

### Appellant's Fourteenth Point of Error

- (a) The court deprived Appellant of his Eighth and Fourteenth Amendment rights to present relevant mitigating evidence under a residual doubt theory by precluding evidence that Paul Reid was responsible for the Fairlanes robbery murders.**
- (b) The court deprived Appellant of his rights under Texas law to present mitigating evidence under a residual doubt theory by precluding evidence that Paul Reid was responsible for the Fairlanes robbery murders.**
- (c) The court deprived Appellant of his constitutional rights to present powerful mitigating evidence when it precluded the introduction of sworn affidavits from witnesses who had died since the first trial.**
- (d) The court deprived Appellant of his constitutional right to present relevant mitigating and rebuttal evidence when it repeatedly precluded such evidence.**

The trial court violated Max Soffar's constitutional rights and rendered his sentencing phase fundamentally unfair when it precluded the categories of mitigating evidence set forth in the subheadings above.

*Law of General Applicability.* In *Tennard v. Dretke*, the Court reiterated that “a State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death . . .” 542 U.S. 274, 285 (2004) (internal quotation marks and citation omitted)). Relevant mitigating evidence includes “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Once this “low threshold for relevance is met, the ‘Eighth Amendment requires that’ such evidence be admitted. *Tennard*, 542 U.S. at 285 (quoting *Boyd v. California*, 494 U.S. 370, 377-378 (1990)).

In *Green v. Georgia*, after the defendant had been convicted of capital murder, he sought during the sentencing phase to introduce a statement that his confederate had made

to a third party that he (the confederate) had alone committed the murder (i.e., without the defendant). 442 U.S. 95, 97 (1979). The trial court precluded admission of the statement as hearsay, and the defendant was sentenced to death. *Id.* The United States Supreme Court noted that the confession was reliable, reaffirmed its holding in *Chambers* that the Constitution forbids states from “mechanistically” applying the hearsay rule “to defeat the ends of justice,” and held that the Constitution prohibited the State from barring use of the confession at the defendant’s capital sentencing hearing. *Green*, 442 U.S. at 97 (quoting *Chambers*, 410 U.S. at 302). *See also United States v. Fields*, \_\_\_ F.3d \_\_\_, 2007 WL 926864, \* 14 (5th Cir. Mar. 29, 2007) (holding that Confrontation Clause does not apply to capital sentencing proceedings because of the “particular importance of individualized sentences in capital cases[;] we will not free freeze the evidential procedure of sentencing in the mold of trial procedure where, as here, challenged testimony is relevant only to a sentencing authority’s selection decision”) (internal quotation marks and citation omitted).<sup>1</sup>

**(a) The court deprived Appellant of his Eighth and Fourteenth Amendment rights to present relevant mitigating evidence under a residual doubt theory by precluding evidence that Paul Reid was responsible for the Fairlanes robbery murders.**

The trial court violated Soffar’s constitutional right to present all relevant mitigating evidence when it precluded him from introducing evidence that Paul Reid

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<sup>1</sup> The **standard of review** for the preclusion of mitigation evidence, a constitutional and legal issue not involving a credibility determination, is *de novo*. *Moff*, 154 S.W.3d at 601; *Guzman*, 955 S.W.2d at 87.

committed the bowling alley murders at the sentencing phase of Soffar's trial – including Reid's admission to shooting four people in a bowling alley on Route 290 and his *modus operandi* in crimes strikingly similar to the Fairlanes robbery murders. (37 RR 38-41).

The Supreme Court recently left open whether capital defendants have a constitutional right to introduce residual doubt evidence at sentencing. *Oregon v. Guzek*, 546 U.S. 517, 126 S. Ct. 1226 (2006).<sup>2</sup> In *Guzek*, the Court declined to answer that question because, *inter alia*, the defendant had an opportunity to present the evidence during the guilt phase but did not do so. *Id.* at 1233. By contrast, Soffar was prohibited from introducing the Reid evidence at the guilt phase of his trial. *See Appellant's First, Second, and Third Points of Error, supra.* Thus, Soffar's case squarely presents the question left open in *Guzek*. The answer must be that defendants have a constitutional right to present reliable evidence of innocence at the sentencing phase when the defense was unable to present such evidence during the guilt phase, through no fault of its own. Any other rule would violate the Eighth Amendment and offend “the evolving standards of decency that mark a maturing society,” *Roper v. Simmons*, 543 U.S. 551, 561 (2005). Under the constitution, capital defendants must be allowed to introduce reliable<sup>3</sup> evidence

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<sup>2</sup> In 2003, this Court cited the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164, 167 (1988), for the proposition that the “federal constitution does not require reconsideration by capital sentencing juries of ‘residual doubts’ about a defendant’s guilt.” *Blue v. State*, 125 S.W.3d 491, 502 (Tex. Crim. App. 2003) (citing *Franklin*). The *Blue* decision was before the Supreme Court in *Guzek* clarified that “*Franklin* did not resolve whether the Eighth Amendment affords capital defendants such a right.” *Guzek*, 126 S. Ct. at 1232. Moreover, in *Blue*, this Court did not address whether a defendant may introduce evidence of residual doubt or argue its significance to the jury because the defendant in that case was permitted to do both. 125 S.W.3d at 502-03.

<sup>3</sup> Like the unconstitutionally-precluded evidence in *Green*, 442 U.S. at 97, the Reid evidence the defense sought to introduce was reliable. Appellant incorporates by reference all of the previous arguments demonstrating its reliability and admissibility, set forth in Appellant's First, Second, and Third Points of Error, as though set forth completely in the present point of error.

tending to establish residual doubt during capital sentence proceedings if they attempted and were unable to introduce the evidence at the guilt phase. This rule, moreover, is constitutionally required in Texas where, to secure a sentence of death, the state must prove future dangerousness, i.e. that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. Art. 37.071, § 2 (b)(1). Any evidence offered by the defense tending to disprove such future dangerousness – including evidence that the defendant was not guilty – would certainly be relevant and admissible in a Texas sentencing proceeding. *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986).

This Court should hold under the federal constitution that the preclusion of relevant mitigation evidence in a capital sentencing hearing is structural error and can never be harmless. *See Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006).<sup>4</sup> *See also* U.S. Const. amends. VIII; XIV; Tex. Const. Art. I, §§ 10, 13. In the alternative, because the State cannot prove beyond a reasonable doubt that the jury would have sentenced Soffar to death if it had known about the Reid evidence, his death sentence must be set aside. *Chapman*, 386 U.S. at 24.

**(b) The court deprived Appellant of his rights under Texas law to present mitigating**

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<sup>4</sup> *See also* Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 149 (1993); Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. Crim. L. & Criminology 283, 316-326 (1991) (explaining that *Lockett* violation can never be harmless). *See also* *State v. Kleypas*, 40 P.3d 139, 272-73 (Kan. 2001) (similar), *overruled on other grounds*, *State v. Marsh*, 102 P.3d 445 (Kan. 2004), *rev'd on other grounds*, *Kansas v. Marsh*, 544 U.S. 1060 (2006). Although this Court recently indicated that the preclusion during the sentencing phase of relevant mitigation evidence can be harmless, *Halprin v. State*, 170 S.W.3d 111, 116 (Tex. Crim. App. 2005), it did so without any analysis of this question and only as an alternative holding to the primary holding that the preclusion of the mitigation evidence was not error. Accordingly, the persuasive authorities cited above, including the recent Fifth Circuit decision cited in the text, and not *Halprin*, should be followed.

