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COURT OF CRIMINAL APPEALS
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No. AP-77,064

In the
Court of Criminal Appeals
At Austin

No. 0620074
In the 228th District Court
Of Harris County, Texas

WILLIAM MICHAEL MASON
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DIRECT APPEAL

KIM OGG
District Attorney
Harris County, Texas

KATIE DAVIS
Assistant District Attorney
Harris County, Texas
State Bar Number: 24070242
davis_katie@dao.hctx.net

1201 Franklin Street, Suite 600
Houston, Texas 77002
Telephone: (713) 274-5826
Fax Number: (713) 755-5809

ORAL ARGUMENT REQUESTED ONLY IF GRANTED TO APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

The appellant requested oral argument. Contrary to the appellant's claim, the State submits that the issues raised by the appellant are not of first impression, but rather appear well-settled in Texas jurisprudence. Accordingly, the State does not believe that oral argument is necessary, or that it would assist this Court in its evaluation of the factual and legal matters presented. However, the State is willing to appear and present argument and reserves the right to do so, if the appellant's request for argument is granted or this Court deems it necessary.

IDENTIFICATION OF THE PARTIES

Counsel for the State:

Kim Ogg—District Attorney of Harris County

Katie Davis—Assistant District Attorney on appeal

Lance Long; Katherine McDaniel—Assistant District Attorneys at trial

Appellant or Criminal Defendant:

William Michael Mason

Counsel for Appellant:

Patrick F. McCann; Mandy Miller—Counselors on appeal

Terrance Gaiser; Robert Scott; Kurt Wentz—Counselors at trial

Trial Judge:

Honorable Marc Carter—Presiding Judge of 228th District Court

Honorable Frank Price—Deputy Judge over Voir Dire

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STATEMENT OF THE CASE

The State charged the appellant with the felony offense of capital murder (7/7/92-CR.—5).[1] The indictment alleged in relevant part that on or about January 17, 1991, in Harris County, Texas, the appellant intentionally and knowingly caused the death of Deborah Ann Mason by striking her in the head with a deadly weapon while in the course of committing and attempting to kidnap her (7/7/92-CR.—5).

The appellant was convicted of capital murder and sentenced to death on March 16, 1992 (CR.—184; CR. Supp.—1).[2] On March 20, 2013, the appellant was granted a new punishment hearing. *See Ex Parte Mason*, AP-76,997, 2013 WL 1149829 (Tex. Crim. App. Mar. 20, 2013) (not designated for publication). At the conclusion of the most recent punishment hearing, the jury found that the murder was committed deliberately, that the appellant was a continuing threat to society, and that there were insufficient mitigating circumstances to justify only a life sentence (CR.—178-84). Therefore, a sentence of death was assessed on November 19, 2015 (CR.—184; RR. XXIII – 240). The appellant filed a notice of appeal and

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[1] The original indictment was not included in the 2015 trial Clerk's Record. Therefore, any reference to the original 1992 Clerk's Record is marked with the file date.

[2] "CR." refers to the 2015 trial filed Clerk's Record; "CR. Supp." refers to the supplemental Clerk's Record filed in 2016; "RR" refers to the Reporter's Record followed by the volume in Roman numerals and the page in Arabic numerals.

the trial court certified that he had a right to appeal (CR.—187-90). Appeal to this Court is automatic. TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(j) (West 2014).

STATEMENT OF FACTS

The appellant was previously found guilty for the capital murder of his wife, Deborah Ann Mason. (CR.—184; CR. Supp.—1). During the most-recent punishment hearing, the State presented evidence that the appellant committed numerous offenses both in and out of custody and had a lengthy criminal history starting from the late 1960s up until trial in 2015. *See, e.g.*, (CR.—33-38, 58-61). A brief recitation of the facts regarding the appellant's more egregious offenses is necessary to understand the nature of the case.

Curtis Henry's Murder

Before the appellant murdered Deborah, he murdered Curtis Henry in 1977 (RR. XVII—19-22). On April 9, 1977, the appellant, Deborah, and some friends were drinking and came across a car in the middle of the road (RR. XVII—15-17). *See* (St. Ex. 333-339). They stopped and saw Curtis Henry, an African American man, sitting in the driver's seat and who appeared to be asleep or passed out (RR. XVII—19-22). When they could not wake him, the appellant turned to the others and stated, "let me show you how to kill a [N-Word]" (RR. XVII—22). The appellant shot Henry in the head (RR. XVII—22). The appellant bragged about the murder to his friends (RR. XVII—58).

After the murder of Henry, the appellant fled to California where he was arrested in San Francisco and escaped custody (RR. XV—152-53; RR. XXII—32-34). *See* (St. Ex. #323). The appellant returned to Texas and pled guilty to murdering Henry (RR. XVII—134). *See* (St. Ex. #325). While awaiting sentencing in Texas, the appellant escaped from custody and was found outside the jail hiding in a barrel (RR. XVII—150-59, 182-83). *See* (St. Ex. 340-351, 361-372). He was sentenced to 55 years for the murder as well as a separate aggravated robbery he had committed prior to Henry's murder (RR. XVII—134). While in custody for Henry's murder, the appellant joined and became a high-ranking member of the Aryan Brotherhood of Texas (RR. XVII—194-99).

Deborah Ann Mason's Murder

In January 1991, just 18 days after being paroled from his previous murder conviction, the appellant murdered his wife, Deborah (RR. XXI—17-18). On January 16, 1991, the appellant was at Deborah's home with his brother, Lonnie Carney; his brother's friend, Thomas Mullins; and his daughter, Mandy Mason (RR. XVI—19-20). Deborah and her two-year-old son were also present (RR. XVI—19-20). The appellant got into an argument with Deborah in the bedroom; the appellant slapped her and beat her while Deborah cried for him to stop (RR. XVI—22, 25-6). The appellant called Deborah a "whore" and a "bitch" and said he was going to kill her (RR. XVI—27). Terry Goodman, the appellant's brother-in-law, came over to the house with black plastic trash bags (RR. XVI—27-28).

Mullins and Carney left the house with Mandy and later met the appellant at the house of his mother, Juanita (RR. XVI—29). Deborah's two-year-old son was left alone in the house during the murder of his mother and was not found until the next day (RR. XX—74).

The appellant, Carney, and Goodman left Juanita's with Deborah in the trunk and went to the San Jacinto River (RR. XVI.—30-33). Deborah was hogtied and gagged inside of trash bags in the trunk of the car (RR. XVI—145-47). The appellant took Deborah out of the car, still in the bags and smashed her head with a rock (RR. XVI—147). He then threw Deborah, still in the trash bags, into the river (RR. XVI—147). The appellant told Carney and Mullins to tell the police that Deborah had left with a black man (RR. XVI—148-50).

Deborah's good friend, Kathy Garrett, became concerned when she had not heard from Deborah in several days (RR. XV—86-7, 93-6). The appellant answered when she called the house and told her that Deborah had run off with a black man and was doing drugs (RR. XV—97-8). Garrett, who knew that Deborah would never leave her children, found the appellant's response suspicious and reported her missing (RR. XV—93-96, 99-100).

Deborah's body was found in the San Jacinto River on January 27, 1991 (RR. XV—30-31, 35-36). She was hogtied inside of plastic trash bags (RR. XV—59-61). Deborah's eyes and lips had been bitten and eaten by animals (RR. XV—64). She had a fractured jaw and skull, which was determined to be the cause of her death

(RR. XV—71-75). The medical examiner found that she had died before she was placed in the water (RR. XV—63-71).

Assault of Misty Mason

In the time after the he murdered Deborah but before he was arrested, the appellant brutally assaulted his niece, Misty Mason. That day, Misty's friend, who was African-American and Mexican, brought her home where the appellant was also staying with Mandy (RR. XVI—235). Misty and Mandy got into an argument when she went into her room (RR. XVI—235-36). The appellant grabbed Misty by the hair, threw her on the floor, and cut off her hair with a switchblade, scalping her, while Mandy held her feet (RR. XVI—235-37). Misty received gouges in her head from the appellant scalping her (RR. XVI—236). The appellant told Misty that he was doing this because she "came home with a black person" (RR. XVI—237). The appellant shaved her eyebrows, made her get naked, and shaved her private parts as well (RR. XVI—239). He then invited people from the neighborhood into the house to see her, humiliating her (RR. XVI—240). *See* (St. Ex. #107-110).

Misty's aunt, Vicki Walker, came in the house to rescue Misty from the situation (RR. XVI—201-4). When she walked in, Walker saw the appellant laying with Mandy in a sexual manner; it was commonly known that the appellant had a sexual relationship with his daughter Mandy (RR. XVI—202-3; RR. XX—82).

Other Punishment Evidence

In addition to the above evidence, the following was presented to the jury during appellant's punishment hearing:

- The appellant was a high ranking member of the prison gang the Aryan Brotherhood of Texas (RR. XVII—194-5; RR. XVIII—18-33; RR. XX—28-36). *See* (St. Ex. #331, 379, 394).

- The appellant was previously convicted of theft, assault to murder with malice aforethought, and burglary with intent to commit theft in 1973 (RR. XVII—47-54). *See* (CR.—33-38).

