.S. 703 (2000) 38

Hitchcock v. Dugger,
481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) 32

In re Medley,
134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890) 41

Jackson v. State,
973 S.W.2d 954 (Tex. Crim. App. 1998) 20

Jackson v. State,
877 S.W.2d 768, 771 (Tex. Crim. App. 1994) 21

Johnson v. State,
43 S.W.3d 1 (Tex. Crim. App. 2001) 49

Johnson v. United States,
135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) 37, 38

Jurek v. State,
522 S.W.2d 934 (Tex. Crim. App. 1975) 30

Jurek v. Texas,
428 U.S. 262 (1976) 30

Kerley v. State,
89 Tex.Crim. 199, 230 S.W. 164-65 50

Knight v. Florida,
528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) 45

Lackey v. Texas,
514 U.S. 1045, 115 S.Ct. 1421 (1995) 44

Lagrone v. State,
84 Tex. Crim. 609, 209 S.W. 411, 415 (1919) 26

Lockett v. Ohio,
438 U.S. 586, 98 S.Ct. 2954 (1978) 39

Madrid v. Gomez,
889 F. Supp. 1146 (N.D. Cal. 1995) 42

Marin v. State,
851 S.W.2d 275 (Tex. Crim. App. 1993) 25

Marquez v. State,
725 S.W.2d 217 (Tex. Crim. App. 1987) 40

McFarland v. State,
928 S.W.2d 482 (Tex. Crim. App. 1996) 20

McKinny v. State, 76 S.W.3d 463
(Tex. App.--Houston [1st Dist.] 2002, no pet.) 21

Ngo v. State,
175 S.W.3d 738 (Tex. Crim. App. 2005) 33, 34

Novak v Beto,
453 F.2d 66 (5th Cir. 1971) 43

Parent v. State,
621 S.W.2d 796 (Tex. Crim. App. 1981) 29

Penry v. Johnson,
532 U.S. 782, 121 S.Ct. 1910 (2001) 39

People v. Anderson,
6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880 (1972) 46

Reeves v. State,
420 S.W.3d 812 (Tex. Crim. App. 2013) 34

Robinson v. Hill,
507 S.W.2d 521 (Tex. Sup. Ct. 1974) 28

Robinson v. State,
16 S.W.3d 808 (Tex. Crim. App. 2000) 21

Romano v. Oklahoma,
512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) 22

Sanchez v. State,
209 S.W.3d 117 (Tex. Crim. App. 2006) 34, 36

Santikos v. State,
836 S.W.2d 631 (Tex. Crim. App. 1992) 29

State ex rel. Lykos v. Fine,
330 S.W.3d 904 (Tex. Crim. App. 2011) 28, 29

Strickland v. Washington,
466 U.S. 668 (1984) 20

Texas Workers' Compensation Com'n v. Garcia,
893 S.W.2d 504 (Tex. 1995) 28

Toney v. State,
3 S.W.3d 199 (Tex. App--Houston [1st Dist.] 1999, pet. ref'd) 21

Trop v Dulles,
356 U.S. 86, 78 S. Ct. 590, 2 L.Ed.2d 630 (1957) 43

United States v. Fernandez,
496 F.2d 1294 (5th Cir. 1974) 27

United States v. Filani,
74 F.3d 378 (2d Cir. 1996) 27

United States v. Haywood,
411 F.2d 555 (5th Cir. 1969) 26

United States v. Lanham,
416 F.2d 1140 (5th Cir. 1969) 26

Vasquez v. State,
830 S.W.2d 948 (Tex. Crim. App. 1992) 21

White v. Johnson,
79 F.3d 432 (5th Cir. 1996) 44

Williams v. State,
547 S.W.2d 18 (Tex. Crim. App. 1977) 35

STATUTES

TEX. CODE CRIM. PRO. ANN. ART. 35.16(a)(9) (West 2006) 47

TEX. CODE CRIM. PRO. ANN. ART. 35.16(c)(2) (West 2006) 47

TEX. CODE CRIM. PRO. ANN. ART. 1.051 (West 2008) 20

TEX. CODE CRIM. PROC. ANN. ART. 35.14 (West 2005). 49

TEX. CODE CRIM. PROC. ANN. ART. 36.19 (West 2006) 34

TEX. CRIM. PROC. CODE ANN. ART. 37.071 31

OTHER AUTHORITIES

.http://www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn_human_rights_report_0.pdf 42

http://www.businessinsider.com/aclu-death-row-pictures-2013-7?IR=T 42

Renee Feltz, Cruel and Unusual? Texas Death Row Conditions, Address at KPFT Radio (Nov. 8, 2002) (transcript available at KPFT Radio, http://www.kpft.org/news/110802story3.html) 42

RULES

TEX. R. APP. 33.1(a)(1) 25

Tex. R. App. 44.2(a) 27

TEX. R. APP. P. 38.2(a)(1)(A) 3

TEX. R. OF EVID. 103(e) 25

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. VI 20

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was charged by indictment with capital murder. (CR 14). Although he was convicted, his case was returned for a new punishment hearing. *Ex Parte Mason*, No. AP-76,997, 2013 WL 1149829 (Tex. Crim. App. Mar. 20, 2013) (not designated for publication). Because the State once again sought death, the case was tried on punishment only. The jury answered the special issues in such a way that the court imposed a sentence of death. (CR 178, 180, 182).

STATEMENT OF FACTS

Appellant's guilt in the murder of Deborah Ann Mason was uncontested, as this proceeding was a retrial on punishment only. However, a brief recitation of the facts is necessary to fully understand the nature of the case.

January 1991

On January 27, 1991, Ruben Andrade had just learned his wife had terminal cancer. (RR XV 29, 30). The Andrades stopped at a park near the San Jacinto River Bridge on Highway 59 to take a walk. (RR XV 31; State's exhibits 352, 353). The area had recently flooded and the water was receding. (RR XV 35, 36). Mr. Andrade observed what appeared to be a human leg under some wood and tree branches. (RR XV 36; State's exhibit 204, 205, 206, 207). The couple left the area and reported the body to a police officer. (RR XV 40).

The body was identified as Deborah Ann Mason, appellant's wife. Her body was inside of black, plastic bags and her hands and feet were bound with material. (RR XV 59-61). The same material covered the complainant's mouth. (RR XV 60). The bags were weighted down with pieces of concrete. (RR XV 61). She had a tattoo of "Billy" on her shoulder. (RR XV 62). The medical examiner opined that the complainant had been placed in the water after she died and that she had been dead for five to seven days. (RR XV 65, 71). The complainant's cause of death was a skull fracture due to blunt force trauma. (RR XV 75).