**evidence under a residual doubt theory by precluding evidence that Paul Reid was responsible for the Fairlanes robbery murders.**

In the alternative, this Court should hold under Texas statutory and constitutional law that residual doubt evidence is admissible at the sentencing phase of a capital trial. *See* Tex. Const. art I, §§ 10, 13, 19; TEX. CODE OF CRIM. PROC. 37.0711 § 3 (e). This Court is not bound by the Supreme Court's decisions on the issue of residual doubt, *see Hult*, 982 S.W.2d at 437, and should follow numerous of its sister jurisdictions in allowing defendants to present residual doubt evidence in mitigation.<sup>5</sup> Texas's interests in minimizing the possibility of executing an innocent person would be served by permitting residual doubt evidence at capital sentencing trials under Texas law. This Court should set aside Soffar's death sentence because the exclusion of the Reid evidence cannot be deemed harmless under any standard.

**(c) The court deprived Appellant of his constitutional rights to present powerful mitigating evidence when it precluded the introduction of sworn affidavits from witnesses who had died since the first trial.**

Had Zelda Soffar been alive for her son's retrial in 2006, she would have testified at the sentencing phase about Soffar's psychological, toxin-sniffing, and academic

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<sup>5</sup> *See, e.g., Smith v. Black*, 904 F.2d 950, 968-69 (5th Cir. 1990); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004) (and cases cited therein); *United States v. Davis*, 132 F. Supp. 2d 455 (E.D. La. 2001) (same); *State v. Webb*, 680 A.2d 147, 188-189 (Conn. 1996); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) (holding that "evidence that concerns the defendant's guilt or innocence cannot be excluded by the trial court, even though a guilty verdict has already been rendered in the guilt/innocence phase"); *State v. Hartman*, 42 S.W.3d 44, 53-56 (Tenn. 2001) (reversing defendant's death sentence due to preclusion of residual doubt evidence). *See also* Recommendation 2, Chap. VII, *Duty of Judge and Role of Jury, Mandatory Justice: Eighteen Reforms to the Death Penalty, The Constitution Project*, (judge should instruct jury that it may consider lingering doubt as mitigating factor) (<http://pewforum.org/deathpenalty/resources/reader/23.php3>) (last visited April 19, 2007); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (demonstrating that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact" for juries considering a death sentence).

problems, important information which ineffective counsel did not elicit in the first trial. (45 Defense Punishment Exhibit 14 (affidavit of Ms. Soffar)). Carl Amdur, Soffar's maternal uncle, was also dead by the time of the retrial and had similarly executed an affidavit<sup>6</sup> about Soffar's difficult upbringing, psychological problems, and toxin sniffing as a child. (45 Defense Punishment Exhibit 12)).<sup>7</sup> The trial court violated Appellant's constitutional rights by refusing his request to introduce these witnesses' sworn affidavits<sup>8</sup> into evidence during the sentencing phase. (40 RR 64; 45 Def. Punishment Exhibits 12-13). *See* U.S. Const. amends. VI, VIII, XIV.

Rigid application of the hearsay rule cannot be used to block relevant hearsay evidence. *Wiggins*, 539 U.S. 510, 537 (2004); *Green*, 442 U.S. at 97. Moreover, due process of law and basic fairness demand an equitable solution when a litigant is unable to protect his rights through no fault of his or her own.<sup>9</sup> Max Soffar was on trial for his life twenty-six years after the crime and, through no fault of his own, was unable to present crucial mitigation evidence via the testimony of live witnesses. Basic notions of fairness, due process of law, and the Eighth Amendment required that the court afford

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<sup>6</sup> The affidavit establishes that Soffar's original trial attorneys never contacted Amdur. (7 CR 2120).

<sup>7</sup> Soffar objected on Sixth, Eighth and Fourteenth Amendment grounds to the prosecution seeking the death penalty twenty-six years after the crime because crucial witnesses, including Carl Amdur and Zelda Soffar, had died. (2 CR 500, 532-44). The trial court overruled this objection. (9 RR 19-20). *See also* Appellant's Twenty-Second Point of Error (proffer brief).

<sup>8</sup> In other contexts, this Court has generally viewed sworn affidavits as reliable evidence. *See Cates v. State*, 120 S.W.3d 352, 355 (Tex. Crim. App. 2003) (setting forth requirement for evidentiary hearing on validity of warrant).

<sup>9</sup> *Cf. Keeter v. State*, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002) (noting that new trial for newly discovered evidence is warranted, *inter alia*, whenever that evidence was unknown or unavailable through due diligence at the time of trial).

him an alternative opportunity to present this evidence. Thus, the court's rulings violated Appellant's constitutional rights. The preclusion of relevant mitigation evidence constitutes structural error and can never be harmless. *See Nelson*, 472 F.3d at 314-15. In the alternative, because the precluded mitigation evidence was crucial to Soffar's defense against the death penalty, the court's error was not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

**(d) The court deprived Appellant of his constitutional right to present relevant mitigating and rebuttal evidence when it repeatedly precluded such evidence.**

A capital defendant has a constitutional right to present mitigating evidence. Moreover, when the State creates a false impression about an issue relevant to capital sentencing, the defense must be permitted to rebut the State's claim, even if the defense may only do so through hearsay evidence and even if the defense does not have a Eighth Amendment right to present the evidence.<sup>10</sup> The trial court violated these basic precepts, and the Eighth and Fourteenth Amendments, by repeatedly blocking Soffar's attempts to introduce relevant mitigating evidence and evidence introduced to rebut the prosecution's case for death:

- 36 RR 98-100 (precluding testimony from probation officer trained in rehabilitation and

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<sup>10</sup> *See Renteria v. State*, 206 S.W.3d 689, 697-98 (Tex. Crim. App. 2006) (holding that "with the State having opened the door to appellant's remorse evidence, the exclusion of [his hearsay expression of remorse] violated due process by preventing appellant from rebutting the State's evidence and argument that appellant was unremorseful" and citing, *inter alia*, *Skipper v. South Carolina*, 476 U.S. 1, 9-15 (1986) (Powell, J., concurring) (finding reversible error because the defendant "was not allowed to rebut evidence and argument used against him") (internal quotes omitted)).

treatment that Appellant needed in-house psychiatric treatment as a child);<sup>11</sup>

- 37 RR 36-37; 14 CR 4122-23 (precluding evidence that the State’s method of execution would cause undue pain and suffering by using a three-drug protocol previously outlawed for the euthanasia of animals);
- 38 RR 46-47 (precluding testimony from Soffar’s cousin concerning whether Soffar had contact with his rabbi and Soffar’s feeling about his sentence of death);<sup>12</sup>
- 38 RR 52-53 (precluding testimony about conditions at Austin State Hospital, where Soffar was hospitalized as a child, including details about its cockroach infestation);
- 38 RR 75 (precluding testimony that Soffar’s admission records at Gulf Coast Trade Center reflected heroic acts by Soffar prior to his admission), *see Green*, 442 U.S. at 97;
- 38 RR 109-10 (precluding testimony offered under residual doubt defense, *see* subpoints (a) & (b), *supra*, from trained police officer that police can impart information to suspects about a crime through interrogation);
- 38 RR 118 (precluding testimony from Soffar’s sister, who attended school with him, about his poor performance in elementary school);
- 38 RR 130 (precluding testimony from Soffar’s sister concerning why he did not learn from his mistakes as well as she did);
- 38 RR 160 (precluding testimony from Soffar’s sister concerning why she did better in school than he did);
- 39 RR 8 (precluding testimony from Austin State Hospital worker that hospital was like a “bad dream”);
- 39 RR 12-13 (precluding testimony about conditions of children placed in punitive

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<sup>11</sup> Although the probation officer was trained and much more familiar with mental health issues than lay persons, it is perfectly permissible even for lay witnesses with personal knowledge to testify that another person appeared mentally ill or insane. *See, e.g., Bigby v. State*, 892 S.W.2d 864, 888-89 (Tex. Crim. App. 1994); *Pacheco v. State*, 757 S.W.2d 729, 733 (Tex. Crim. App. 1988) (citations omitted).