- In 1973, the appellant went to prison after stabbing a stranger close to the heart without provocation (RR. XVII—47-54).

- While incarcerated on this case, the appellant was cited for numerous threats and bad acts, including the possession of a shank (RR. XVII—214-238; RR. XVIII—56-57, 72-74, 89-90, 105-6, 127, 137-38, 147-49, 152-53, 185, 195-98, 228; RR. XIX—17-21, 35-40, 82, 96-99, 111-17, 128-29, 134, 142; RR. XX—12, 20-22). *See* (St. Ex. 395-96).

- While incarcerated on this case, the appellant attacked a guard with his leg irons and threatened to kill him (RR. XVIII—141-56).

- While incarcerated on this case, the appellant told others that he was trying to have witnesses killed (RR. XVII—205).

SUMMARY OF THE ARGUMENT

Informing the jury that the appellant had previously been sentenced to death in this case in a retrial is a reasonable trial strategy, and without a record, the appellant failed to show counsel was ineffective for not objecting to the trial court's comments regarding his previous sentence. Additionally, the trial court's comments did not violate his due process rights because jurors were repeatedly

instructed that they would base their decision on the evidence presented and agreed to be fair prior to being seated on the jury.

The appellant's arguments that portions of the Texas Death Penalty statute are unconstitutional were either not preserved or have been previously denied by this Court. The appellant raises no new meritorious claims that the statute was unconstitutional on its face or in application to his case. Nothing prevented the appellant from presenting particular mitigation evidence, and the jury was able to consider all evidence offered. Furthermore, there was no jury charge error when the charge tracked the language of the statute, and the abstract portion of the charge did not conflict with the special issue or mislead the jury.

The appellant's extended time on death row due to availing himself of the appellate process and receiving a new punishment trial does not amount to cruel and unusual punishment. Finally, the trial court did not err in denying the appellant a causal challenge to a potential juror who, at most, vacillated in her response on whether she could follow the court's instructions.

REPLY TO APPELLANT'S FIRST POINT OF ERROR

In the appellant's first point of error, he claims that he received ineffective assistance of counsel during the re-trial on punishment. (App'nt Brf. 20-25). He specifically complains that trial counsel was ineffective for not objecting to the trial court's comments the appellant had previously been sentenced to death. At

various points in trial, including jury selection, the jury was informed, without objection, that this case was a retrial on punishment and that the appellant had previously been sentenced to death or was on death row. *See, e.g.*, (RR. V—10; RR. XIX—8-14). But the appellant failed to show that his trial counsel rendered a deficient performance that harmed the appellant.

I. The appellant has failed to show that his trial counsel rendered a deficient performance that harmed the appellant.

A claim of ineffective assistance is governed by the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 774 (Tex. Crim. App. 1999) (holding a *Strickland* analysis also applies to determine if the appellant received ineffective assistance of counsel at the punishment phase of his trial). In order to prove an ineffective assistance claim, the appellant must first show that the trial counsel's performance was deficient. *Strickland*, 988 S.W.2d at 687; *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). "Specifically [the appellant] must prove by a preponderance of the evidence that the trial counsel's representation fell below the objective standard of professional norms." *Mitchell*, 68 S.W.3d at 642; *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). The appellant must also show that the deficient performance, affirmatively demonstrated in the record, prejudiced his defense. *Strickland*, 466 U.S. at 687. Prejudice is shown by the reasonable probability that but for his trial

counsel's unprofessional errors, the result of the proceeding would have been different. *Mitchell*, 68 S.W.3d at 642.

When, as in this case, there is no evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show trial counsel's performance was deficient. *See Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) (noting cases in which counsel's deficiency is apparent from the record are rare). In reviewing a claim of ineffective assistance, a reviewing court presumes trial counsel's competence, and the appellant has the burden to rebut this presumption by proving that his attorney's representation was not sound strategy. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992) (citing *Strickland*, 466 U.S. at 689). An appellate court looks to the totality of the representation, rather than isolated acts or omissions of trial counsel. *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987); *Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995).

An appellate court does not judge trial counsel's decisions in hindsight. *Lopez*, 343 S.W.3d at 142. Rather, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. a 686.

A. *The appellant failed to show trial counsel was deficient; the record does not adequately reflect the reason for trial counsel's actions and informing the jury that the appellant had previously been sentenced to death is a reasonable trial strategy.*

The appellant contends that trial counsel was deficient for failing to object to any mention that the appellant was previously sentenced to death (App'nt Brf. 20-25). But his complaints merely indicate that he would have done things differently and are based on speculation. The appellant brings his claim for the first time on direct appeal; thus, the record cannot adequately reflect the motives behind trial counsel's actions. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (holding that to defeat the strong presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness."); *Mallet v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (noting a record on direct appeal cannot adequately reflect the motives behind trial counsel's actions).

Because the appellant's allegations of ineffective assistance were not raised in his motion for new trial, trial counsel has had no opportunity to explain his conduct. And absent such opportunity, this Court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.

Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

The appellant argues that no valid trial strategy could justify trial counsel's inaction. (App'nt Brf. 25). But it is possible trial counsel wanted jurors to feel sympathy for the appellant, feel that he had already served his time by spending 23 years in solitary confinement on death row. Or it is possible trial counsel wanted to demonstrate that the appellant could function in the prison society. As a retrial, this case presented an opportunity for jurors to have some unique insight in answering the special issues. Jurors had the ability to see how the appellant had been behaving in prison for the past 23 years and thus, were in a better position than most capital jurors to answer whether or not the appellant posed a future danger to society. Notably, during both cross-examination and in the appellant's case in chief, trial counsel emphasized that while there had been some infractions, most of the appellant's time in prison had been fairly uneventful. *See, e.g.*, (RR. XVIII—78, 91-99; RR. XIX—103-4; RR. XXI—9-13).

Or perhaps, trial counsel used the information during voir dire to weed out the more "State-oriented" jurors, hoping they would admit that they could not be fair with the knowledge that he had been convicted and sentenced to death before. And at least in one instance, trial counsel informed a potential juror that the current process was different under the new law (RR. XIV—92, 134-169). *See Montez v. Czerniak*, 239 P.3d 1023, 1039 (2010), *aff'd*, 322 P.3d 487 (2014) (finding

reasonable trial strategy to inform jurors of prior death sentence; noting "counsel reasonably could have believed that it would benefit petitioner if the jury knew not only that another jury had sentenced him to death, but that the death sentence had been determined by a court to be improper."). Accordingly, trial counsel's conduct was not "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392.

But, as previously stated, a reviewing court should not speculate on trial counsel's motives in the face of a silent record. "An appellate court should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions[.]" *Thompson*, 9 S.W.3d at 814 (declining to speculate on counsel's failure to object to hearsay in light of silent record).

Furthermore, failures to object to specific types of evidence generally do not constitute ineffective assistance of counsel; whether counsel provides a defendant adequate assistance is to be judged by the totality of the representation rather than by specific trial strategies. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994); *see also Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)

(right to effective assistance of counsel merely ensures the right to reasonably effective, not perfect, assistance).

Here, the totality of the representation afforded the appellant was above the prevailing professional norms. Before trial, counsel made at least seven appearances and filed motions for the appointment of an investigator; for the appointment of a mitigation specialist; for funding for psychology, pathology, penology and psychiatry experts; for psychological and physical examinations; and for access to records from the Texas Department of Family and Protective Services (CR.—9-20, 29, 41-57, 75, 77-79, 86-93, 98-99).[3] Trial counsel additionally filed motions objecting to the presentation of unavailable witnesses through means of transcripts from the previous trial, objected to the Texas capital sentencing scheme, and moved to preclude the imposition of the death penalty (CR.—101-4, 110-118). Trial counsel noticed several defense expert witnesses (CR.—119-20).

Additionally, trial counsel conducted a thorough voir dire and secured many challenges for cause and by agreement. *See* (CR.—122-149; RR. V-XIV). During trial, counsel cross-examined the State's witnesses, pointing out the appellant's age and diminishing health at every opportunity. *See, e.g.,* (RR. XVI—170-181, 217-20, 243-45; RR XVII—25-44, 63-76, 93-112, 135-45, 160-68, 185-88, 207-212, 238-41;

[3] The appellant's trial counsel consisted of Terrance Gaiser, Kurt Wentz, and Robert Scott (CR.—9, 75; RR—IV-XXIII).

XVII—33-46, 58-60, 75-78, 91-99, 107-120, 130-32, 156-65, 172-78, 186-88, 200-209, 213-18, 232-244; RR. XIX—24-31, 40-47, 50-58, 66-79, 87-92, 100-104).