Kathy Garrett was friends with the complainant. (RR XV 86). After returning from a trip, she called the complainant and appellant answered the phone. (RR XV 92). Appellant told Garrett that the complainant had "left with a black man." (RR XV 93). The following day, she stopped by the complainant's home to find appellant, another man, and appellant's daughter, Mandy Mason, at the home. (RR XV 95, 96). Garrett noticed that the usually spotless house was in disarray and the television was missing. (RR XV 96, 97). Appellant told Garrett that the complainant "was probably off with a black person doing drugs." (RR XV 98). Three days later, Garrett reported the complainant missing. (RR XV 100). Garrett testified that, after the complainant's wake, appellant followed her to her vehicle and stated "You have a family. Well, then, you need to leave it alone." (RR XV 106).

Thomas Mullins, a friend of appellant's brother, Lonnie Carney, testified that he was at the complainant's home on January 16, 1991. (RR XVI 17). Appellant, the

complainant, Mandy, and two children were present. (RR XVI 19). Appellant and the complainant got into an argument in the bedroom. (RR XVI 22). Mullins heard appellant slapping the complainant, and her stating "I love you. Don't hit me." (RR XVI 22). Mullins took Mandy and the children and left the house. (RR XVI 22). They picked up Lonnie Carney and returned to the home. (RR XVI 23, 129). Appellant again became agitated and began hitting the complainant in the bedroom and called her a "whore bitch." (RR XVI 26, 27, 132, 133, 134, 137). Appellant came out of the bedroom alone and told Carney to call his brother-in-law, Terry Goodman. (RR XVI 138). Goodman brought some black, plastic bags over. (RR XVI 28).

Mullins, Carney, and Mandy left to go to Carney's mother's home. (RR XVI 31, 141). Later, appellant showed up at the house driving the complainant's vehicle. (RR XVI 31, 142). Appellant, Goodman, and Carney drove the complainant's vehicle to the San Jacinto River. (RR XVI 31, 143). They parked and appellant took something out of the trunk. (RR XVI 145). Carney heard noises coming from the bags until appellant "smashed what was in the trash bags with rocks." (RR XVI 147). Appellant told Carney that, if the police asked, the complainant left with someone. (RR XVI 150).

Mitigating evidence presented by the defense

Appellant's mother, Juanita[1], was a severe alcoholic who also liked men who drank and abused her and her children. Juanita married William Mason and had two

[1] Juanita Carney testified at appellant's original trial. However, she had passed away by the time this trial

children with him, appellant and Pearl. Pearl died from a drug overdose in 1981. (RR XXI 243, 250). Appellant's father was in prison most of his life and left soon after appellant was born. (RR XXI 237). When he was not incarcerated, he was physically abusive to both Juanita and appellant. (RR XXI 240). Juanita began living with William Franklin Holloway. (RR XXI 243). They had four children, David, Sandra, Vickie, and Connie Sue. (State's exhibit 56). Holloway was an alcoholic and was violent with Juanita and the kids. (RR XXI 247). Appellant often viewed the abuse and tried to shield his mother. (RR XXI 245). Juanita subsequently married Marland Arthur Carney. (State's exhibit 56). Not only was he a heavy drinker and abusive, he also sexually abused appellant's sisters. (RR XXI 248; RR XXII 11, 12, 25, 48). Their children are Marland, Jr. and Lonnie Wade. (State's exhibit 56).

Appellant came home one day to find that Carney, Sr. had beaten Juanita. (RR XXII 12). Appellant pulled out a gun and the bullet accidentally hit appellant's sister, Sandra. (RR XXI 12).

Being a heavy drinker herself, Juanita would have her children accompany her to barrooms when she drank. (RR XVI 191). Out of Juanita's eight children, four have been to the penitentiary. (RR XXI 250).

Appellant began using drugs at a very young age. (RR XXII 78). By the age of eight, appellant was smoking cigarettes and marijuana. (RR XXII 79). He began drinking alcohol at ten. (RR XXII 79). Appellant abused marijuana, cigarettes,

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commenced. Her previous testimony was read into the record.

alcohol, glue, heroin, and prescription medication regularly by the age of 16. (RR XXII 79). This early drug abuse would have had a significant impact on appellant's brain development and behavior control. (RR XXII 79). His intelligence was gauged as low to average. (RR XXII 81).

A clinical psychologist, Jolie Brams, testified on behalf of the defense. She opined that appellant's entire family was limited in their coping skills. (RR XXII 27). To cope with difficulties, they often resorted to violence. (RR XXII 29). Substance abuse was pervasive throughout the family. (RR XXII 29). Appellant was constantly surrounded by negative role models where he was either severely disciplined by random violence, or not disciplined at all. (RR XXII 30, 36). Appellant experienced both physical and emotional abandonment and cannot negotiate in the free world. (RR XXII 52, 60).

The defense presented several witnesses who encountered appellant while he was incarcerated. (RR XXI 34, 35, 115, 139, 150, 159, 167). They all testified that appellant was often polite and good-humored. These witnesses were never threatened or disrespected by appellant. (RR XXI 34, 35, 115, 139, 150, 159, 167).

Appellant, now 62, has significant health problems. He is diabetic and requires the regular use of insulin. (RR XXI 63). He is hypertensive and has chronic pain and neuropathy. (RR XXI 63). He must the use the aid of a walker to move around. (RR XXI 115; RR XXII 207)

After all the evidence was presented, the jury answered the special issues in such a way that a sentence of death was imposed. (CR 178, 180, 182).

SUMMARY OF THE ARGUMENT

First Point of Error

Trial counsel's performance was deficient when he failed to object to various references that appellant had previously been convicted of capital murder and was sentenced to death. Counsel's inaction cannot be excused as trial strategy, because there is no strategy in predisposing the jury to rendering a death sentence. There is a reasonable probability that the results of the proceeding would have been different but for counsel's deficient performance.

Second Point of Error

The trial court's comments that appellant had been previously sentenced to death were an improper comment on the weight of the evidence and predisposed the jury to impose a death sentence. The court's actions violated appellant's right to Due Process under the Fourteenth Amendment, his right to a fair trial under the Sixth Amendment, and subjects him to cruel and unusual punishment as prohibited by the Eighth Amendment of the United States Constitution. This Court cannot be confident, beyond a reasonable doubt, that the error did not contribute to appellant's death sentence.