<sup>12</sup> Soffar objected on Sixth, Eighth and Fourteenth Amendment grounds to the prosecution seeking the death penalty twenty-six years after the crime because crucial mitigating evidence had been lost and crucial witnesses, including Rabbi Ted Sanders, had died. (2 CR 499, 534). Thus, he had no other means of introducing evidence about his rabbi. Moreover, evidence of Soffar’s feelings about his sentence of death was not offered for the truth of the matter asserted but to show his inherent humanity. In any event, under *Green*, 442 U.S. at 97, the hearsay rule did not trump Soffar’s Due Process and Eighth Amendment right to present this relevant mitigating evidence.

“quiet room,” in which Soffar had also been placed);

- 39 RR 20 (precluding testimony of child-care worker who had cared for Soffar on why Soffar had picked fights with larger children);

- 39 RR 31-32 (precluding testimony from child-care worker that children could have been treated better in Austin State Hospital in that the hospital could have “quit locking kids naked in . . . solitary confinement . . . [and begun] feed[ing] them good”);

- 39 RR 94 (precluding testimony from nun who ministered to prisoners about letters Soffar wrote to her indicating his spirituality and redeeming characteristics);

- 39 RR 96-102 (precluding use during mental health expert’s testimony of chart summarizing toxins Soffar ingested as a child, which was derived from medical records, prior testimony and affidavits of people with personal knowledge, and which was relied upon by expert in forming in her opinion, and precluding testimony about such toxin use as hearsay);<sup>13</sup>

- 39 RR 156 (precluding expert testimony about the relationship of Soffar’s therapeutic need for structure and his work as a police informant);

- 39 RR 228-29 (precluding mental-health expert testimony on the type of parenting needed by a “child with attention deficit hyperactive disorder”);

- 39 RR 266-67 (precluding testimony by former Texas Department of Criminal Justice (TDCJ) official that notorious inmate James Dumachete, who was housed with Soffar when Soffar was alleged to have possessed shanks in prison, was a violent inmate on death row for killing two men, and later killed a fellow inmate with a knife);<sup>14</sup>

- 39 RR 267-69 & 273 (precluding testimony to rebut evidence elicited by prosecution that Soffar had a prison disciplinary charge for an “escape attempt,” including expert testimony from former TDCJ official: (1) about the types of conduct which can lead to such a charge; (2) that the charge did not mean that Soffar tried to escape (but rather that he was merely out of place) and (3) that the attempted escape charge was never

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<sup>13</sup> See TEX. R. EVID. 705 (a) (allowing experts to disclose underlying facts or data supporting their opinion). See also TEX. R. EVID. 703 (allowing experts to base opinions on otherwise inadmissible evidence if of the type reasonably relied upon by an expert in that field).

<sup>14</sup> See Executed Offender Information (<http://www.tdcj.state.tx.us/statistics/deathrow/executed/dmochete.jpg> (last checked April 19, 2007)).

sustained);<sup>15</sup>

- 40 RR 32-33 (precluding evidence concerning Soffar’s correspondence with his wife from which the jury could have inferred his strong relationship with his wife, his redeeming qualities and inherent humanity).

As established, *supra*, the preclusion of this evidence constitutes structural error and can never be harmless. Alternatively, because the mitigating and rebuttal evidence precluded by the trial court was crucial to Soffar’s defense against the death penalty, the court’s error was not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

### **Appellant’s Fifteenth Point of Error**

**The trial court violated Appellant’s constitutional and statutory rights by allowing victim impact evidence related to a victim not named in the indictment.**

For purposes of admissible victim impact testimony, a victim is the person named in the indictment. *See Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997). In *Cantu*, this Court stated that impact evidence about a victim not named in the indictment “serves no purpose other than to inflame the jury” and “that such evidence is irrelevant . . . in the context of the special issues under Art. 37.071.” *See also Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005) (precluding victim impact testimony about a victim of an extraneous offense); *see also* Tex. Code Crim. Proc. 37.0711. Here, Soffar was convicted of the capital murder of Ms. Felsher, and was not charged with or convicted of the murder of Mr. Sims. By allowing impact evidence related to Mr. Sims

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<sup>15</sup> The defense certainly had a due-process right to rebut the prosecution’s assertion that Soffar had attempted to escape. *Renteria*, 206 S.W.3d at 697-98. Moreover, to the extent that any portion of the expert’s testimony is deemed hearsay, it was “invited hearsay.” *See id.* at 698 n.6 (citing *Kipp v. State*, 876 S.W.2d 330, 337, n.11 (Tex. Crim. App. 1994) (discussing rule of optimal completeness as example of invited hearsay). *See also* Motion for a New Trial (14 CR 4185-98) (discussing same doctrine).

over defense counsel's objection. (40 RR 43), the trial court violated Soffar's constitutional rights to a fair and reliable sentencing hearing. *See* U.S. Const. amends. VIII, XIV.

The testimony of Mr. Sims's widow, Brenda Moebius, was highly prejudicial to the defense. A young wife and mother of a one year-old at the time of Mr. Sims's death, Mrs. Moebius described Mr. Sims as follows:

He was a very kind person, very fun loving. When he was in high school he was on the football team and the track team. . . . He [had been] a member of the Students Parks and Recreation Society and in fact when [our son] was born [he] became the youngest honorary member cause his dad would take him up there to the meetings and play with him and be very active with him. He was just – he was my best friend; not only my husband but my best friend.

(40 RR 43-44). Unlike in *Cantu*, 939 S.W.2d at 637, where, “the State did not even mention [the victim impact testimony], much less emphasize it,” the State emphasized the Sims victim impact evidence in summation. *See also* (41 RR 47, 57 (“Steve Sims never got to see his son graduate, marry and [sic] him Steve become a [g]randfather.”)). Thus, the prosecution cannot now prove that the introduction of this irrelevant and prejudicial victim-impact evidence was harmless under any standard. *Cantu*, 939 S.W.2d at 637 (applying constitutional harmless error standard). *See also Chapman*, 386 U.S. at 24.