Trial counsel also presented witnesses to explain the appellant's childhood, to show the appellant's good behavior and treatment of others while in prison, and to describe the appellant's current health condition in an attempt to demonstrate that he could not be a future danger (RR. XXI—8-14, 24-37, 44-48, 51-54, 59-64, 71-84, 88-96, 99-104, 113-16, 119-31, 135-40, 143-51, 154-60, 163-68, 236-249; RR. XXII—6-56, 66-79, 89-92). Moreover, trial counsel presented testimony from several experts who opined that the appellant was not a future danger and who explained how the appellant's background and upbringing affected his choices in an effort to establish enough mitigating circumstances for the jury to answer the third special issue affirmatively (RR. XXI—173-207; RR. XXIII—7-90, 130-56). Furthermore, trial counsel asked the jury for life (RR. XXIII—195, 207-215). Thus, the totality of the representation afforded the appellant was above the prevailing professional norms.

Therefore, the appellant failed to show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (noting that the right to effective assistance of counsel ensures the right to reasonably effective assistance and "[d]oes not mean errorless or perfect counsel whose competency of representation is to be judged by hindsight."); *Bone v. State*, 77

S.W.3d 828, 833-37 (Tex. Crim. App. 2002) (reiterating *Strickland*'s requirement that the record must reflect the errors and it is not a legal basis for finding counsel deficient the fact merely because he could have provided a better defense). The appellant's first point of error should be overruled.

B. *The appellant cannot meet the prejudice prong of Strickland because he failed to show that the result of the trial would have been different had trial counsel not made these potential errors and because prejudice is not presumed.*

Even if the record affirmatively demonstrated counsel's deficiency, the appellant has failed to show that, but for his trial counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694; *Lopez*, 343 S.W.3d at 142; *see also Woodford v. Visciotti*, 537 U.S. 19, 22–23 (2002) (noting when it is alleged that counsel performed deficiently at the punishment phase of trial, defendant must prove that there is a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable penalty-phase verdict). Moreover, he has not offered or discussed any instances to show how that could be true. *See Bone*, 77 S.W.3d at 837 (noting *Strickland* requires proof of prejudice); *Valencia v. State*, 891 S.W.2d 652, 664 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 946 S.W.2d 81 (Tex. Crim. App. 1997) (finding the appellant did not prove ineffective when he alleged that the trial would have been different but did not provide any specific examples to show how).

Trial counsel's performance was not one of the rare circumstances from which prejudice is presumed. *See Batiste v. State*, 888 S.W.2d 9, 14-15 (Tex. Crim. App. 1994) (noting that prejudice is presumed in rare Sixth Amendment violations such as actual or constructive denial of counsel altogether at a critical stage of the proceeding or an actual conflict of interest); *see also Burdine v. Johnson*, 262 F.3d 336, 345 (5th Cir. 2001) (en banc) (distinguishing between the total lack of counsel and ineffective assistance of counsel; noting that prejudice is presumed "when, during a critical stage of a trial, counsel is either (1) totally absent, or (2) present but prevented from providing effective assistance").

The appellant argues that evidence regarding his prior death sentence "infected" the punishment hearing with unfairness and relies on the dissent in *Romano v. Oklahoma*, 512 U.S. 1 (1994). (App'nt Brf. 22-25). But in *Romano*, the majority concluded that it was impossible to know how knowledge of a defendant's prior death sentence might have affected the jury and refused to speculate on the issue. *See Romano*, 512 U.S. at 13-17. The Supreme Court of the United States held that evidence of the defendant's prior death sentence did not deprive him of a fair sentencing proceeding. *See id*. Moreover, the *Romano* Court did not address the issue of ineffective assistance of counsel but only whether the appellant's due process rights were violated by such evidence. *See id*.

This Court has declined to presume prejudice under the second prong of *Strickland* for every possible structural defect with due process implications. *See Batiste*, 888 S.W.2d at 14-17 (declining to presume prejudice when trial counsel failed to assert a *Batson* challenge). *Strickland* ensures that the adversarial process has not been undermined by counsel's conduct. *See id.* Prejudice is presumed only in those rare situations in which counsel is absent or is constructively absent during a critical stage of trial. *Id*. Prejudice is not presumed based on a trial strategy disliked in hindsight, especially when a reviewing court would need to speculate on how knowledge of a defendant's prior death sentence might have affected the jury. *See Romano*, 512 U.S. at 13-17.

Here, as previously stated, trial counsel subjected the State's case to the adversarial process: he presented witnesses to discuss the appellant's background, presented experts, cross-examined the State's witnesses, and presented the appellant's current situation in the best light possible to argue for life. At no point was the appellant actually or constructively denied counsel.

The fact that the appellant had been on death row was not a misstatement of law that could mislead the jury. *Cf. Andrews v. State*, 159 S.W.3d 98, 102–3 (Tex. Crim. App. 2005) (reversing a conviction "in a rare case" on the basis of ineffective assistance when trial counsel did not object to a misstatement of law by the prosecutor during argument which was further supported by the court, affecting

the sentence). Instead, throughout trial, the jury was properly informed of the law and what needed to be found in order to reach the conclusion of death. *See Romano*, 512 U.S. at 13-14 (noting the jurors were presumed to have followed the court's instructions, and so the evidence of a prior death sentence should have "little-if any-effect" on deliberations). Furthermore, during voir dire, jurors gave assurances that they could be fair, could wait and listen to the evidence presented, and could make up their own mind about the case. *See, e.g.*, (RR. V—56-103; RR. VI—67-68); *see also Stafford v. Saffle*, 34 F.3d 1557, 1568 (10th Cir. 1994) (distinguishing *Romano*, finding knowledge of the prior death sentence had no impact because jurors had this information before the voir dire and during voir dire gave assurances that they could be fair). Therefore, this is not one of the rare instances where prejudice could be presumed. Thus, the appellant was required to satisfy both prongs of *Strickland*.

The appellant failed to show that the results of the proceeding would have been different. The State's case was very strong. The appellant had been previously found guilty of the underlying capital murder of his wife, Deborah, of which the evidence pointed he was the mastermind (RR. V—10; RR. XV—180-94; RR. XVI—22-35, 131-52). The record showed that the appellant beat Deborah, tied her up, placed her in plastic trash bags, kidnapped her in his trunk, bashed her skull with concrete, and threw her into the San Jacinto River (RR. XV—59-78, 180-94; RR. XVI—22-35, 131-52). Additionally, the evidence showed the appellant made

threats regarding the lives of witnesses to the murder (RR. XV—106; RR. XVI—151-53; RR. XVII—205).

In addition, the record reflects that Deborah's murder occurred only days after the appellant made parole on a previous murder he committed in 1977 (RR. XXI—17-18). In that case, the appellant approached an unknown African American male asleep in his car and shot him in the head in an apparent hate crime (RR. XVII—17-22, 44, 58, 134). *See* (St. Ex. #325). Afterward, the appellant bragged to his friends about the murder (RR. XVII—17-22, 44, 58, 134).

The jury was also presented with evidence of other violent acts the appellant committed against family members, his previous violent felony convictions, and the appellant's lengthy jail disciplinary record that included evidence of at least one prior escape from custody, threats to the staff, and an assault of a guard (RR. XVII—160-69, 182-83, 225-38; RR. XVIII—54-57, 72-74, 83-91, 104-6, 123-27, 137-8, 146-56, 192-200, 223-29; RR. XIX—17-22, 37-40, 49-50, 64, 81-83, 97-8, 111, 128-29, 134, 142; RR. XX—12, 20-23, 52). *See* (St. Ex. #401-409). The record reflects that the appellant was a high-ranking member of the Aryan Brotherhood of Texas, a violent prison gang (RR. XVI—156-63; RR. XVIII—15-33; RR. XIX—13-14; RR. XX—32-36).

Moreover, as previously stated, the fact that jurors knew the appellant had been on death row for the past 23 years could have just as likely benefitted the appellant. Jurors may have felt sorry for his circumstances, felt he had served his

time, or found that he could function in the prison society with the evidence of increasingly rare instances of any disruptive behavior.[4] Furthermore, as previously stated, jurors gave assurances that they could be fair. *See, e.g.*, (RR. V—56-103; RR. VI—67-68); *see also Stafford*, 34 F.3d at 1568. Thus, it is unlikely that knowledge that the previous jury sentenced the appellant to death prejudiced the appellant.

The appellant has not shown that the outcome would have been different had trial counsel performed differently. *See Ex parte Rogers*, 369 S.W.3d 858, 864 (Tex. Crim. App. 2012) (finding relief is only granted when, but for trial counsel's errors, the sentencing jury would have reached a more favorable verdict); *see also Ex parte McFarland*, 163 S.W.3d 743, 754 (Tex. Crim. App. 2005) (noting in a capital trial the question is whether "there is a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). Accordingly, the appellant has not shown prejudice. *See Thompson*, 9 S.W.3d at 812 (requiring the appellant to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different in order to prove prejudice). Thus, the appellant's first point of error should be overruled.

[4] Even if jurors had not been directly informed that the appellant had previously been sentenced to death, jurors were aware of the appellant's capital murder conviction 23 years earlier and would have likely concluded that he had received a death sentence to warrant a new trial on punishment.

REPLY TO THE APPELLANT'S SECOND POINT OF ERROR

In his second point of error, the appellant argues that the trial court improperly commented on the weight of the evidence and violated his constitutional rights to a fair trial by informing the venire that the appellant had previously been sentenced to death. (App'nt Brf. 25-29). Specifically, the appellant argues that the information predisposed the jury to impose a death sentence again. (App'nt Brf. 27). But the appellant failed to object to the trial court's comments and thus, failed to preserve error.