Third Point of Error

The Texas special issue on future danger is unconstitutional as applied because it does not permit the jury to rationally consider appellant's unique physical circumstances and limitations. Thus, the special issue deprives appellant of Due Process under the Fourteenth Amendment, and exposes him to cruel and unusual punishment, as prohibited by the Eighth Amendment.

Fourth Point of Error

The Texas special issue concerning mitigation is unconstitutional as applied to appellant because it limited the type of evidence the jury could consider as mitigation. The question limits the jury's consideration to "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." Thus, it fails to provide the jury a meaningful way to consider any mitigation that does not fall within these two categories in violation of the Due Process Clause of the Fourteenth Amendment, a right to a fair trial under the Sixth Amendment, and the prohibition against cruel and unusual punishment under the Eighth Amendment.

Fifth Point of Error

The jury charge and third special issue presented the jury with conflicting guidance as to what could be considered when it was deliberating mitigating evidence that may have potentially spared appellant a death sentence. Appellant suffered egregious harm because the conflicting charge limited the jury's consideration of

relevant mitigating evidence, depriving appellant Due Process under the Fourteenth Amendment, the right to a fair trial under the Sixth Amendment, and subjected him to cruel and unusual punishment under the Eighth Amendment.

Sixth Point of Error

The first special issue is unconstitutionally vague as applied because "deliberately" was not defined and it is subject to various interpretations. Further a deliberate act presents no practical difference with an intentional act.

Seventh Point of Error

Appellant's return to death row, coupled with his quarter century waiting to be executed deprives him of Due Process under the Fourteenth Amendment and results in cruel and unusual punishment as prohibited by the Eighth Amendment. Beginning the post-conviction process over again to execute an elderly and ill convict serves no practical or penological purpose.

Seventh Point of Error

The trial court abused its discretion when it denied a challenge for cause to Daisy Talavera. Ms. Talavera exhibited a reluctance to follow the law as instructed when she indicated that she would automatically consider an intentional act a deliberate one. She also agreed that a person who commits an intentional, or deliberate, act would always be a continuing threat to society. In turn, she would find appellant a continuing threat to society based solely upon the fact that he murdered

someone in the course of kidnapping them. Appellant established harm because he was forced to use a preemptory strike on Ms. Talavera, and a subsequent juror was seated who the defense would have stuck.

APPELLANT'S FIRST POINT OF ERROR

Trial counsel was ineffective for permitting the venire members to learn that appellant had previously been sentenced to death. The trial court conducted a general voir dire prior to allowing the parties to conduct individual questioning. The judge informed the panel "[This is a capital murder case… Back in March of 1992, Mr. Mason was tried by a jury and found guilty of capital murder. The same jury assessed the death penalty. Many years later, an appellate court reviewed this particular case and decided that it was in the best interest of justice to have another punishment hearing." (RR V, 9, 10). With every new group, the court continued to inform them that appellant had previously been sentenced to death. (RR VIII 11, 12; RR XI 12; RR XIII 12).

Additionally, throughout trial, the jurors were repeatedly and explicitly reminded that appellant had been on death row since his conviction. (RR XVII 234; RR XVIII 57; RR XVIX 9, 12, 34, 63; RR XX 9; RR XXI 9, 29). Trial counsel failed to object to any references to appellant's prior sentence and did not ask for an instruction that the jury could not consider this evidence when assessing appellant's punishment.

I. STANDARD OF REVIEW

Both the United States and Texas Constitutions guarantee an accused the right to the effective assistance of counsel. U.S. CONST. AMEND. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. ANN. art. 1.051 (West 2011); *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *Strickland*, 466 U.S. at 688-92; *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing a claim of ineffective assistance, there is a presumption that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689. This is judged from the totality of representation at trial and not from isolated acts or omissions viewed through hindsight. *Id.* at 695.

The record on direct appeal usually will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and

professional. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). When the record is silent as to counsel's trial strategy, an appellate court may not speculate about why counsel acted as he did. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Toney v. State*, 3 S.W.3d 199, 210 (Tex. App--Houston [1st Dist.] 1999, pet. ref'd).

But in the rare cases in which the record on direct appeal is sufficient to show that counsel's performance was deficient, an appellate court should address the claim. *Robinson v. State,* 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). If "no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as [he] did." *Andrews v. State,* 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). A single egregious error of omission or commission by counsel has been held to constitute ineffective assistance, even in the absence of a record setting forth counsel's reasons for the challenged conduct. *Vasquez v. State,* 830 S.W.2d 948, 950-51 (Tex. Crim. App. 1992); *McKinny v. State,* 76 S.W.3d 463, 470-71 (Tex. App.--Houston [1st Dist.] 2002, no pet.).

II. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE JURY LEARNING THAT APPELLANT HAD PREVIOUSLY BEEN SENTENCED TO DEATH

In *Chaffin v. Stynchcombe*, the United States Supreme Court found that a higher sentence meted out by a jury on retrial did not offend Due Process if certain factors

were met, including that the jury not be informed of the prior sentence. 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973). And in *Caldwell v. Mississippi*, the Court stated that the jury must not be misled regarding the role it plays in the sentencing decision. 472 U.S., at 336, 105 S.Ct., at 2643.

More specifically, in *Romano v. Oklahoma*, the Court was called upon to determine "whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." 512 U.S. 1, 12, 114 S. Ct. 2004, 2012, 129 L. Ed. 2d 1 (1994). While the Court acknowledged that the admission of the defendant's prior death sentence was irrelevant, it also presumed that the jury followed the trial court's instructions regarding the sufficiency of other aggravating circumstances. *Id.* Thus, the jury was not misled regarding its role in the sentencing process. *Id.*

A dissent noted that the evidence of Romano's prior death sentence "created an unacceptable risk of leading the jurors to minimize the importance of their roles." *Id.*, 512 U.S. at 15, 114 S. Ct. at 2013 (Blackmun, J., dissenting). And Justice Ginsburg would have vacated the defendant's sentence because "[t]he jury's consideration of evidence, at the capital sentencing phase of petitioner Romano's trial, that a prior jury had already sentenced Romano to death, infected the jury's life-or-death deliberations as did the prosecutorial comments condemned in *Caldwell*." *Id.,* 512 U.S. at 16-17, 114 S. Ct. at 2014. (Ginsburg, J., dissenting)

Turning to Texas jurisprudence, this Court has previously found, that a court's instruction can cure any prejudice from a jury learning a defendant had previously been sentenced to death. In *Davis v. State*, a witness testified that the defendant was previously sentenced to death. No. AP-76,521, 2013 WL 5773353, at *3 (Tex. Crim. App. Oct. 23, 2013) (not designated for publication). Defense counsel objected and the trial court instructed the jury to disregard the comment. The court denied the defendant's motion for mistrial. This Court found that the trial court's instruction to disregard sufficiently cured any prejudice resulting from the statement. *Davis v. State*, No. AP-76,521, 2013 WL 5773353, at *3 (Tex. Crim. App. Oct. 23, 2013).