### Appellant's Sixteenth Point of Error

- (a) The trial court committed reversible errors by refusing Appellant's charge that the jurors could not give "no weight" to the mitigating circumstances they found and by charging them that "[i]f you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any . . . ."**
- (b) The trial court committed reversible error by charging the jurors that they had discretion to decide whether a circumstance was mitigating.**
- (c) The trial court committed reversible error by charging the jurors that a "yes" vote to Special Issue Four required ten votes.**
- (d) The trial court committed reversible error by charging the jurors that their answer to Special Issues One, Two, and Three, which presented factual questions, "should reflect an individualized determination by each juror of the personal culpability of the defendant."**
- (e) The trial court committed reversible error by denying the Appellant's written and oral objections to the court's charge and verdict form on the ground that the indictment did not allege special issues one, two and three.**
- (f) The trial court committed reversible error by charging the jury on special issue three (i.e., future dangerousness).**
- (g) The trial court committed reversible error by failing to instruct the jury to disregard victim impact evidence not shown to be within the knowledge or reasonable expectation of the defendant.**
- (h) The trial court committed reversible error by refusing to charge on residual doubt as mitigating evidence.**

As shown below, the trial court's charge at Soffar's penalty phase contained numerous errors which, individually and cumulatively, violated his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, Article 1, §§ 10, 3, 3a, 13, 15 and 19 of the Texas Constitution, and this Court's decisions.<sup>16</sup>

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<sup>16</sup> **Standard of Review applying to all subpoints.** A "reviewing court must [first] determine whether the jury charge contains error. Second, the court must determine whether sufficient harm resulted from the error to require reversal." *Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998). "The standard to determine whether sufficient harm resulted from the charging error to require reversal depends upon whether appellant objected. Where there has been a timely objection made at trial, an appellate court will search for only 'some harm.' By contrast, where the error is urged for the first time on appeal, a reviewing court will search for 'egregious harm.'" *Abdnor v. State*, 871 S.W.2d 726, 731, 732 (Tex. Crim. 1994). To the extent that the Court finds any of these requests unpreserved, counsel's assistance was constitutionally ineffective. See Appellant's Twentieth Point of Error, *infra*.

**(a) The trial court committed reversible errors by refusing Appellant’s charge that the jurors could not give “no weight” to the mitigating circumstances they found and by charging them that “[i]f you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any . . . .”**

The trial court committed reversible error by failing to give Appellant’s proposed instruction charging the jurors that they could not give the mitigating circumstances found by them “no weight.” (7 CR 2522; 40 RR 62). The trial court also committed reversible error by charging the jurors: “[i]f you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, *if any . . . .*” (14 CR 4155).<sup>17</sup>

Under the Eighth Amendment, although jurors may decide what weight to give a mitigating circumstance, “*they may not give it no weight by excluding such evidence from their consideration.*” See *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982) (emphasis added)). The trial court’s errors caused Soffar “some harm” – indeed, egregious harm – by unconstitutionally informing the jurors that they did not have to give any weight to his proven mitigating circumstances. Reversal is required.

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

The trial court erroneously informed the jurors that “[a] mitigating circumstance may include, but is not limited to, any aspect of the defendant’s character, background or record or a circumstance of the crime that *you believe* could make a life sentence appropriate in this case” and that “[y]ou shall consider mitigating evidence to be any

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<sup>17</sup> Appellant preserved his objection to the error by proposing an instruction containing a correct statement of the law. See TEXAS CODE OF CRIM. PROC. Article 36.15; *Chapman v. State*, 921 S.W.2d 694, 695 (Tex. Crim. App. 1996); *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996) (holding that preservation of error relating to defensive issue in jury charge is made by objection or submission of requested charge to court).

evidence that *a juror might regard* as justifying a life sentence.” (14 CR 4154-4156). In other words, the trial court informed the jurors that they were legally entitled to decide whether Max Soffar’s mitigating evidence was mitigating. The prosecutor, in closing argument, made the same error. *See* (41 RR 10-11).

The Eighth Amendment gives jurors no such discretion. The United States Supreme Court’s “cases have established that the sentencer may not be precluded from considering, *and may not refuse to consider*, any constitutionally relevant mitigating evidence.” *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (emphasis added) (citations omitted). Indeed, the Court has held that such mitigating circumstances as a defendant’s troubled childhood (*Eddings*, *supra*) and drug use (*Roberts v. Louisiana*, 431 U.S. 633, 637 (1977)) are mitigating under the Eighth Amendment, that “evidence of good conduct in jail *...is ...by its nature relevant to the sentencing determination*,” and that impaired intelligence is *inherently mitigating*.” *Tennard*, 542 U.S. at 285, 287 (citing *Skipper*, 476 U.S. at 5). Here, Appellant presented inherently mitigating evidence of impaired intelligence, a troubled childhood, drug addiction, and good conduct in jail.

Thus, the trial court committed errors by misinforming jurors that they could refuse to treat Soffar’s mitigating evidence as mitigating. The error caused him egregious harm by permitting the jury to refuse to consider mitigation. Reversal is required.

**(c) The trial court committed reversible error by charging the jurors that a “yes” vote to Special Issue Four required ten votes.**

As Appellant objected below (14 CR 4139), the trial court’s charge that at least ten

jurors had to agree that the answer to Special Issue Four<sup>18</sup> was “yes” before the jury could find this issue violated his rights under the Sixth, Eighth, and Fourteenth Amendments, which require that “each juror . . . be allowed to consider all mitigating evidence . . . [and that] such consideration . . . may not be foreclosed by one or more jurors’ failure to find a mitigating circumstance.” *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (citing *Mills v. Maryland*, 486 U.S. 467 (1988)). *But see Rousseau v. State*, 855 S.W.2d 666, 687, n.26 (Tex. Crim. App. 1993) (rejecting this claim).

The error clearly was not harmless because the jury was unconstitutionally misled about whether a single juror could find and give effect to Appellant’s mitigating circumstances. Therefore, Soffar must receive a new punishment trial.

**(d) The trial court committed reversible error by charging the jurors that their answer to Special Issues One, Two, and Three, which presented factual questions, “should reflect an individualized determination by each juror of the personal culpability of the defendant.”**

Special Issues One, Two, and Three in the verdict form required the jury to answer three factual questions: (1) whether Appellant’s “conduct . . . that caused the death of Arden Alane Felsher was committed deliberately and with the reasonable expectation that the death . . . would result?”; (2) whether the appellant “actually caused the [the victim’s] death . . . , or if [not whether] he intended to kill Arden Alane Felsher or another or that he anticipated that a human life would be taken?”; and (3) whether “there is a probability that the defendant . . . would commit criminal acts of violence that would constitute a

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<sup>18</sup> Special Issue Four in the verdict form asked the jury to consider whether sufficient “mitigating circumstance or circumstances [existed] to warrant that a sentence of life imprisonment rather than a death sentence be imposed?” (14 CR 4166).

continuing threat to society?” (14 CR 4160-65).

Despite the factual nature of these questions, the trial court charged the jurors that “[y]our answers to the special issues should reflect an individualized determination by each juror of the personal culpability of the defendant.” (14 CR 4156). This charge lessened the state’s burden of proving the factual questions presented by special issues one, two, and three beyond a reasonable doubt, as required by TEXAS CODE OF CRIMINAL PROCEDURE Article 37.071, by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article 1, Sections 10, 3, 3a, 13, 15 and 19 of the Texas Constitution. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *Walton v. Arizona*, 497 U.S. 639, 650 (1990) (statute may not “lessen the State’s burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances . . .”), *rev’d on other grounds, Ring v. Arizona, supra*. That is, the instruction allowed the State to meet its factual burden with irrelevant evidence regarding the defendant’s “personal culpability.”