I. The appellant was required to object to preserve his complaint to the trial court's comments that he was previously sentenced to death; the comments did not amount to fundamental error.

Generally, a complaint regarding an improper judicial comment must be preserved at trial. *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013); *Jasper v. State*, 61 S.W.3d 413, 420–21 (Tex. Crim. App. 2001). To preserve error relating to a trial judge's improper comment or conduct, the challenging party must object to the alleged improper comment or conduct when it occurs and request a curative instruction unless a proper instruction cannot render the comment or conduct harmless. *Id.*; *see also* TEX. R. APP. P. 33.1(a)(1)(A). No objection is required when the error cannot be repaired or when it is fundamental and must be implemented regardless of the parties' wishes. TEX. R. EVID. 103(e); *Unkart*, 400 S.W.3d at 99

(citing *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993) and *Blue v. State*, 41 S.W.3d 129, 131–33 (Tex. Crim. App. 2000) (plurality op.)).

The appellant does not dispute that he failed to object to the trial court's comments during voir dire.[5] (App'nt Brf. 27-28). He argues, however, that he had no obligation to object to the comments because they were fundamental error. (App'nt Brf. 27-28). But the appellant does not cite any authority where similar comments constituted fundamental error nor does he cite any authority that prohibits prospective jurors from learning of a previous jury's holding.[6]

Nothing about the trial court's comments rose to such a level as "bear on the presumption of innocence or vitiate the impartiality of the jury." *See Jasper*, 61 S.W.3d at 421 (finding comments not fundamental error when did not bear on the presumption of innocence or vitiate the impartiality of the jury); *cf. United States v. Haywood*, 411 F.2d 555 (5th Cir. 1969) (finding trial judge repeatedly informing defendant of his right to allocution before case had been submitted to the jury was error not requiring an objection because affected defendant's constitutional presumption of innocence). Instead, here, the trial court's comments occurred in the context of explaining why the jury would only be deciding punishment and

[5] The record reflects that the appellant did not object at any time the appellant's previous death sentence was referenced or to any reference of death row; the appellant brought up the issue by his own questioning as well. *See, e.g.*, (RR. VII—234, RR. XVIII—57, RR. XVI—168; RR. XVIII—57; RR. XIX—19-20; RR. XXI—9, 29).

[6] As previously stated, a defendant may have several strategic reasons for informing a jury of the defendant's prior death sentence

the age of the case (RR. V—9-10; RR. VIII—11-12; RR. XI—11-12; RR. XIII—12). Each time the trial judge informed the panel that the appellant's punishment sentence was overturned because of a change in the law or in the interest of justice (RR. V—9-10; RR. VIII—11-12; RR. XI—11-12; RR. XIII—12). Additionally, the comments were followed by thorough individual voir dires where jurors made assurances that each juror could be fair and wait to listen to the evidence before deciding punishment. *See, e.g.*, (RR. V—5-103). At no point did the trial judge convey his opinion to the jurors about what sentence he preferred. *See Brumit v. State*, 206 S.W.3d 639, 644 (Tex. Crim. App. 2006) ("Absent a clear showing of bias, a trial court's actions will be presumed to have been correct.").

Moreover, this Court's precedent in analogous situations has required an objection to preserve any potential error. *See Garcia v. State*, AP-71,417, 2003 WL 22669744, at *4 (Tex. Crim. App. Nov. 12, 2003) (not designated for publication) (noting the appellant failed to preserve any possible error in the court's reference to a previous trial); *see also Davis v. State*, AP-76,521, 2013 WL 5773353, at *3 (Tex. Crim. App. Oct. 23, 2013) (not designated for publication) (finding the jury learning about defendant's previous death sentence in a re-trial was cured by an instruction to disregard); *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999) (finding the jury learning about a co-defendant's death sentence was cured by an instruction to disregard). Thus, any possible error in informing prospective jurors

about the appellant's previous death sentence was not fundamental and an objection was required to preserve the appellant's complaint for review. The appellant's second point of error should be overruled.

II. Jurors' knowledge of the previous death sentence did not violate the appellant's due process rights.

Even assuming *arguendo* that error was preserved, knowledge of the appellant's previous death sentence did not violate the appellant's due process rights. As previously stated, the Supreme Court of the United States has held that evidence of a defendant's prior death sentence did not deprive him of a fair sentencing proceeding. *See Romano*, 512 U.S. at 13-17. Although *Romano* dealt with the introduction of a sentence in an unrelated offense, rather than a retrial for the same offense, the rationale is the same. *See id*.

The concern with the introduction of evidence regarding a previous death sentence is whether jurors were misled by the evidence or that their sense of responsibility in considering the death penalty was diminished by the evidence. *See id.*; *Muniz v. Johnson*, 132 F.3d 214, 223 (5th Cir. 1998) ("The introduction of a prior death sentence is allowable if it does not mislead the jury in its sentencing role."). Here, nothing about the introduction of the previous sentence misled jurors in their sentencing decision. As previously stated, each juror underwent a thorough voir dire examination, assuring that he or she could be fair and judge the case only on the evidence presented. *See, e.g.*, (RR. VIII—93-95, 101-2). And, as

previously stated, like *Romano*, each juror was clearly and properly instructed on their role in determining the appellant's sentence through the court's charge. *See* (CR.—167-83).

Finally, the appellant's claim of prejudice is entirely speculative. The appellant cites nothing in the record that supports his claim that any juror either voted to impose the death penalty because the previous jury had done so or devalued the appellant's evidence because it had failed to persuade the previous jury. *See Romano*, 512 U.S. at 13-14 (declining to speculate on how knowledge of prior death sentence might have affected the jury). Additionally, as previously stated, the other relevant evidence presented was sufficient to justify the appellant's death sentence. Thus, the appellant failed to show harm. The appellant's second point of error should be overruled.

REPLY TO THE APPELLANT'S THIRD AND SEVENTH POINTS OF ERROR

In his third point of error, the appellant complains that the Texas special issue on "future danger" is unconstitutional as applied to him because the jury could not consider his unique physical circumstances and limitations. (App'nt Brf. 29-31). In his seventh point of error, the appellant argues that the time he has spent confined on death row constitutes unconstitutional cruel and unusual punishment. (App'nt Brf. 42-48). The appellant raised these issues, among others, in his motion for new trial, which was denied after a hearing consisting of both

live testimony and affidavits (RR. XXIV; RR.—XXV). (CR. Supp.—6-9, 13-23). It appears the appellant contends that the trial court erred in denying his motion for new trial on these issues. Because both issues deal with the trial court's denial of a motion for new trial they will be addressed here together.

A trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). A trial court abuses its discretion in denying a motion for new trial when no reasonable view of the record could support the court's ruling. *Id.*

I. Nothing about the future danger special issue limited the appellant's ability to present evidence of his current physical circumstances and limitations for the jury to consider.

The trial court did not abuse its discretion in denying the appellant's motion for new trial regarding the constitutionality of the future danger special issue. In the second special issue, the State was required to prove beyond a reasonable doubt that there was a probability, or that the evidence indicated it was more likely than not, the appellant represented a continuing threat to society. *See* (CR.—180-81). The appellant argues that this special issue is unconstitutional "as applied" to him because it did not permit the jury to consider his current physical circumstances and limitations. (App'nt Brf. 29). But nothing about the second special issue limited the appellant's ability to present such evidence or limited the jury's ability to consider such evidence presented in answering the question. *See* (CR.—180); TEX. CODE CRIM. PROC. ANN. art. 37.011 § 3(b)(2) (West 2014); *Muniz v.*

State, 851 S.W.2d 238, 256 (Tex. Crim. App. 1993) (noting a statute is unconstitutional as applied if "the relationship between the particular case's evidence and the special issues is such that the special issues provide no means for the jurors to respond in a morally reasoned way").

In fact, the record reflects that the jury heard abundant evidence of the appellant's current physical circumstances and health; the fact that he was too ill to be a future danger was one of the main arguments the appellant made in asking for a life sentence (RR. XXI—63, 71-82, 114-16, 136-37, 145-46, 198-207; RR. XXIII—188-215). Therefore, the jury, well equipped with a fuller picture of what, if any, future danger the appellant possibly posed, was able to consider such evidence when answering special issue number two. *See Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir. 1994) (finding no constitutional error as applied to defendant on second special issue when jury considering special issue regarding future dangerousness was able to consider *any* mitigating effect of evidence presented).