In *Guidry v. State*, the State's comment, during closing argument, about the co-defendant receiving a death sentence was also cured by an instruction to disregard. 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). And in *Garcia v. State*, this Court held that an instruction to disregard rendered harmless a witness's comment that he saw the defendant being transported with death row inmates because "[t]he uninvited and unembellished reference to death row ... was not so inflammatory as to undermine the efficacy of the trial court's instruction to disregard." No. 71,417, 2003 WL 22669744, at *4 (Tex. Crim. App. Nov. 12, 2003) (not designated for publication).

The federal and State case cited above differ greatly from the facts presented here because each involved a single mention of a previous death sentence and contained some form of instruction to disregard, or guidance that a previous sentence of death could not factor into the jury's deliberations. From voir dire, the jury was

aware that appellant had been found guilty and it was being chosen to assess punishment only. Then, it was informed that appellant had previously received a sentence of death. The chosen jurors were then reminded throughout the trial that appellant had been on death row since his conviction. (RR XVII 234; RR XVIII 57; RR XVIX 9, 12, 34, 63; RR XX 9; RR XXI 9, 29).

The numerous times that the jury was informed that appellant had previously been sentenced to death "infected the jury's life-or-death deliberations." *Romano,* 512 U.S. at 16-17, 114 S.Ct. at 2014 (Ginsburg, J., dissenting). Counsel failed appellant when he did not object to any of the references to the prior death sentence. His inaction cannot be blamed on a valid trial strategy. There is no reason to predispose the jury into rendering a sentence of death. Counsel's inaction was further compounded when the jury was told throughout the trial that appellant had been on death row. Further, the jury was not provided an instruction that it could not consider the prior sentence when deliberating. Bur for counsel's deficient performance, there is a reasonable probability that the results of the proceeding would have been different. Appellant's first point of error should be sustained, his sentence reversed, and the cause remanded for a new trial on punishment.

APPELLANT'S SECOND POINT OF ERROR

The trial court violated appellant's right to Due Process under the Fourteenth Amendment, a fair trial under the Sixth Amendment, and the right to be free from

cruel and unusual punishment under the Eighth Amendment when it informed the venire panel that appellant had previously been sentenced to death, as it was an improper comment on the weight of the evidence. As noted in the previous point of error, while conducting the general voir dire, the trial judge informed the panels that appellant was had been convicted of capital murder and sentenced to death. (RR V, 9, 10; RR VIII 11, 12; RR XI 12; RR XIII 12)

Generally, counsel must object during trial to preserve error. TEX. R. APP. 33.1(a)(1). However, appellate courts are authorized to "tak[e] notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court." TEX. R. OF EVID. 103(e). And "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. A principle characteristic of these rights is that they cannot be forfeited - they are not extinguished by inaction alone. Instead, if a defendant wants to relinquish one or more of them, he must do so expressly." *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993), *overruled on other grounds*, *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997).

In 1919, this Court noted the importance in judicial restraint when speaking with juries:

> [T]oo much caution cannot be exercised in the effort to avoid impressing the jury with the idea that the court entertains any impressions of the case which he wishes them to know, and putting

> before them matters which should not enter into or affect their deliberations ... should in all cases be avoided. To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret.

Lagrone v. State, 84 Tex. Crim. 609, 209 S.W. 411, 415 (1919).

I. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT INFORMED THE VENIRE MEMBERS THAT APPELLANT HAD PREVIOUSLY BEEN SENTENCED TO DEATH

The trial court informed the jurors that appellant had previously been convicted of capital murder and sentenced to death. This was an improper comment on the weight of the evidence and diminished the jury's sense of importance of its role as sentencer. Thus, appellant's right to Due Process, a fair trial, and to be free from cruel and unusual punishment was violated. Informing the jury that appellant had previously been sentenced to death predisposed the jury to again impose such a sentence.

The court's comments were fundamental error, so that an objection was not necessary to preserve the claim for appellate review. *See, e.g., United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969) (actions of trial judge who improperly injected himself into role of prosecutor during trial destroyed neutrality and impartiality of trial

atmosphere, defendant's credibility, and defendant's presumption of innocence, and constituted plain error); *United States v. Haywood*, 411 F.2d 555 (5th Cir. 1969) (trial judge who, in presence of jury, twice interrupted charge and informed defendant of right to allocution, before case was submitted to jury for decision effectively destroyed defendant's presumption of innocence and committed plain error); *United States v. Filani*, 74 F.3d 378 (2d Cir. 1996) (trial court's extended and critical questioning of defendant gave jury impression of partiality and was plain error); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974) (prosecutor's argument that sought to impose a "presumption of guilt," together with failure of charge to instruct on the presumption of innocence, was plain error).

II. THIS COURT CANNOT BE ASSURED, BEYOND A REASONABLE DOUBT, THAT THE ERROR DID NOT CONTRIBUTE TO APPELLANT'S DEATH SENTENCE.

Error of a constitutional magnitude that is subject to a harm analysis must be reverse a judgement of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. 44.2(a). Prior to hearing the evidence in the case, the jurors were informed that a previous jury had sentenced appellant to death. And they were not provided any context as to why his sentence was reversed. Although there is no presumption of life in capital cases, the comments predisposed the jury to also sentence appellant to death. Further compounding the harm, the jury was never instructed that they could not consider the prior sentence when deliberating. This

was an improper comment on the weight of the evidence and violated appellant's right to Due Process, a fair trial, and to be free from cruel and unusual punishment. Thus, this Court cannot say beyond a reasonable doubt that the court's error did not contribute to appellant's sentence of death.

Appellant's second point of error should be sustained and the cause remanded to the trial court for a new sentencing trial.