Additionally, the instruction charged the jury to decide an extraneous issue not contained in TEX. CODE OF CRIM. PROC. Art. 37.071. By its terms, this statute does not permit the jury to decide the three special issues based upon “an individualized determination by each juror of the personal culpability of the defendant.” Thus, the charge was contrary to the intent of the Texas Legislature, infected the jury’s deliberative process with an issue extraneous to the statute,<sup>19</sup> and requires reversal. Moreover, the

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<sup>19</sup> *See Lanier Mem’l Hosp. v. Andrews*, 809 So. 2d 802, 806-07 (Ala. 2001) (reversing because trial court’s “statement did not contain the **elements** of the action” before the jury but instead “introduced **extraneous elements and an extraneous** duty that was not at issue”) (emphasis added); *Martin v. State*, 553 S.E.2d 827, 829 (Ga. Ct. App. 2001) (forbidding “deliberate introduction of extraneous issues”). *Cf. Stirone v. U.S.*, 361 U.S. 212 (1960)

charge permitted the jurors to decide the three issues through consideration of highly irrelevant evidence (*i.e.*, the defendant's personal culpability) in violation of Texas Rules of Evidence 401, 403 and 404, and due process. *See McKinney v. Rees*, 993 F.2d 1378, 1379 (9th Cir. 1993) (introduction of irrelevant evidence can violate due process).

The error caused Soffar egregious harm because the charge lessened the State's burden of proving the three issues, interjected an extraneous issue, and allowed consideration of irrelevant evidence. Reversal is required.

**(e) The trial court committed reversible error by denying the Appellant's written and oral objections to the court's charge and verdict form on the ground that the indictment did not allege special issues one, two and three.**

The trial court committed reversible error by denying Appellant's written and oral objections to the court's jury charge and verdict form regarding special issues one, two, and three. *See* (1 CR 264-278; 6 RR 127-130; 14 CR 4141, 4147; 40 RR 62-63). As Appellant argued below, his indictment was legally deficient because it did not contain grand jury findings of these special issues. *See* Tex. Const. Art I, § 10; *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004). *But see* *Rousseau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005) (holding that neither *Apprendi* nor *Ring* requires the state to allege special issues in indictment), *cert. denied*, 126 S. Ct. 2982 (2006).

Under Article 1, § 10, in general, a criminal defendant need not "answer for a

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(reversing conviction for obstruction of interstate commerce under the Hobbs Act, 18 U.S.C. § 1951, because the indictment was improperly amended and the offense charged was impermissibly enlarged by the trial court's jury instructions); *United States v. Milstein*, 401 F.3d 53, 65 (2nd Cir. 2005) ("When the trial evidence or the jury charge operates to broaden the possible bases for conviction from that which appeared in the indictment, the indictment has been constructively amended. . . . Constructive amendment is a *per se* violation of the Fifth Amendment.") (internal quotation marks, brackets and citations omitted).

criminal offense, unless on an indictment of a grand jury.” Under TEXAS CODE OF CRIMINAL PROCEDURE Article 37.0711, a capital defendant can receive a death sentence only if his jury finds the requisite special issues. Therefore, before the State may seek a death sentence at a capital trial, a grand jury must find all charged special issues because such issues (most often labeled aggravating factors) are “the functional equivalent of an element of a greater offense.” *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (internal quotation marks omitted).<sup>20</sup> In *Ring*, the Court held that statutory aggravating factors making a defendant death eligible are elements of the charged capital offense.<sup>21</sup> *See also State v. Fortin*, 843 A.2d 974, 1033-35 (N.J. 2004) (holding that New Jersey Constitution requires aggravating factors to be submitted to a grand jury in a capital case).

This Court must remand this case for imposition of a life sentence because the State’s error in failing to obtain an indictment charging the special issues cannot be subject to harmless error analysis and, even if it can be, the State cannot prove the error harmless beyond a reasonable doubt. *See United States v. Resendiz-Ponce*, 425 F.3d 729 (9<sup>th</sup> Cir. 2005), *rev’d on other grounds*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 782 (2007). Alternatively, this Court should remand to allow the State to attempt to obtain a grand jury indictment charging the requisite special issues. If the State were to obtain such an indictment, then the Appellant would be subject to another punishment trial.

**(f) The trial court committed reversible error by charging the jury on special issue**

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<sup>20</sup> Because of *Ring*, federal courts now agree that aggravating circumstances must be found by a grand jury under the Fifth Amendment. *See, e.g., United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005) (*en banc*).

<sup>21</sup> In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003), the Court ruled that “if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.”

**three (i.e., future dangerousness).**

The trial court committed reversible error by overruling Appellant's objection to charging the jury that it had to find beyond a reasonable doubt a "reasonable probability that the defendant would commit criminal acts of violence that would constitute a threat to society." TEX. CODE CRIM. PROC. Art. 37.0711 (3)(b)(2). *See* (1 CR 250-63; 6 CR 117-20; 40 RR 62-63). Appellant correctly argued that this instruction diluted the reasonable doubt standard. *Id.* *See also* *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 477, and *Blakely v. Washington*, 542 U.S. 296 (2004). *But see* *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003) (rejecting this claim).

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

Thus, the question here is whether there is a reasonable likelihood that the jury applied the challenged instruction in a manner that diluted the State's burden. There clearly is. When non-lawyer jurors are faced with an illogical instruction like the one mandated by Article 37.0711, they would naturally focus on the more familiar concept of probability, to the detriment of a less familiar, legal term of art like "reasonable doubt." Moreover, non-lawyer jurors (and many lawyers) would find it impossible to figure out how they were to determine if they were persuaded beyond a reasonable doubt that something is more likely than not. Indeed, determining beyond a reasonable doubt that

something is more likely than not is an oxymoron. The end result is a reasonable likelihood that jurors would answer yes to the future danger special issue if they were merely persuaded that it was more likely than not that the defendant would be a danger in the future. And that would substantially dilute the State's burden of proving this issue beyond a reasonable doubt.

The trial court erred by overruling Appellant's objections to this instruction. The State cannot prove the error harmless beyond a reasonable doubt. Reversal is required.

**(g) The trial court committed reversible error by failing to instruct the jury to disregard victim impact evidence not shown to be within the knowledge or reasonable expectation of the defendant.**

Over defense objection, the trial court failed to instruct the jury to disregard victim impact evidence not shown to be within the knowledge or reasonable expectation of the defendant. (14 CR 4145; 40 RR 62). The court's failure was reversible error. *See* U.S. Const. amends. V, VI, VIII, XIV; *Payne v. Tennessee*, 501 U.S. 808, 845 (1991) (Marshal, J., dissenting) (arguing that introduction of victim impact evidence outside the knowledge or reasonable expectation of defendant violates the Eighth Amendment); Tex. Const. Art. 1, §§ 3, 3a, 10, 13, 15, 19.

In *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002), this Court upheld the admissibility of victim impact evidence "*when that evidence has some bearing on the defendant's personal responsibility and moral culpability.*" *Id.* at 335 (citing *Mosley v. State*, 983 S.W.2d 249, 261-62 (Tex. Crim. App. 1998) (emphasis added)). In other words, victim impact evidence is relevant only insofar as it has some bearing on the

defendant's personal responsibility and moral culpability. If the defendant had no knowledge or reasonable expectation of the character of the victim or of the impact of the death on the survivors, the evidence does not speak to his personal responsibility and moral culpability. The trial court's failure to so instruct the jury was not harmless.