In *Jurek v. State*, this Court upheld the future dangerousness special issue despite the absence of a list of factors to be considered. *Jurek v. State*, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975) (providing non-exhaustive list of factors that could be considered in deciding the second special issue), *aff'd*, 428 U.S. 262 (1976). This Court noted that the future danger special issue allowed for some discretion from jurors, which ensured "individualization based on consideration of

all extenuating circumstances." *Id.* ("We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula."). Nothing about this Court's decision limited evidence or a jury's consideration only to those exemplars enumerated as the appellant appears to suggest. *See id.*

Jurors in the present case were able to answer the future danger special issue considering all of the evidence presented. Furthermore, jurors were also able to consider all relevant evidence in answering the mitigation special issue. Therefore, the jury's assessment of all of the appellant's relevant evidence, in including evidence of his "unique physical circumstances and limitations," could be expressed through the special issues. *See Hughes v. State*, 897 S.W.2d 285, 299 (Tex. Crim. App. 1994) (rejecting appellant's claim that article 37.071 is unconstitutional as applied to him because evidence of his mental and emotional instability could be considered within the scope of the submitted issues). Thus, the second special issue is not unconstitutional as applied to the appellant. Accordingly, the trial court did not abuse its discretion in denying the appellant's motion for new trial on this issue. The appellant's third point of error should be overruled.

II. The time the appellant has served on death row does not constitute cruel and unusual punishment when he has been pursuing appeals and collateral relief.

The trial court did not abuse its discretion in denying the appellant's motion for new trial regarding the length of time he has been on death row. There is no authority to support the appellant's claim that prolonged death row confinement violates his rights under the Eighth Amendment.[7] *See Ex Parte Ruiz*, WR-27,328-03, 2016 WL 6609721, at *18 (Tex. Crim. App. Nov. 9, 2016) (not yet released for publication) (finding the carrying out of death sentence following capital murder defendant's years on death row would not render his execution cruel and unusual punishment); *see also White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (same).

Rather, this Court and other courts have declined to grant relief for such a reason. *See id.*; *Smith v. State*, 74 S.W.3d 868, 875 (Tex. Crim. App. 2002) (finding the imposition of the death penalty for capital murder after defendant had served 12 years in prison did not constitute cruel and unusual punishment when had been pursuing appeals and collateral relief); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (rejecting claim that to execute death-sentenced inmate after nearly twenty-years after pursuing appeals is cruel and unusual); *see also White*, 79 F.3d at 439 (rejecting claim that to execute death-sentenced inmate after pursuing appeals and collateral relief for seventeen years is cruel and unusual). "The present

[7] Courts generally refer to such claims as a "*Lackey* claim," which was developed from the case, *Lackey v. Texas*, 514 U.S. 1045 (1995).

standards of decency do not deem cruel and unusual the delay occasioned while a condemned prisoner pursues direct appeals and collateral relief." *Smith*, 74 S.W.3d at 875; *see also Bell*, 938 S.W.2d at 53 (noting that any possible tortuous effects of appellate delay coupled with the hope of a life sentence are arguably preferable to a certain death). This Court has declined to hold any delays against the State or the appellant during the necessary appellate process. *Bell*, 938 S.W.2d at 53.

Here, the appellant has availed himself to the meticulous process of appeals and habeas proceedings and has benefitted. *See Ex Parte Mason*, AP-76,997, 2013 WL 1149829, at *1 (Tex. Crim. App. Mar. 20, 2013) (not designated for publication) (granting the appellant a new punishment hearing in light of the former death penalty statute's inadequate mechanism for a jury to consider mitigating evidence). He received a new trial on punishment and a new death sentence was imposed in November 2015 (CR.—185; RR. XXIII—239-40).

The appellant argues that he has waited nearly 25 years on death row. (App'nt Brf. 47). But the appellant has failed to cite any authority that the entire time he has been in prison should count. Nor has he cited any authority for why any potential cruel and unusual "clock" would not start anew with the latest sentence. *See Bell*, 938 S.W.2d at 53 (noting the extreme difficulty of counting and determining a threshold number of years that would be *per se* cruel and unusual when there have been multiple trials).

Any delay in the appellant's execution has been as a result of the appellate process. There is no evidence that the State abused the system, despite the retrial on punishment. Furthermore, reforming his sentence to life would not avoid the conditions of which he complains. (App'nt Brf. 48). *See Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) (noting that any relief from proving a claim of cruel and unusual prison conditions does not include release from confinement). Therefore, the trial court did not abuse its discretion in denying the appellant's motion for new trial on this issue. Thus, the appellant's seventh point of error should be overruled.

REPLY TO THE APPELLANT'S FOURTH POINT OF ERROR

In his fourth point of error, the appellant argues that the third special issue is unconstitutional as applied because it limited the jury's consideration of evidence. (App'nt Brf. 32-34). The final question asked the jury the following:

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

TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(e) (West 2014). The appellant argues that the question limits the jury's consideration to the examples enumerated and thus, fails to provide a way for the jury to consider other evidence, such as his

"unique circumstances." (App'nt Brf. 32-33). But the appellant failed to preserve this contention for appellate review.

I. The appellant failed to preserve this issue for appellant review by making the same objection in the trial court.

To preserve error for appellant review, a party generally must present a timely objection to the trial court, stating the specific grounds for the complaint, and obtain a ruling. TEX. R. APP. P. 33.1(a); *see also Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (requiring a specific objection to preserve an as-applied challenge to article 37.071). Additionally, arguments on appeal must comport with the objection at trial or the error is waived. *See Green v. State*, 912 S.W.2d 189, 195 (Tex. Crim. App. 1995) (finding appellant's pre-trial motion was too general to preserve the claims he advanced on appeal).

There is no evidence in the record that the appellant specifically objected at trial that Article 37.0711 limited the type of evidence the jury could consider as mitigation. The appellant filed a pre-trial "Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty" (CR.—110-118). But nowhere in the motion does the appellant specifically contend that the mitigation special issue is unconstitutional as applied to him. Thus, the appellant's fourth point of error was not preserved for appellate review and should be dismissed.

II. Nothing about the language of the third special issue limited the jury's consideration of relevant mitigating evidence presented at trial.

The appellant argues that the third special issue unconstitutionally limited the jury's consideration to the listed examples. (App'nt Brf. 32). But the appellant's claim is unavailing. Nothing about the plain language of the third special issue limited the jury's consideration of mitigating evidence. The crux of the third special issue was whether or not sufficient mitigating circumstances were presented to warrant a life sentence rather than a death sentence. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(e) (West 2014). The plain language told the jury to take into consideration "all of the evidence" and used the term "including" followed by examples of such evidence that could be considered. *See id*.

The term "including" is one of inclusion, not limitation. *State v. Vasilas*, 187 S.W.3d 486, 489-490 (Tex. Crim. App. 2006); *see also* TEX. GOV'T CODE ANN. § 311.005(13) (West 2012) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."). The legislature's use of the word "including" to illustrate an example or examples of evidence the jury could consider does not exclude other evidence. *See Vasilas*, 187 S.W.3d at 490; *see also Beasley v. State*, 902 S.W.2d 452, 456–57 (Tex. Crim. App. 1995) (holding that evidence concerning the activities of a gang, to which the appellant belonged, was

admissible under Article 37.07(3)(a) because matters relevant to sentencing were not limited to "the prior criminal record of the defendant, his general reputation and his character" when it followed the term "including"). Therefore, the only limitation, if any, comes from whether the evidence was presented in the first place.

In the present case, the jury heard extensive evidence of mitigating circumstances from the appellant. The jury learned about his unstable upbringing, his abusive father-figures, and evidence of his good behavior in prison over the twenty-three years he was incarcerated prior to the retrial (RR. XXI—9-13, 37, 46-47, 53-54, 62-63, 82, 103-4, 114-15, 119-31, 135-40, 147-48, 167, 173-207, 236-249; RR. XXII—6-56, 66-79, 92; RR. XXIII—7-90, 130-56). The jury also heard about his current health situation and that he required the aid of a walker to move around (RR. XXI—115; RR XXII—207). Nothing about the language of the third special issue limited this evidence from the jury's consideration in answering the question. Thus, the third special issue was not unconstitutional as applied. *See Cole v. State*, AP-76,703, 2014 WL 2807710, at *37 (Tex. Crim. App. June 18, 2014) (not designated for publication) (rejecting appellant's argument that mitigation special issue was unconstitutional as applied when record showed court's charge included definition of mitigating evidence required by the statute). The appellant's fourth point of error should be overruled.

REPLY TO THE APPELLANT'S FIFTH POINT OF ERROR

In his fifth point of error, the appellant complains of jury charge error. (App'nt Brf. 34-38). Specifically, the appellant contends that a conflict existed between the third special issue and the abstract portion of the jury instruction regarding that special issue. (App'nt Brf. 34-38). The appellant argues that the "including but not limited to" language included in the abstract portion of the charge regarding special issue number three conflicts with the term "including" used in the third special issue (CR.—171, 182). (App'nt Brf. 35-36). Similar to his fourth point of error, the appellant argues that this conflict improperly limited the mitigating evidence that the jury considered. (App'nt Brf. 34-38).

In determining jury charge error, a reviewing court first decides whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). If error is found in a jury charge, it is then analyzed for harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Ngo*, 175 S.W.3d at 743-44. The degree of harm necessary for a reversal depends on whether the appellant preserved the error by objection. *Id.* When, as in the present case, a defendant fails to object to the charge, he is required to show egregious harm. *Id.*; *see also* TEX. R. APP. P. 33.1.