APPELLANT'S THIRD POINT OF ERROR

The Texas special issue on future danger is unconstitutional as applied because it does not permit the jury to rationally consider appellant's unique physical circumstances and limitations. Thus, the special issue deprives appellant of Due Process under the Fourteenth Amendment, and exposes him to cruel and unusual punishment, as prohibited by the Eighth Amendment. When reviewing the constitutionality of a statute, the appellate courts presume its validity and that the legislature has not acted unreasonably or arbitrarily in its enactment. *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978). The party challenging the statute has the burden of proving its unconstitutionality. *Id.* (citing *Robinson v. Hill*, 507 S.W.2d 521 (Tex. Sup. Ct. 1974)).

A litigant raising an "as applied" challenge to a statute concedes the general constitutionality of the statute, but asserts that it is unconstitutional as applied to his particular facts and circumstances. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex.

Crim. App. 2011) (citing *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 518 at n.16 (Tex. 1995)). "Because a statute may be valid as applied to one set of facts and invalid as applied to a different set of facts, a litigant must show that, in its operation, the challenged statute was unconstitutionally applied to him; that it may be unconstitutional as to others is not sufficient (or even relevant)." *State ex rel. Lykos*, 330 S.W.3d at 910, citing *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *Parent v. State*, 621 S.W.2d 796, 797 (Tex. Crim. App. 1981).

At the time of trial, appellant was 62 years old. He is diabetic and requires the regular use of insulin. (RR XXI 63). He is hypertensive and has chronic pain and neuropathy. (RR XXI 63). He must the use the aid of a walker to move around. (RR XXI 115; RR XXII 207). During the motion-for-new-trial hearing, appellant's trial counsel testified that appellant would need regular dialysis soon. (RR MNT I 9). He also indicated that appellant was slow to move around and it would take him a significant time to get from place to place. (RR MNT I 9). During trial, appellant would occasionally wince from pain. (RR MNT 11).

Under *Jurek v. State*, the factors that one could evaluate, though not exhaustive, in evaluating future danger under article 37.071 are as follows:

> "However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or

> under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

522 S.W.2d 934, 940 (Tex. Crim. App. 1975), *aff'd*, *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (relying on this interpretation to find the statute constitutional).

Although a jury may consider past behavior as an indicator of future behavior in answering the special issue, the focus must only be on the probability that a defendant will commit future acts of violence. The factors enumerated in *Jurek* fail to account for appellant's age and current health. Jurek's past criminal record, while admittedly extensive, had little or no bearing on whether he would be a threat to healthy younger inmates or corrections officials. Likewise, appellant's youth at the time of the offense is not reconcilable with his age and present diminished physical ability. Neither the 2nd special issue, nor *Jurek's* interpretation of the factors to be considered are applicable to these factual circumstances, which involve an elderly man whose mobility is so limited that he cannot even walk without assistance.

The Texas special issue of future danger deprives appellant Due Process and exposes him to an undue risk of the death penalty because it does not permit the jury to rationally consider his unique physical circumstances and limitations. Appellant's third point of error should be sustained, his sentence reversed, and the case remanded for a new punishment hearing.

APPELLANT'S FOURTH POINT OF ERROR

The Texas Code of Criminal Procedure provides that a jury in a capital murder case must answer "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CRIM. PROC. CODE ANN. ART. 37.071 This third special issue is unconstitutional as applied because it limited the type of evidence the jury could consider as mitigation. The plain language limits the jury's consideration to "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." *Id.* Thus, it fails to provide the jury a meaningful way to consider any mitigation that does not fall within these categories in violation of the Due Process Clause of the Fourteenth Amendment, a right to a fair trial under the Sixth Amendment, and the prohibition against cruel and unusual punishment under the Eighth Amendment.

A jury may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating

evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998).

The Supreme Court, in *Eddings*, made clear that not only must the defendant be allowed to present mitigating evidence to the jury, but the jury must also be able to consider and give effect to that evidence in imposing the sentence. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987).

Because appellant was being retried on punishment only, the jury was only provided a cursory look at the circumstances surrounding the crime. It did not have a meaningful way to consider, as mitigation, the complainant's drug use and intoxication, and appellant's jealousy and sudden passion. It could not weigh appellant's adaptability to prison, evidenced by his past ability to make parole, against the gravity of the death penalty. It also could not consider how the passage of time weighed against a death sentence, given appellant's age and physical health.

Because the statute limited mitigation the jury could consider to three categories, it is unconstitutional as applied to appellant. The special issue violated appellant's right to Due Process under the Fourteenth Amendment, the right to a fair trial under the Sixth Amendment, and subjects him to cruel and unusual punishment

in violation of the Eighth Amendment. Appellant's fourth point of error should be sustained, his sentence reversed, and the cause remanded for a new punishment trial.

APPELLANT'S FIFTH POINT OF ERROR

The jury charge and third special issue unconstitutionally mislead the jury in its consideration of mitigating evidence that may have spared appellant from a sentence of death. The conflict between the two deprived appellant of Due Process under the Fourteenth Amendment, the right to a fair trial under the Sixth Amendment, and the right to be free from cruel and unusual punishment under the Eighth Amendment. Special Issue No. 3 asked the jury "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, William Michael Mason, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" (CR 182). The jury placed numbers before each category of mitigating evidence. (CR 182). However, the charge instructed the jury "In answering Special Issue No. 3 you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's personal moral culpability, *including but not limited to,* evidence of the defendant's background, character, or the circumstances of the offense that mitigates against the imposition of the death penalty." [Emphasis added] (CR 169).

I. STANDARD OF REVIEW

Jury charge error is reviewed in two steps. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). First, the reviewing court determines whether error exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). Second, the court must review the record to determine whether sufficient harm was caused by the error to require reversal. *Id.*

The degree of harm necessary for reversal depends on whether appellant preserved error by objecting to the charge. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). When charge error is not preserved, as in this case, reversal is not required unless the resulting harm is egregious. *Id.*; *see also* TEX. CODE CRIM. PROC. ART. 36.19 (West 2006).

Charge error is egregiously harmful when it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). In other words, the error must have been so harmful that the defendant was effectively denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 172. The record must show that the charge error caused the defendant actual, rather than merely theoretical, harm. *Ngo*, 175 S.W.3d at 750. And neither party has the burden to show harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

II. THE JURY CHARGE WAS ERRONEOUS

Special Issue No. 3 asked the jury "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, William Michael Mason, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" (CR 182). The jury placed numbers before each category of mitigating evidence. (CR 182). However, the charge instructed the jury "In answering Special Issue No. 3 you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's personal moral culpability, *including but not limited to,* evidence of the defendant's background, character, or the circumstances of the offense that mitigates against the imposition of the death penalty." [Emphasis added] (CR 169).