**(h) The trial court committed reversible error by refusing to charge on residual doubt as mitigating evidence.**

Appellant requested an instruction that the jury could consider any residual doubt about his guilt as a mitigating circumstance. (2 CR 401-405; 8 RR 59). The court committed reversible error by refusing the instruction.

As Appellant argued below, *see id.*, he had a right under Texas law to this instruction. *See* Tex. Const. art 1, §§ 10, 13, 19, 29; TEX. CODE. OF CRIM. PROC. 37.0711 § 3 (e) (requiring capital sentencing juries to determine whether “sufficient mitigating circumstance or circumstances [exist] to warrant a sentence of life imprisonment,” including “the circumstances of the offense”). This Court should find as a matter of state law that capital defendants have a right to a residual doubt instruction.<sup>22</sup> Texas has a compelling interest in minimizing the possibility of executing an innocent person. Permitting jurors to consider residual doubt when deciding whether a defendant should be executed will serve this crucial interest. This Court should reverse.

**Appellant's Seventeenth Point of Error**

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<sup>22</sup> This Court is not bound by the Supreme Court's decisions on the issue of residual doubt. *Hulit*, 982 S.W.2d at 437. *Cf.* note 208, *supra* (collecting cases in which state courts allowed residual doubt evidence under state law).

- (a) The trial court committed reversible error under the common law and this Court’s case law when it reassembled the jury to render a verdict after dismissal.**
- (b) The trial court’s reassembly of the jury violated Appellant’s federal and state constitutional rights to due process of law, to be free of cruel and unusual punishment and against double jeopardy.**
- (c) In the alternative, this Court should order an evidentiary hearing on any facts it deems in dispute and dispositive of the issue.**

*Factual Background.* After a death verdict was read, the jurors were individually polled and stated unanimous agreement with it. (42 RR 4-5). The trial court ordered that Appellant be delivered to State prison and “confined until the date of execution is imposed.” *Id.* at 6. The trial court then discharged the jury: “Ladies and Gentlemen you’re now released from the instructions of the Court and . . . you’re free to go.” *Id.* The jury left the courtroom. *Id.* at 5-6 (“Jury excused”). After the jury departed, at the prosecution’s urging and over defense objection, the trial court directed court personnel: “Would you ask them to come back out.” *Id.* at 6-7.

Once the jury had returned and been reseated, the trial court told the reassembled jury: “I’m sorry but I didn’t turn to the last page of the verdict form and it must be signed also, if this is indeed your verdict.<sup>23</sup> So if I could send you back with instructions to complete the paperwork I would appreciate it.” *Id.* The jury left the courtroom and then returned, with the last page of the verdict signed by the foreperson. *Id.* at 7-8. The trial court once again discharged the jury, and the ex-jurors left the courtroom for a second time. *Id.* at 8. (“Thank you again for your service and ya’ll truly are free to go now.”)<sup>24</sup>

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<sup>23</sup> See TEXAS CODE CRIM. PROC. Art. 36.29 (a) (“Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman.”).

<sup>24</sup> See also (15 CR 4678) (docket sheet noting that the “jury was [] released from any further duties” and then “brought . . . back into open court [for court] to admonish them to complete the jury . . . [and] was seated again [to turn[] over the completed charge”).

**(a) The trial court committed reversible error under the common law and this Court's case law when it reassembled the jury to render a verdict after dismissal.**

A discharged jury may be reassembled only if its members remain in the judge's *actual presence* and under his or her control. *See Webber v. State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983) (“[w]hen the jury has not separated or have only momentarily separated *and are still in the presence of the court* and it appears that no one has talked to the jurors about the case, the court may recall the jurors to correct their verdict . . .”) (emphasis added); *West v. State*, 340 S.W.2d 813, 815 (Tex. Crim. App. 1960) (same). *See also State v. Green*, 995 S.W.2d 591, 612-13 (Tenn. Crim. App. 1998) (reversing and emphasizing separation from the presence of the trial court and the opportunity for outside contacts or influence and finding it irrelevant that less than two minutes passed before jury's initial dismissal and jury's return to jury box).<sup>25</sup>

Here, the trial court ordered the former jurors reassembled after they had left the courtroom and left the court's presence. In so doing, the court committed reversible error. *Webber*, 652 S.W.2d at 782; *West*, 340 S.W.2d at 815.

**(b) The trial court's reassembly of the jury violated Appellant's federal and state constitutional rights to due process of law, to be free of cruel and unusual punishment and against double jeopardy.**

The jury's reassembly also violated Soffar's constitutional rights. *See* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. Art. 1, §§ 3, 10, 13, 14, 15, 19. The reassembly of a discharged jury violates the procedural fairness demanded by due process. *See Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). It is unfair to criminal defendants to discharge the jury,

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<sup>25</sup> The long-standing traditional view is even stricter. *See, e.g., West v. State*, 92 N.E.2d 852, 855 (Ind. 1950).

allow the jurors to leave the courtroom and the court's presence, and then reassemble them as a jury. *Commonwealth v. Johnson*, 59 A.2d 128, 129, 131 (Pa. 1948).

In addition, regardless of how this Court would resolve this issue in a non-capital case, this Court must resolve it in Max Soffar's favor here because the resolution means the difference between life and death. As the United States Supreme Court has emphasized, "[th]e fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quotations omitted).

Furthermore, the reassembly of a discharged jury violates a criminal defendant's double jeopardy rights. *See, e.g., People v. Henry*, 639 N.W.2d 285, 317, 320 (Mich. Ct. App. 2001) (affirming trial court's refusal to reconvene jury because "the jeopardy that had attached at the selection and swearing of the jury terminated with that panel's discharge"); *People v. Rushin*, 194 N.W.2d 718 (Mich. Ct. App. 1971) (same).

Because the trial court's reassembly of the jury violated Appellant's right against double jeopardy, this Court should remand this case for imposition of a sentence of life imprisonment. Alternatively, this Court should remand for another punishment trial. *See* TEX. CODE CRIM. PROC. Art. 36.33.

**(c) In the alternative, this Court should order an evidentiary hearing on any facts it deems in dispute and dispositive of the issue.**

If this Court for some reason decides not to remand this case for imposition of a sentence of life imprisonment or for a new punishment trial, it should remand the case for

an evidentiary hearing on whether the jurors, after leaving the courtroom, remained an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others, including court personnel. *See Summers v. United States*, 11 F.2d 583, 586 (4<sup>th</sup> Cir. 1926) (setting forth this standard).

### **Appellant's Eighteenth Point of Error**

#### **Prosecutors' unfettered, standardless and unreviewable discretion under Article 37.0711 violates equal protection, due process and the Eighth Amendment.**

Texas lacks statewide standards governing the discretion of local prosecutors to seek or decline to seek the execution of death-eligible defendants, TEX. CODE CRIM. PROC. Art. 37.0711, and only a few of Texas's 254 counties purport to have such standards.<sup>26</sup> Harris County is not among them. (6 CR 1685, 1710).<sup>27</sup> As a result, the decision whether to seek the death penalty turns on "the willingness of the local prosecutor" to seek death. Richard Willing and Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999 at A1.