I. The jury charge did not mislead the jury in its consideration of mitigating evidence.

No error existed in the jury charge. "A jury charge which tracks the language of a particular statute is a proper charge on the statutory issue." *Riddle v. State*, 888

S.W.2d 1, 8 (Tex. Crim. App. 1994); *see also Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010) (finding no jury charge error when the third special issue tracked the language of the mandated mitigation question in Article 37.0711); *Davis v. State*, AP-77,031, 2016 WL 6520209, at *42-43 (Tex. Crim. App. Nov. 2, 2016) (not yet designated for publication) (declining to find jury charge error when the trial court instructed the jury in a manner consistent with Article 37.071). Here, the language in the third special issue tracked the language of the statute. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b) (West 2014).

Additionally, as previously stated, the term "including" does not limit the jury from considering all mitigating circumstances presented. *See Vasilas*, 187 S.W.3d at 489-90; *see also* TEX. GOV'T CODE ANN. § 311.005(13) (West 2012). The third special issue asked the jurors to consider "all evidence" and then included examples of evidence jurors might consider in determining whether there was sufficient mitigating circumstances to warrant a life sentence rather than death (CR.—182). *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b) (West 2014).

The appellant claims a conflict existed between language in special issue number three and language in the abstract portion of the charge, misleading jurors. (App'nt Brf. 36-37). But no such conflict existed. The appellant points to the following language in the court's instruction:

> In answering Special Issue No. 3 you shall consider mitigating evidence to be evidence that a juror might regards 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 the imposition of the death penalty.

(CR.—171) (emphasis added). The appellant argues the phrase "including but not limited to" contained in the abstract conflicts with the term "including" in the third special issue. But this is a distinction without a difference. The abstract portion of the charge serves to guide the jury on the meaning of concepts and terms used in the application paragraphs of the charge. *See Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012). Here, the instruction in the abstract portion of the charge made it clear that jurors must consider *any* mitigating evidence when answering the third special issue (CR—171). Again, there was no limitation on what mitigating evidence the jurors could consider.

Nothing about the abstract instruction was an incorrect or misleading statement of law. *See Crenshaw*, 378 S.W.3d at 466 ("Generally, reversible error occurs in the giving of an abstract instruction only when the instruction is an incorrect and misleading statement of law that the jury must understand in order to implement the commands of the application paragraph."); *cf. Riley v. State*, 830 S.W.2d 584, 586-87 (Tex. Crim. App. 1992) (holding confusing conflict between abstract and application paragraphs on burden of proof concerning insanity was reversible error when abstract portion included correct burden of proof and application paragraph was incorrect). The charge properly allowed the jury to

consider any of the evidence submitted at trial relevant to mitigation. *Russeau v. State*, 291 S.W.3d 426, 435 (Tex. Crim. App. 2009); *see also Riddle*, 888 S.W.2d at 8 (upholding similar instructions and finding no charge error); *Fuller v. State*, 829 S.W.2d 191, 202 (Tex. Crim. App. 1992) (same). Thus, there was no jury charge error.

II. The appellant was not egregiously harmed by any error in the difference of the terminology between the abstract portion of the charge and the third special issue.

Even if the language in the abstract instruction misled the jury in answering the third special issue, the appellant failed to object to this issue and thus, any error is analyzed for egregious harm. Errors which result in egregious harm are those which affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). The error must have been so harmful as to effectively deny the defendant a fair and impartial trial. *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008). "Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis." *Hutch*, 922 S.W.2d. at 172; *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). The defendant must have suffered actual, rather than theoretical, harm. *Id.* In determining whether the defendant suffered egregious harm, a reviewing court considers: (1) the entire jury charge; (2) state of the evidence, including contested issues and the weight of the

probative evidence; (3) the parties' arguments; and (4) all other relevant information in the record. *Id.*

The appellant does not complain about any other sections of the jury charge, which are otherwise correct. Neither the State nor the appellant's counsel incorrectly argued that the jury could only consider the limited enumerated evidence (RR. XXIII). Rather, the appellant's counsel emphasized that the mitigating evidence presented, particularly the appellant's failing health and his less-than-ideal upbringing, required a life sentence (RR. XXIII—188-215).

Additionally, as previously stated, the evidence strongly supported the appellant's death sentence. Although the jury learned the appellant had an unstable upbringing and was diabetic, they also learned that he had made numerous death threats while in prison (RR. XV—106; RR. XVI—151-53; RR. XVII—205). The circumstances of the underlying offense were particularly heinous—the appellant beat and hogtied his wife, stuffed her in plastic trash bags, drove her in his trunk to the river, bashed her head in with a rock, and threw her body into the river, just days after making parole on a different murder (RR. XV—59-78, 180-94; RR. XVI—22-35, 131-52; RR. XXI—17-18).

Beyond that offense, the jury learned of the first murder the appellant committed, where he murdered a man just because he was African American (RR. RR. XVII—17-22, 44, 58, 134). The jury also learned of other acts of violence he committed against family members; his other past felony convictions for assault,

burglary and robbery; and ample evidence of misconduct the appellant committed while in custody (RR. XVII—160-69, 182-83, 225-38; RR. XVIII—54-57, 72-74, 83-91, 104-6, 123-27, 137-8, 146-56, 192-200, 223-29; RR. XIX—17-22, 37-40, 49-50, 64, 81-83, 97-8, 111, 128-29, 134, 142; RR. XX—12, 20-23, 52). *See* (St. Ex. #401-409).

Moreover, the jury heard evidence of friends and family members of the appellant who had similar life stories and had not killed anyone, let alone two people so callously (RR. XVI—117-180, 222-43; RR. XVII—8-25, 47-63). Finally, the jury learned the appellant was a high-ranking member of the Aryan Brotherhood of Texas (RR. XVI—156-63; RR. XVIII—15-33; RR. XIX—13-14; RR. XX—32-36). Thus, the appellant was not egregiously harmed. The appellant's fifth point of error should be overruled.

REPLY TO THE APPELLANT'S SIXTH POINT OF ERROR

In his sixth point of error, the appellant argues that the special issue on deliberateness was unconstitutionally vague on its face. (App'nt Brf. 38-42). The appellant complains that the term "deliberately" is vague and subject to various interpretations. This Court has already decided this issue adversely to the appellant.

I. The appellant failed to preserve this issue for appellate review.

The appellant failed to properly preserve this claim for appellate review by making a timely objection and obtaining a ruling from the trial court. *See* TEX. R.

APP. P. 33.1(a)(1); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (defendant could not raise a facial challenge to the constitutionality of a statute for the first time on appeal); *see also Curry*, 910 S.W.2d at 496 (finding appellant failed to preserve claim that article 37.071 is unconstitutional because of vagueness and uncertainty). There is no evidence in the record that the appellant specifically objected at trial to the punishment statute being unconstitutionally vague, nor is there any evidence that he objected to the term "deliberately" (CR.—110-118, 151-61; RR. XXIII—169-170).[8] Therefore, the appellant's sixth point of error was not preserved for appellate review and should be dismissed.

II. The deliberateness special issue is not unconstitutionally vague because the term is understood in its common meaning and has a different meaning than intentional.

Even if the appellant preserved the claim, it is without merit. The appellant recognizes that this Court has already decided that the deliberateness special issue is not unconstitutionally vague. *Ramirez v. State*, 815 S.W.2d 636, 653 (Tex. Crim. App. 1991) (citing *Williams v. State*, 668 S.W.2d 692, 700 (Tex. Crim. App. 1983)); *see also Jurek*, 428 U.S. at 274-75 (finding Texas future dangerousness special issue not unconstitutionally vague). Though not defined in the statute, the term deliberately is "to be understood in its usual acceptation in common language." *Tucker v. State*, 771 S.W.2d 523, 537 (Tex. Crim. App. 1988). And this Court has held that the

[8] Furthermore, no objection made on this ground in the appellant's motion for new trial (CR. Supp.—3-23; RR. XXIV; RR. XXV—8, 10).

terms "deliberate" and "intentional" have different meanings for purposes of Texas' former capital murder sentencing scheme. *Id.*; *see also Prystash v. State*, 3 S.W.3d 522, 541 (Tex. Crim. App. 1999) (Keller, J. concurring) (noting based on the different meanings that a jury finding of guilt would not itself constitute a finding of deliberateness). Furthermore, this Court has repeatedly found the Texas capital sentencing statute to be constitutional and acceptable. *See Wilkerson*, 726 S.W.2d at 548 (citing cases in which this Court addressed the constitutionality of Article 37.071).

The appellant argues that *Johnson v. United States*, 135 S. Ct. 2551 (2015), "breathed new life into facial challenges alleging that statutes are void for vagueness under the Due Process Clause." (App'nt Brf. 39). But the deliberate special issue does not invite the same arbitrary or discriminatory enforcement found in the statute at issue in *Johnson*. In *Johnson*, the government sought a punishment enhancement based on three prior "violent felony" convictions. 135 S.Ct. at 2555. The statute defined the term "violent felony" to include any crime that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555-2556. The Supreme Court found that the term left uncertainty of "how to estimate the risk" or "how much risk it takes to qualify as a violent felony." *Id.* The statute asked the factfinder to make a determination on a sliding scale, leaving defendants without notice of whether or not their past

convictions fit into *that* jury's determination of risk versus a different jury's interpretation. *See id.*

Here, on the other hand, the term deliberately does not leave defendants in the same dilemma. As previously stated, deliberately is understood in its usual acceptation in common language. *See id.*; *Tucker*, 771 S.W.2d at 537. A jury is asked whether the intentional killing was deliberate or not, a binary-style question, based on understood terms (CR.—178-79).