The State may not limit the amount or type of mitigating evidence a jury may consider when considering whether to impose a sentence of death. *Eddings*, 455 U.S. at 113-114, 102 S.Ct. at 876-877. "It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion." *Williams v. State,* 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

The abstract put no limitation on what a juror may consider to be mitigating. But the special issue contradicts the abstract and explicitly lists mitigation to be the evidence that fits into "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." The jury took

this mandate seriously, as it marked: "[(1) the circumstances of the offense], [(2) the defendant's character and background], and [(3) the personal moral culpability of the defendant.]" (CR 182).

Because the charge was misleading, and limited the jury's consideration of mitigating evidence, it was erroneous.

III. APPELLANT WAS EGREGIOUSLY HARMED BY THE JURY-CHARGE ERROR

In determining whether there has been egregious harm, the reviewing court considers (a) the jury charge as a whole; (b) the state of the evidence, including contested issues and the weight of probative evidence; (c) arguments of counsel, and (d) any other relevant information in the record. *Sanchez*, 209 S.W.3d at 121.

The charge provided conflicting guidance to the jury. While the special issue tracked the statute, the charge instructed the jury that mitigating evidence was not limited to that mentioned in the charge. (CR 169, 182). The jury followed the language in the special issue, as it numbered the specific categories of mitigation. The State propagated this fallacy during its closing argument when it reminded the jury of the type of mitigation it can consider and whether it is sufficient to sentence appellant to life over death. The State specifically limited its argument to "character and background and the circumstances of the offense." (RR XXIII 228, 234).

Because this was a retrial on punishment only, the jury was not provided the full scope of "the circumstances of the offense." Thus, it was not provided a vehicle in which to consider the complainant's drug use and intoxication, and appellant's

jealousy and sudden passion. It could not weigh appellant's adaptability to prison, evidenced by his past ability to make parole, against the gravity of the death penalty. It also could not consider how the passage of time weighed against a death sentence, given appellant's age and physical health.

Because the conflicting charge limited the jury's consideration of relevant mitigating evidence, appellant suffered egregious harm.

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The charge provided the jury with conflicting instructions in violation of the Due Process Clause of the Fourteenth Amendment, the right to a fair trial under the Sixth Amendment, and the right to be free from cruel and unusual punishment under the Eighth Amendment. Appellant's point of error should be sustained, his sentence reversed, and the cause remanded for a new punishment hearing.

APPELLANT'S SIXTH POINT OF ERROR

The special issue on deliberateness unconstitutionally vague on its face, in violation of the standard set forth in *Johnson v. United States*[2] and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. "The government violates the Due Process Clause by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."

[2] U.S. _, 135 S.Ct. 939 (2015)

Johnson v. United States, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). The Due Process Clause's prohibition of vagueness in criminal statutes applies not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Id.*

Under *Johnson,* the United States Supreme Court breathed new life into facial challenges alleging that statutes are void for vagueness under the Due Process Clause. *Johnson* involved a facial challenge to the federal Armed Career Criminal Act. The Supreme Court's holding that the statute's residual clause was void for vagueness, makes it clear that statutory challenges do not have to be consigned to the dungeons of analysis when they offend the due process clause due to poor drafting. The late Justice Scalia, in one of his final opinions, wrote that, since the wisdom of the law is found in experience, the issue of stare decisis permits a court, after grappling with terms that defy easy application, to jettison a statute that does not provide a person of average intelligence notice of the prohibited conduct and its consequences. *Id.*, at 2560.

The Due Process Clause in modern times has been interpreted to mean that it is unfair to penalize a person if the statute he or she is accused of violating fails to provide notice to defendants and invites arbitrary enforcement by judges [or in this case, juries]. *Johnson* 135 S. Ct at 2557. "A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The jury was ordered to answer the "deliberateness" Special Issue first, under Article 37.071, which read as follows: "Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, William Michael Mason, that caused the death of Deborah Ann Mason was committed deliberately and with the reasonable expectation that the death of Deborah Ann Mason or another would result?" (CR 178). The jury answered the issue affirmatively, permitting it to address the other Special Issues. (CR 178)

The term "deliberately" is vague and subject to various interpretations. This is especially true when a jury was also attempt to distinguish between "intentional" and "deliberately." The trial court even acknowledged "[Y]ou [attorneys] keep saying that there's a difference between intentional and deliberate. And I say there's not that much difference." (RR XI, 116).

Arguably, the deliberate special issue was upheld on a facial challenge, though not for vagueness, in *Jurek v. Texas*. However, that plurality decision was premised upon the Court of Criminal Appeals interpreting the wording and the meaning of the terms, such as "deliberately" with sufficient latitude that full effect could be given to the evidence presented under *Eddings v. Oklahoma*[3], and *Lockett v. Ohio*[4]. In *Penry v. Johnson*, the Supreme Court made it clear that some types of evidence would never fit into the original special issues because they did not provide a meaningful vehicle to

[3] 455 U.S. 104, 102 S.Ct. 869 (1982)
[4] 438 U.S. 586, 98 S.Ct. 2954 (1978)

give effect to the jurors' moral reason. 532 U.S. 782, 121 S.Ct. 1910 (2001). The Texas Legislature abandoned the deliberateness issue in 1991 when it re-wrote Article 37.071 and added a mitigation question. Since then, the Court of Criminal Appeals has struggled repeatedly to define the term "deliberately" while attempting to uphold the original question in some way. This is despite the bizarre language that requires a person already convicted of an intentional killing to establish that the killing was not "deliberate" in the conventional sense of the word.

This Court has stated that it should not ignore common sense in the administration of justice when they coincide. *Almanza v. State,* 686 S.W.2d 157, 173 (Tex. Crim. App. 1984). There has also been tacit acknowledgment in that only in the extraordinary case would the evidence that was sufficient to support an intentional murder *not automatically* suffice for the issue of deliberateness, thus making this question a useless one. *Gardner v. State*, 730 S.W.2d 675, 680 (Tex. Crim. App. 1987). Appellant acknowledges that this Court has upheld this special issue despite its obvious problems. *Marquez v. State*, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987). But at least one Supreme Court Justice has noted the futility of the deliberateness issue. "It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to [the defendant's] sentence, that 'the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result,' because a capital murder conviction requires a finding that the defendant

"intentionally or knowingly cause[d] the death of an individual…" *Barefoot v. Estelle*, 463 U.S. 880, 917 n.1 (1983) (J. Blackmun, dissent)

In this case, the impossibility of finding any significant meaning to the term "deliberately," despite decades of attempts and legislative abandonment, means that a jury trying to interpret what that term means in the context of a death sentencing procedure runs an unacceptable risk of imposing an arbitrary and random sentence upon appellant. The Texas Legislature set this Special Issue adrift on its own ice floe over two decades ago – given the tortured history and ridiculous language used by courts for years to try and follow this most-confusing jury instruction, it is time this Court put to death this death penalty question. Accordingly, this Court should sustain appellant's point of error and remand the case for a new punishment trial.