Harris County provides a glaring example of the disparities in Texas's system. The current and former Harris County District Attorneys have sought a death sentence whenever there has been a "better than average chance" of a jury returning one. Mike Tolson & Steve Brewer, *Harris County is a Pipeline to Death Row*, HOUSTON CHRONICLE, Feb. 4, 2001 at A1. At a pretrial hearing in this case, the prosecution conceded that Harris County District Attorneys seek the death penalty more often than

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<sup>26</sup> See Lena G. Roberts, *All over the Map: How an Accident of Geography Turns Texas' Death Penalty Scheme Into Lethal Lottery* (April 2003) (unpublished, on file with the Texas Defender Service).

<sup>27</sup> The Harris County written policy provides that the District Attorney shall "personally" make the final decision on whether to seek death without providing any guidance for that decision. *Id.*

other prosecutors as a matter of personal opinion. (7 RR 186). As a result, Harris County has returned a vastly disproportionate number of death sentences. Although the county has a similar per capita murder rate as Dallas and San Antonio, it has 324% more death-row inmates than Dallas and 430% more than San Antonio.<sup>28</sup> And although it accounts for only about 12% of Texas's murders, Harris County has sentenced to death 29% of all death-sentenced prisoners.<sup>29</sup>

The trial court committed reversible constitutional errors by denying Appellant's motion to preclude application of the death penalty on equal protection, due process, and Eighth Amendment grounds,<sup>30</sup> and by denying his request for discovery to prove his selective prosecution claim. (6 CR 1673-1712; 7 RR 187). *See* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const., Art. 1, §§ 13 & 19.

**Equal protection.** “[U]niform” and “specific” vote-counting standards are required to prevent the arbitrary and disparate treatment of similarly situated people whose fundamental right to vote is at stake. *Bush v. Gore*, 531 U.S. 98, 102, 106 (2000).

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<sup>28</sup> *See* (6 CR 1691-92 (basing calculations of statistics from the Federal Bureau of Investigation, *FBI Uniform Crime Reports by Metropolitan Statistical Area*, available at <http://www.fbi.gov/ucr/ucr.htm#cius> (last visited April 19, 2007), from the Texas Department of Criminal Justice, Offenders on Death Row, available at <http://www.tdcj.state.tx.us/stat/deathrow.htm> (last visited April 19, 2007), and from the 2000 Census, U.S. Census Bureau, Population 2000, available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited April 19, 2007).

<sup>29</sup> *FBI Uniform Crime Reports*, *supra* note 229, reports 1407 murders for all of Texas and 166 in Harris County (166/1407 = 0.117982). The Texas Department of Criminal Justice, *supra* note 231, reports a total of 962 persons sentenced to death row in Texas since 1976, and 282 persons from Harris County (282/962 = 0.293139). TDCJ, *Total Number of Offenders Sentenced to Death from Each County*, available at <http://www.tdcj.state.tx.us/stat/countysentenced.htm> (last visited April 19, 2007).

<sup>30</sup> *But see Threadgill v. State*, 146 S.W.3d 654, 671 (Tex. Crim. App. 2004) (rejecting argument that unguided prosecutorial discretion and variance among counties violates equal protection); *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995) (*en banc*) (prosecutorial discretion to seek or forgo death penalty not unconstitutional).

Because Texas’s death penalty system concerns a more fundamental right – the right to life<sup>31</sup> – the system must satisfy the equal protection principles enunciated in *Bush* and must value the lives of all citizen equally. Just as a State may not, “by arbitrary and disparate treatment, value one person’s vote over that of another,” *Bush*, 531 U.S. at 104-05, a state may not, by arbitrary and disparate treatment, value one person’s life over that of another.<sup>32</sup> Texas fails this test. Its law does not even provide an “abstract proposition” or a “starting principle,” *Bush*, 531 U.S. at 106, as to how local prosecutors should make these life-and-death decisions.

**Due process.** In determining the scope of the constitutional due process protections, three factors must be balanced: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Under this test, the discretion granted to Texas prosecutors to seek or decline to seek a death sentence violates Appellant’s due process rights. The interest at stake, the right to life, is the most fundamental of all. The lack of standards increases the risk of an erroneous deprivation by failing to ensure that the death penalty is applied only to individuals “who act with the level of moral culpability that

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<sup>31</sup> *Furman v. Georgia*, 408 U.S. 238, 359 (1972) (Marshall, J., concurring).

<sup>32</sup> Since *Bush*, numerous commentators have recognized that its logic prohibits standardless prosecutorial discretion to seek or not to seek the death penalty against statutorily death-eligible defendants. See, e.g., Laurence Benner et. al., *Criminal Justice in the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions* (October 2, 2000 - September 30, 2001), 38 Cal. W. L. Rev. 87, 90-94 (2002).

characterizes the most serious adult criminal conduct.” *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). Statewide standards would reduce the risk of arbitrary application and could be adopted with relative ease. Additionally, the State’s interest in granting prosecutors unbridled discretion is minimal. Therefore, the standardless prosecutorial discretion to seek the execution of death-eligible defendants in Texas violates due process.

**Cruel and unusual punishment.** Capital sentencers’ decisions must be guided by standards that narrow and guide their discretion. In his trial testimony, Garner confirmed that employees never kept a water jug on the control booth. (28 RR 189). *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Because a prosecutor’s “*decision whether or not to seek capital punishment is no less important than the jury’s, . . . [his or her] ‘discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.’*” *DeGarmo v. Texas*, 474 U.S. 973, 974-975 (1985) (Brennan, J., dissenting from denial of cert.) (emphasis added) (quoting *Gregg*, 428 U.S. at 189). “Absent facts to the contrary,” Justice White would not assume that prosecutors would “exercise [their] power in a standardless fashion.” *Gregg*, 428 U.S. at 225 (White, J., concurring). The arbitrary and capricious nature of standardless prosecutorial discretion to seek or not to seek the death penalty, however, has now been demonstrated empirically.<sup>33</sup> The death penalty continues to be imposed in an arbitrary, freakish and discriminatory manner in violation of the Eighth Amendment and the Texas Constitution.

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<sup>33</sup> *See, e.g.,* Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 743, 765 (1990/91) (after controlling for other factors, Texas prosecutors are *five times* as likely to seek death sentences against defendants accused of murdering white victims as those accused of murdering African-American victims, and *twice* as likely to seek death sentences against defendants accused of murdering white victims as those accused of murdering Hispanic victims).

This Court should reverse. Alternatively, this Court should remand for a hearing and order the discovery on this issue sought by Appellant. (6 CR 1677-78).

### **Appellant's Nineteenth Point of Error**

#### **The Eighth Amendment's Prohibition Against Cruel and Unusual Punishment and the Fourteenth Amendment's Due Process Clause Prohibit Max Soffar's Execution, Given that He Has Spent Close to Twenty-Five Years Awaiting it.**

Soffar has been on death row for close to 25 years.<sup>34</sup> His lengthy and torturous incarceration amounts to cruel and unusual punishment and violates his due process rights. *See* U.S. Const. amends. VIII & XIV.<sup>35</sup> *See also* *Lackey v. Texas*, 514 U.S. 1045 (1995) (opinion of Stevens, J., respecting denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari). At the time the U.S. Constitution was written, over twenty-five years under sentence of death was clearly “unusual.” *Id.* at 944. During the past three decades, a number of jurists have recognized the torturous effects of “death-row phenomenon.”<sup>36</sup> Additionally, several foreign courts have found death-row phenomenon cruel and inhumane.<sup>37</sup> Thus, this Court must reform Soffar's death sentence to a sentence of life imprisonment.