While knowledge of whether one's past convictions enhance future punishment should be consistent, the determination of deliberateness is a case-by-case determination established from "the totality of the circumstances of each individual case." *Cannon v. State*, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). "To find the act of deliberateness, there must be the moment of deliberation and the determination on the part of the actor to kill." *Id.*; TEX. CODE CRIM. PROC. ANN. art. 37.0711 (West 2014). This Court has recognized an intentional act is not necessarily deliberate and thus, the question for the factfinder ensured that the most serious punishment was left for the most serious offenses.[9] *See id.* (providing an example of intentional but not deliberate: "while from the act of suddenly and impulsively firing a gun can be found the intent to cause the death, such action

[9] To the extent the appellant argues that the legislature's deletion of the deliberateness special issue renders the statute unconstitutional, this Court has held otherwise. *See Green*, 912 S.W.2d at 195 (holding "the deletion of the 'deliberateness' special issue does not render Texas' death penalty scheme unconstitutional, and Texas' death penalty scheme does allow for consideration of 'offense-specific criteria' in a 'meaningful manner.'").

may not necessarily show that the act was deliberate."). Therefore, the deliberation special issue is not unconstitutionally vague. The appellant's sixth point of error should be overruled.

REPLY TO THE APPELLANT'S EIGHTH POINT OF ERROR

In his eighth point of error, the appellant alleges that the trial court improperly denied his challenge for cause against veniremember Daisy Talavera. (App'nt Brf. 48-52). The appellant alleges that Ms. Talavera was challengeable for cause under Article 35.16 of the Texas Code of Criminal Procedure because: (1) she could not follow the court's instructions and assess deliberateness independent from a finding of intent and (2) she would find someone a continuing threat to society based on the fact he murdered someone in the course of kidnapping. (App'nt Brf. 48-52). *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b)(1) (West 2014) (laying out procedure in capital case for an offense committed prior to September 1, 1991).

During the State's examination of Talavera, the prosecutor informed Talavera that this was a retrial on punishment and asked if she could start with a clean slate and not base her decision on what a previous jury found (RR. XIII – 75). Talavera responded, "Oh, no, because I don't even know the details – many details from back then. So I need details in order to make up my mind since things have changed from back then." (RR. XIII – 75-6).

The prosecutor explained that the jurors would answer three special issues. First, the prosecutor explained Talavera would be faced with a question of whether or not the crime was committed deliberately (RR. XIII – 82). The prosecutor explained that although there was no definition for deliberate, it was more than an intentional killing and less than a premeditated killing (RR. XIII – 77-84). Talavera indicated that she understood the difference (RR. XIII – 84). The following exchange occurred:

> [STATE]: If we prove to you beyond a reasonable doubt that he killed his victim deliberately and with the expectation that she would die, would you answer that question yes, if we prove that to you?
>
> [TALAVERA]: Yes. If provided with evidence, yes.
>
> [STATE]: Right. And if we don't prove it to you, will you answer it no?
>
> [TALAVERA]: Can you repeat question?
>
> [STATE]: If you don't believe beyond a reasonable doubt – so we don't prove that to you, can you answer it no?
>
> [TALAVERA]: Yeah, I can answer it no.
>
> [STATE]: See, the point is, is for jurors to be over here, they have to say, look, I haven't heard anything yet. I don't know anything about this case, and I haven't made up my mind how I would vote. I need to hear the evidence before I could decide. Is that you?
>
> [TALAVERA]: Yes.
>
> [STATE]: So you could answer it either way depending on what the evidence is?
>
> [TALAVERA]: Depending on the evidence, yes.

> [STATE]: And you haven't said, look, I'm done. If I knew he intended to kill the victim, I already know I'm going to answer this yes. That's not you. You would have to wait and hear the evidence?
>
> [TALAVERA]: Yes, that's fair.

(RR. XIII – 84-6). Second, the prosecutor informed Talavera of the second special issue—that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (RR. XIII – 86). The prosecutor provided Talavera examples of violence and society and the following exchange occurred:

> [STATE]: If we prove that to you beyond a reasonable doubt, will you answer it yes?
>
> [TALAVERA]: Yes.
>
> [STATE]: If we do not prove that to you, will you answer it no?
>
> [TALAVERA]: I would answer it no.
>
> [STATE]: Do you see we have to prove it to you, right, with evidence?
>
> [TALAVERA]: Yes.
>
> [STATE]: So you haven't made up your mind as you sit there today?
>
> [TALAVERA]: No, I have not made up my mind.
>
> [STATE]: Because you haven't heard anything, right?
>
> [TALAVERA]: Correct.

(RR. XIII – 87-8). At the end of his examination, wrapping up his questions, the prosecutor again asked Talavera about having an open mind and if she would wait to hear the evidence; the following exchange occurred:

> [STATE]: Okay. I don't want to beat a dead horse, but I'm going to do it anyway real quick just to make sure where you're at. You believe the death penalty is appropriate in some cases?
>
> [TALAVERA]: Yes.
>
> [STATE]: You believe it might be appropriate for someone who intentionally kills someone during a kidnapping?
>
> [TALAVERA]: Yes.
>
> [STATE]: You haven't made up your mind. Life could be appropriate, too, depending on the facts of the case?
>
> [TALAVERA]: Correct, I have not made up my mind.
>
> [STATE]: You don't know how you would answer those questions as you sit there today because you haven't heard any of the evidence?
>
> [TALAVERA]: That is correct.
>
> [STATE]: And you get the concept that deliberately is something more than intentional?
>
> [TALAVERA]: Correct.

(RR. XIII – 93-95).

During the appellant's voir dire, Talavera again reasserted that she had not yet made up her mind when defense counsel asked if she would be influenced by the fact another jury found the appellant guilty (RR. XIII –101-2). Talavera stated, "I make up my own mind. I'm not going to change because of them. They are not the ones that's providing me with the evidence, and stuff like that, it's you guys. So I'm going to probably just stick to my position." (RR. XIII – 102).

Defense counsel discussed how, in "common usage," the words intentional and deliberate are frequently interchanged (RR. XIII – 106-7). Defense counsel asked Talavera how that affected her in regards to the first special issue:

> [DEFENSE COUNSEL]: So the question is this: Because of the common usage of the word deliberate, with intentional, or meant to, all those kind of things that you agreed with me that are interchangeable in your mind, wouldn't you always answer that question yes because you've already found that it was deliberately done?
>
> [TALAVERA]: The fact that I remain thinking intentionally means something that you meant to do?
>
> [DEFENSE COUNSEL]: Yes.
>
> [TALAVERA]: I mean, it's not going to change my answer.
>
> [DEFENSE COUNSEL]: So you meant to do it, right?
>
> [TALAVERA]: Yes.
>
> [DEFENSE COUNSEL]: You deliberately do it, right?
>
> [TALAVERA]: Right.
>
> [DEFENSE COUNSEL]: You intentionally did it, right?
>
> [TALAVERA]: Right.
>
> [DEFENSE COUNSEL]: So if you get to that point, is what I'm saying, then you would always answer that question yes because the words all mean the same to you, right?
>
> [TALAVERA]: Yes.
>
> [DEFENSE COUNSEL]: So no matter what the fact situation was, you would always answer that first question yes –
>
> [TALAVERA]: Correct.

> [DEFENSE COUNSEL]: – before you've ever heard anything because it's been predetermined because of the use of the wordage, correct?
>
> [TALAVERA]: I just go by what the word is; I mean, what it means to me.
> ...
>
> [DEFENSE COUNSEL]: So that would be your response in relation to that question every time; correct, because of your usage of the words, correct?
>
> [TALAVERA]: Correct.

(RR. XIII – 108-10). The appellant challenged Talavera for cause, which the trial court overruled (RR. XIII – 110).

Defense counsel questioned Talavera regarding the second special issue, whether the appellant would commit future acts and continue to be a threat to society (RR. XIII – 111-12). Defense counsel asked Talavera:

> Now, you're going to the second question, and my question to you is, do you think that a person who intentionally and deliberately commits an offense – and that's what you – in our hypothetical that's what you've answered, that that's a fact in your mind. Isn't a person like that always, probably, going to be a continuing threat to society in some form or another, whether it's breaking the window, or hitting Craig Goodhart, or setting a fire, or anything? He has the potential because he's already murdered one person while he was kidnapping that person. He deliberately did it. So the question is, do you feel that there's a probability that he will always be a continuing threat to society?

(RR. XIII – 113). Talavera responded, "Yes, I do believe." (RR. XIII – 113). His questioning continued:

> [DEFENSE COUNSEL]: And you would believe that no matter what the circumstances surrounding it because of his prior conduct, and that's all you really need to answer that question, correct?
>
> [TALAVERA]: Correct, that is what it's based off of.