APPELLANT'S SEVENTH POINT OF ERROR

Appellant's nearly 25 years on death row constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. "[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835 (1890). The period of time being described in Medley was four weeks. If such a description is accurate,

then it would apply with even greater force when describing appellant's experience on death row.

The isolation on Texas death row is complete, with appellant confined alone to his cell for 22-24 a day. (RR MNT I 20, 21). He is held in solitary confinement in almost every aspect of his life – he eats alone, exercises alone and has no physical or social contact with other inmates. (RR MNT I 20, 21). Since death row moved to the Polunsky unit appellant has had no physical contact with anyone other than prison staff from the time of he entered death row. (RR MNT I 21). He is not permitted to participate in structured educational or occupational programs, and the rare, opportunities he gets to briefly leave his tiny cell offer little in the way of release. It is easy to see why the American Civil Liberties Union has described 'life' on death row as "a death before dying." http://www.businessinsider.com/aclu-death-row-pictures-2013-7?IR=T

"Mental health experts have repeatedly observed that prolonged confinement without sensory stimulation or human contact exacerbates pre-existing psychological disorders and can precipitate mental illness in otherwise healthy individuals." .http://www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn_human_rights_report_0.pdf; *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988)

James Colburn, a Texas death row inmate who suffered from schizophrenia, was so negatively affected by the conditions on death row that he deteriorated to the

point that he was psychotic and eating his own feces, before he was executed in 2003. Renee Feltz, Cruel and Unusual? Texas Death Row Conditions, Address at KPFT Radio (Nov. 8, 2002) (transcript available at KPFT Radio, http://www.kpft.org/news/110802story3.html).

The stifling Texas weather can be claustrophobically hot and appellant spends the majority of his time in a cramped space staring at bleak, torn-up walls in a non-air conditioned room with virtually no escape from oppressive temperatures. In December 2013, the Middle District Court of Louisiana ruled that high heat levels on their death row amounted to cruel and unusual punishment, violating the Eighth Amendment. *See*

Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) ("Housing death-row inmates, who suffered from various medical conditions, including hypertension, diabetes, obesity, and high cholesterol, in very hot prison cells, without sufficient access to heat-relief measures, while knowing that each suffered from conditions that rendered him extremely vulnerable to serious heat-related injury, violated Eighth Amendment"). In particular, those with health issues like high blood pressure were at higher risk of irreparable harm or death as a result of the living conditions. *Id.* Appellant suffers from exactly those health problems.

In *Novak v Beto*, it was held that the imposition of basic living conditions did not constitute cruel and unusual punishment. 453 F.2d 66 (5th Cir. 1971). However, this case was decided prior to the relocation of Texas Death Row to the Polunsky

Unit and the subsequent imposition of more stringent restrictions for death row prisoners. Furthermore, the dissenting opinion stated that, such a combination of circumstances raises serious Eighth Amendment questions and is sharply out of line with the Supreme Court's "evolving standards of decency." *Trop v Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L.Ed.2d 630 (1957). Additionally, that court did not consider the compounded impact such conditions would have on prisoners with mental and intellectual disorders, who are considerably more vulnerable, and particularly those, like appellant, who have been subjected to such conditions for three decades.

The 5th Circuit considered the effects of death row on an inmate over a long period of time, but concluded that a 17-year period of incarceration on death row did not constitute cruel and unusual punishment. *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996). The court stated that the case lacked extraordinary facts of unusual circumstances beyond the inevitable anxiety of waiting for an execution date. *Id.* *White* is distinguishable from the facts presented here because appellant has been living on death row, with an impoverished physical health for far longer than the time period in *White*.

Claims that suffering the ravages of death row for a lengthy duration violate the Eighth Amendment are commonly called *Lackey* claims, after Justice Stevens' concurrence in the Supreme Court's denial of certiorari in *Lackey v. Texas*. There, Justice Stevens pointed out that the Court's determination in *Gregg v. Georgia*, that the Eighth Amendment did not prohibit capital punishment relied heavily on the ground

that the death penalty "might serve 'two principal social purposes: retribution and deterrence.'" *Lackey v. Texas*, 514 U.S. 1045, 1 045, 115 S.Ct. 1421, 1421 (1995) (quoting *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)) (Stevens, J., concurring). He questioned whether either of those policy grounds retained any force after an inmate had spent seventeen years on death row, noting that "the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted…[and that] the additional deterrent effect from an actual execution now ... seems minimal…" *Id.* at 1046, 115 S.Ct. 1421.

Since then, Justice Breyer has also questioned whether the additional punishment of death after confinement on death row for "more than a generation" was cruel and unusual punishment. *Foster v. Florida*, 537 U.S. 990, 993, 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (Breyer, J., dissenting from denial of certiorari) (arguing that imposition of the death penalty might violate the Eighth Amendment where Florida courts twice vacated petitioner's sentence and the 11th Circuit held that his sentence was unconstitutional, but then four months later withdrew all relief); *Knight v. Florida*, 528 U.S. 990, 993-94, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that imposition of the death penalty might violate the Eighth Amendment where petitioner had been on death row for twenty-four years and the 11th Circuit found that Florida's death penalty sentencing procedure was constitutionally defective, but the State waited more than seven years before holding a new sentencing hearing).

Much of the time spent by appellant on death row has been due to the flawed procedures in his first trial, which lacked an appropriate charge in punishment. Justice Breyer likewise questioned those circumstances caused by State procedural flaws as violating the Eighth Amendment. *See Elledge v. Florida*, 525 U.S. 944, 945, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) (Breyer, J., dissenting from denial of certiorari) ("Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures....")