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<sup>34</sup> Appellant was sentenced to death in March of 1981. (1 CR 15). In December of 2004, he won habeas relief, and was sentenced to death again in March of 2006.

<sup>35</sup> Defense counsel preserved this argument in a written pretrial motion. (2 CR 538-54).

<sup>36</sup> *See, e.g., Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in the denial of certiorari); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (“In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”); *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring).

<sup>37</sup> *See, e.g., Soering v. United Kingdom*, 11 EUR. HUM. RTS. REP. 439 (1989) (refusing to extradite a German national to face capital charges because of anticipated time that he would have to spend on death row).

### Appellant's Twentieth Point of Error

**Appellant was denied the effective assistance of counsel because of counsel's prejudicial failures to object and protect Appellant's rights.**

Max Soffar was entitled to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). Where a preponderance of the evidence in the record demonstrates that there "is no plausible professional reason for a specific act or omission," a claim of ineffective assistance of counsel may be raised on direct appeal and sustained if there is sufficient prejudice. *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Here, the "totality" of counsel's errors prejudiced Appellant's rights to a fair trial and requires reversal. *Ex parte Nailor*, 149 S.W.3d 125, 130 (Tex. Crim. App. 2004).

First, counsel failed to object, or state all of the proper grounds for objection, to some of the prosecution's most blatantly unfair and impermissible arguments during its guilt summation. As discussed in Appellant's Twelfth Point of Error, *supra*, incorporated herein, the prosecution argued that: 1) the defense had not presented any evidence of an alternative perpetrator or false confession, (35 RR 9); 2) details in Soffar's putative confession could only have been known by the perpetrator, (35 RR 11, 22-23); and 3) that there were no medical records to support the defense argument that Soffar's hospitalization in a mental hospital contributed to the likelihood of a false confession. (35 RR 82). All of these misleading arguments impermissibly shifted the burden of proof to Soffar and misrepresented the truth. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269-72

(1959); *McKenzie v. State*, 617 S.W.2d 211, 221 (Tex. Crim. App. 1981). Counsel objected only to the prosecution’s comment about the missing medical records, and then cited only the burden-shifting grounds. (35 RR 82). If this Court rejects the argument in Appellant’s Twelfth Point of Error that the prosecution’s arguments were so egregious that “no instruction to disregard could possibly cure the harm,” *Willis*, 785 S.W.2d at 385, this Court should find counsel ineffective for failing to object and/or failing to object on all possibly meritorious grounds. Moreover, when the prosecution argued that the defense had not presented evidence of an alternative perpetrator or of a false confession and that details of Soffar’s “confession” could only have been known by the perpetrator, counsel was ineffective for failing to move for a mistrial or to reopen the defense case to present evidence of Reid’s guilt and the media dissemination of details of the crime.<sup>38</sup> There was no plausible professional reason for these failures because counsel had everything to gain and nothing to lose by responding as an advocate to the prosecution’s improper arguments. Counsel’s failures were constitutionally deficient and prejudicial. *See, e.g., Thomas v. State*, 812 S.W.2d 346, 450 (Tex. App. – Dallas 1991, *pet. ref’d*) (finding ineffective assistance due to failure to object to improper prosecution argument). Had counsel objected successfully, there is more than a reasonable probability that the jury would have found Soffar not guilty. Had counsel’s objection been overruled (or had the court sustained the objection but denied a mistrial motion), counsel would have preserved a meritorious appellate argument. Appellant’s Twelfth Point of Error, *supra*.

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<sup>38</sup> *See* Appellant’s Fourth Point of Error, *supra*, incorporated herein. *See also Skipper*, 476 U.S. at 5 n.1.

Second, counsel failed to object to penalty-phase instructions that violated Appellant's constitutional rights by nullifying the value of mitigation evidence, introducing irrelevant factors, and reducing the prosecution's burden of proof. *See Appellant's Sixteenth Point of Error*, subpoints (a), (b), and (d), *supra*.<sup>39</sup> Ignorance of the law was the only plausible reason for counsel's quiet acquiescence.<sup>40</sup> Counsel had everything to gain and nothing to lose by objecting. No valid strategic reason can exist for allowing a court to misinstruct a capital jury in a manner that makes it more difficult for the defendant to win a life sentence. Had counsel objected successfully, there is a reasonable probability that Soffar would have received a life sentence. Had counsel's objection been overruled, he would have preserved a meritorious issue for appeal. Counsel's ineffectiveness was prejudicial to Soffar's right to a fair sentencing trial.

Third, if this Court finds that counsel waived the claim that the trial court erred under TEXAS CODE OF CRIMINAL PROCEDURE Article 38.22 § 3 (a)(1) in admitting Max Soffar's oral statements, (30 RR 151-53; 31 RR 70), *but see Appellant's Eleventh Point of Error*, this Court should find counsel ineffective. Counsel's purpose in the first instance in lodging a statutory objection to the statements was to suppress them. Any failures in articulation and follow-through were due to counsel's ignorance of the law, not

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<sup>39</sup> Counsel's ineffectiveness is an alternative argument to the argument that counsel preserved the argument set forth in subpoint (a) of Appellant's Sixteenth Point of Error.

<sup>40</sup> *See Ex parte Drinkert*, 821 S.W.2d 953, 956 (Tex. Crim. App. 1991) ("Trial counsel's failure to object to the indictment, jury charge, and jury argument were not the result of a reasonable professional judgment, but rather of ignorance of criminal procedure."). *See also Luchenburg v. Smith*, 79 F.3d 388, 393 (4th Cir. 1996) (finding counsel ineffective for failure to request an expanded jury instruction that more accurately described state law).

a strategic purpose. But for counsel's error, Soffar would have: (1) persuaded the court to suppress the statements; or (2) preserved a meritorious appellate issue. *See id.*

Fourth, even though defense counsel clearly preserved an equal protection challenge to the systemic discrimination against women and Hispanics in the selection of the grand jury (*see Appellant's Fifth Point of Error, supra*), if this Court rules otherwise, defense counsel was ineffective for failing to do so. There could have been no plausible reason for such a failure. Had counsel succeeded in convincing the court, based on the Equal Protection claim, the indictment would have been dismissed – clearly the goal of counsel's motion in the first instance. Had counsel failed, he would have preserved a meritorious appellate issue. *See id.* But for counsel's failure, there is more than a reasonable probability of a different outcome on the motion to quash. But for counsel's unprofessional errors, there is a reasonable probability of either dismissal of the indictment, an acquittal or a life sentence. *Strickland*, 466 U.S. at 687. When the prejudice of counsel's errors is combined, it is even clearer that the "totality" of counsel's errors prejudiced Appellant's rights to a fair trial. *Ex parte Nailor*, 149 S.W.3d at 130.

**Appellant's Twenty-first Point of Error**

**This Court should reverse due to the cumulative harm of the errors.**

If the Court finds two or more errors harmless, Appellant is entitled to reversal due to the *cumulative harm* of the errors. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999) (citing *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988) (considering cumulative effect of errors)).