(RR. XIII – 113). The appellant again challenged Talavera for cause and the trial court overruled his objection (RR. XIII – 113).

The appellant continued questioning Talavera and at the end of his voir dire again moved to challenge her for cause, which was subsequently denied (RR. XIII – 118-19). The State accepted Talavera and the appellant excused her, using a peremptory strike (RR. XIII – 119).

I. Standard of Review and Applicable Law

Both the State and defense are entitled to jurors who can follow the law. Article 35.16 of the Texas Code of Criminal Procedure provides that a challenge for cause may be made if a veniremember has a bias or prejudice against any phase of the law upon which the State or defense is entitled to rely. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3), (c)(2) (West 2006); *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). A sufficient foundation has been laid to support a challenge for cause once a juror expressly admits his bias against a phase of law which both the State and defense are entitled to rely upon. *Id.*; *Cardenas v. State*, 325 S.W.3d 179, 184-85 (Tex. Crim. App. 2010). The law must be explained to the prospective juror and he must be asked whether he can follow that law, regardless of his personal views, before he may be excused for cause on this basis. *Id.*;

Cardenas, 325 S.W.3d at 185 (noting trial court or opposing party may examine the juror further to "ensure that he fully understands and appreciates the position that he is taking.").

When a proponent shows that the veniremember understood the requirements of the law but maintains his prejudice, a challenge for cause can be made. *Id.* The trial court must grant a challenge for cause if the juror cannot follow the law unless there is further clarification or vacillation by the juror. *Id.*; *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999) ("When the record reflects that a venireman vacillates or equivocates on his ability to follow the law, the reviewing court must defer to the trial court.").

The trial court has broad discretion over the process of selecting a jury. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). When the trial court overrules a challenge for cause, its decision is reviewed in light of all the answers the prospective juror gave. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex. Crim. App. 1991). Thus, a trial court's action in granting or denying a challenge for cause is reviewed for an abuse of discretion and will not be disturbed if supported by the record. *Barajas*, 93 S.W.3d at 38; *Flores v. State*, 871 S.W.2d 714, 719 (Tex. Crim. App. 1993) (noting that challenges for cause are matters within the trial court's discretion); *see also Gardner*, 306 S.W.3d at 296 (noting particular deference is given

to the a trial court's decisions when veniremember's answers are vacillating, unclear, or contradictory).

II. The trial court did not abuse its discretion in denying the appellant's challenge to Ms. Talavera.

The appellant argues that the trial court erred in denying his challenge for cause because Talavera could not assess deliberateness independent from intent and she would always find someone a future danger who committed murder intentionally and deliberately. (App'nt Brf. 50).[10] A party may challenge a veniremember who expresses a clear bias against the law. *Gardner*, 306 S.W.3d at 295-96. But, as previously stated, if a juror vacillates or equivocates with respect to their ability to follow the law, the reviewing court must defer to the trial court's judgment. *Brown v. State*, 913 S.W.2d 577, 580-81 (Tex. Crim. App. 1996); *Garcia v. State*, 887 S.W.2d 846, 854 (Tex. Crim. App. 1994).

Here, throughout her entire voir dire, Talavera repeatedly stated that she could wait and listen to all the evidence before answering the special issues (RR. XIII – 75-6, 84-86, 88, 94, 102-4). During the State's questioning, she clearly stated that she understood the difference between intentional and deliberate as explained by the prosecutor (RR. XIII – 77-84, 94). And Talavera stated that she had not yet made up her mind whether the appellant was a continuing threat to

[10] The term "intentional" refers to the culpable mental state of the crime and is defined; whereas, the term "deliberate" was codified in the first punishment issue of the former Article 37.071(b)(1) and was not defined by the Legislature. *See* TEX. PENAL CODE § 6.03(a) (West 2011); TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b)(1) (West 2014).

society; she explained that she had not yet made up her mind because she had not heard the evidence (RR. XIII – 85-88, 94).

At most, Talavera vacillated when questioned by the appellant about the first and second special issues. Reading the exchange, it appears defense counsel suggested opposing answers to Talavera and then challenged her when she agreed to them (RR XIII – 108-10, 113-14). The appellant failed to show that the Talavera understood the requirements of the law and could not overcome a prejudice well enough to follow the law. *See Gardner*, 306 S.W.3d at 295 (requiring assurance veniremember understood the law and still could not overcome prejudice to establish proper challenge for cause); *see also Suniga v. State*, AP-77,041, 2017 WL 431904, at *44 (Tex. Crim. App. Feb. 1, 2017) (not designated for publication) (finding no error when defense counsel did not explain the law to the venireman and inquire into his ability to follow it).

Furthermore, the trial court recognized defense counsel's strategy and called him out, informing him that it would not be challengeable (RR. XIII – 121-22). The trial court stated:

> I have to listen to somebody, and I have to take what they answer one way, what they answer another way, and I have to determine from a credibility standpoint what does she really think and how is it being expressed and explained to her so that she can give a particular type of answer, rather than you suggesting this, you suggesting this, you suggesting this. And once you suggest that, then that's got to be this, doesn't it? I mean, that's not the way this is supposed to work. That's just – you're taking somebody – a group of people who don't understand the system, don't understand what's involved, and then

> you are misleading them – not you – you are misleading them along the way so that you could get them committed to something that sounds logical and reasonable.

(RR. XIII – 121-22). Moreover, defense counsel appeared to agree with the trial court's analysis when he responded, "I'm hoping that [trial counsel] can do that with the jury when we have a jury." (RR. XIII – 122).

Based on Talavera's voir dire as a whole, she indicated that she could keep an open mind and wait to hear the evidence before making a decision on any of the special issues. *See Saldano v. State*, 232 S.W.3d 77, 94-99 (Tex. Crim. App. 2007) (finding no clear abuse of discretion denying challenge for cause when appellant claimed veniremember was predisposed to answering yes to future dangerousness special issue when veniremember stated there could be some cases she would say yes and others no and at other times stated she could keep an open mind and hold the State to its burden). Thus, the trial court did not wrongfully deny the appellant's challenge for cause (RR. XIII – 72-119). *See Gardner*, 306 S.W.3d at 297 (declining to find trial court erred in denying appellant's challenge for cause when record showed that veniremember appeared mistaken on the law and, at worst, her responses were sometimes contradictory and vacillating); *see also Buntion v. State*, 482 S.W.3d 58, 90 (Tex. Crim. App. 2016), *cert. denied*, 136 S. Ct. 2521 (2016) (deferring to the trial court's decision that challenged veniremember could follow the court's instructions).

III. The appellant failed to show harm from any erroneous denial of a challenge for cause.

Even if the trial court erred in denying the appellant's challenge for cause to Ms. Talavera, the appellant failed to establish reversible error. "To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that he used a peremptory strike to remove the venireperson and thereafter suffered a detriment from the loss of the strike." *Buntion*, 482 S.W.3d at 83 (citing *Chambers v. State*, 866 S.W.2d 9, 23 (Tex. Crim. App. 1993)).

Article 35.15(a) provides that, in capital cases in which the State seeks the death penalty, the defendant is entitled to fifteen peremptory strikes. TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (West 2014). The record reveals that the appellant exhausted his fifteen statutory peremptory challenges, then requested and received an additional peremptory challenge (CR. I—143; RR. XIV—98-100). Therefore, to demonstrate harm, i.e. reversible error, he was required to show that challenges for cause on at least two venirepersons were erroneously denied. *Buntion*, 482 S.W.3d at 83.

The appellant only identifies one venireman that he maintains should have been excused for cause, Talavera. (App'nt Brf. 48-51). But any harm for this denial was cured by the extra peremptory strike. *See Chambers*, 866 S.W.2d at 23; *Buntion*, 482 S.W.3d at 83; *cf. Johnson v. State*, 43 S.W.3d 1, 7 (Tex. Crim. App. 2001) (finding harm when appellant requested and was denied additional peremptory

challenges). Therefore, the appellant failed to show harm. The appellant's eighth point of error should be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and the trial court's judgment should be affirmed.

KIM OGG
District Attorney
Harris County, Texas

/s/ Katie Davis

KATIE DAVIS
Assistant District Attorney
Harris County, Texas
1201 Franklin Street, Suite 600
Houston, Texas 77002
Telephone (713) 274-5826
Fax Number (713) 755-5809
Davis_Katie@dao.hctx.net
State Bar Number: 24070242

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 13,451 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

Mandy Miller
2910 Commercial Ctr. Blvd., Ste. 103-201
Katy, TX 77494
(832) 900-9884
mandy@mandymillerlegal.com

Patrick F. McCann
Attorney at Law
909 Texas Avenue, #205
Houston, Texas 77002
Writlawyer@justice.com

/s/ Katie Davis

KATIE DAVIS
Assistant District Attorney
Harris County, Texas
1201 Franklin Street, Suite 600
Houston, Texas 77002
Telephone (713) 274-5826
Fax Number (713) 755-5809
Davis_Katie@dao.hctx.net
State Bar Number: 24070242

Date: February 10, 2016