Appellant has endured nearly 25 years on death row, with the constant threat of execution looming. Now, in his diminished physical condition he is being sent back, only to start the post-conviction process over again. At this point, executing him serves no purpose; it will deter no one and the State of Texas has gotten its pound of flesh long ago. Appellant's return to death row, coupled with his quarter century waiting to be executed deprives him of Due Process under the Fourteenth Amendment and results in cruel and unusual punishment as prohibited by the Eighth Amendment. *See People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological

torture"). Appellant's point of error should be sustained and his sentence reformed to life in prison.

APPELLANT'S EIGHTH POINT OF ERROR

The trial court erred in denying appellant's motion to strike for cause juror Daisy Talavera. When questioned by the defense, Ms. Talavera revealed that an intentional act is the same as a deliberate act. (RR XIII 110, 112). She agreed that a person who commits an intentional, or deliberate, act would always be a continuing threat to society. (RR XIII 113). She also indicated that she would find appellant a continuing threat to society based upon the fact that he murdered someone in the course of kidnapping them. (RR XIII 113). That would be all she needed to answer the future dangerousness question. (RR XII 113). Based upon Ms. Talavera's answers to the special issues, the defense challenged her for cause. (RR XIII 113). The trial court denied the challenge. (RR XIII 113). The State accepted the juror and the defense was forced to use a peremptory strike. (RR XIII 119).

I. STANDARD OF REVIEW

A defendant may challenge a prospective juror for cause if the juror exhibits a "bias or prejudice against the defendant or the law on which the State or defendant is entitled to rely." TEX. CODE CRIM. PRO. ANN. ART. 35.16(a)(9), (c)(2) (West 2006); *Gardner*, 306 S.W.3d at 295. A trial court must excuse the venire member if such a

bias or prejudice would substantially impair the juror's ability to carry out his oath and instructions in accordance with the law. *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

The proponent of the challenge for cause bears the burden of establishing that the challenge is proper. *Gardner*, 306 S.W.3d at 295. The proponent does not meet this burden until he has shown that the venire member understood the law's requirements and could not overcome his or her prejudice well enough to follow the law. *Id.*

When reviewing a trial court's decision to grant or deny a challenge for cause, the appellate court looks to the entire record to determine whether there is sufficient evidence to support the trial court's ruling and reverse only for a clear abuse of discretion. *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010). Because the trial judge is in the best position to evaluate a potential juror's demeanor and responses, the appellate court reviews a trial court's ruling on a challenge for cause with considerable deference. *Gardner*, 306 S.W.3d at 295.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGE FOR CAUSE

Before a prospective juror is qualified to sit as a juror, that person must unequivocally demonstrate for the record that he or she would not disregard his oath or the trial court's instructions on the law in deciding both guilt and punishment. *Cordova v. State*, 733 S.W.2d 175, 186 (Tex. Crim. App. 1987). Thus, a prospective

juror cannot decide the issue of punishment or answer the special issues fairly and impartially based upon the evidence, is a disqualified, as a matter of law. *Id.*

Ms. Talavera's responses indicate that she was challengeable for cause because she could not assess deliberateness independent a finding of intent. She would always find someone a future danger if they committed murder intentionally and deliberately. Thus, Ms. Talavera could not follow the court's instructions regarding the second special issue and consider all the evidence presented fairly. The trial court abused its discretion in denying appellant's challenge to Ms. Talavera for cause. Denial of a proper challenge for cause is error because the makeup of the jury affects its decision. *Johnson v. State*, 43 S.W.3d 1, 5 (Tex. Crim. App. 2001).

III. HARM

To establish harm from an erroneous denial of a challenge for cause, the defendant must show on the record that "(1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury." *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014).

Appellant challenged Ms. Talavera for cause and the challenge was improperly denied. (RR XIII 113). Appellant used a peremptory strike on her. (RR XIII 119). As a result, the defense was forced to accept venireman 201, Michael Devries. (RR

XIV 182). After Mr. Devries was questioned by both sides, the defense asked for an additional peremptory strike. (RR XIV 180, 181). Trial counsel expressed a desire to strike Mr. Devries due to "his strong belief in the death penalty." (RR XIV 181).

The purpose of the peremptory challenge is to allow either party to remove a venire member without stating a reason. *Johnson v. State*, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001) (citing TEX. CODE CRIM. PROC. ANN. ART. 35.14 (West 2005)). In *Kerley v. State*, the Court commented on the predecessor of article 35.14:

> It is the privilege of accused to exclude from service one whom, in his judgment is unacceptable to him. In conferring it, the law gives effect to the natural impulse to eliminate from the jury list not only persons who are rendered incompetent for some of the disqualifying causes named in the statute, but persons, who, by reason of politics, religion, environment, association, or appearance, or by reason of the want of information with reference to them, the accused may object to their service upon the jury to which the disposition of his life or liberty is submitted. In other words, the law fixes the number of challenges and confers upon the accused the right to arbitrarily exercise them. This right having been denied the appellant in the instant case, he having exercised all of the challenges the court would permit him to use, and having been forced to try his case before jurors who were objectionable and whom he sought to challenge peremptorily, the verdict of conviction rendered by the jury so selected cannot, we think, with due respect to the law, be held to reflect the result of a fair trial by an impartial jury, which it is the design of our law shall be given to those accused of crime.

Kerley v. State, 89 Tex.Crim. 199, 230 S.W. 164-65 (1921) (citations omitted).

Appellant has established that he was harmed because of the court's improper denial to his challenge to Ms. Talavera. Appellant's sixth point of error should be

sustained, his sentence reversed, and the cause remanded for a new punishment hearing.

CONCLUSION

Appellant respectfully urges this Court to sustain appellant's points of error, and remand the case to the trial court for further proceedings consistent with this ruling.

Respectfully submitted,

/S/MANDY MILLER

Patrick McCann
SBOT# 00792680
Mandy Miller
SBOT# 24055561
Attorneys for William Michael Mason
700 Louisiana, Ste 3950
Houston, Texas 77002
713-223-3805
FAX (877) 904-6846
writlawyer@justice.com
mandy@mandymillerlegal.com

CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on November 15, 2016, has 11,671 words based upon a word count under MS Word.

Respectfully submitted,

/S/MANDY MILLER

Patrick McCann
SBOT# 00792680
Mandy Miller
SBOT# 24055561

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument to counsel for the State of Texas via electronic mail at:

Alan Curry
Harris County District Attorney's Office
curry_alan@dao.hctx.net

Respectfully submitted,

/S/MANDY MILLER

Patrick McCann
SBOT# 00792680
Mandy Miller
SBOT# 24055561