

could “serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.”²³⁰

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

INSTRUCTIONAL ERRORS AT SENTENCING

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

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

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

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

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

Texas jurors must answer two questions²³² at the penalty phase of a capital trial: (1) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (herein "future dangerousness"); and (2) "whether ... there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed" (herein "mitigation catchall"). Art. 37.071 § 2(e)(1). This statute segregates one type of mitigation, lack of future dangerousness, from all other mitigation.²³³ A death sentence may be imposed only if the jury answers yes to the future dangerousness question and

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

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

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

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

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

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

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

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

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

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

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

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

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

The deliberating jurors submitted the following note to the trial court: “What happens if we can’t come to a decision on issue #1?” 24 RR 41-42; 2 CR 544-45. This question confirmed that the jury did **not** know that capital punishment could not be imposed without unanimous agreement, contrary to the *Lawton* Court’s “savings” interpretation, and accordingly did not know they need **not** agree on mitigation. *Compare*, 913 S.W.2d at 559. The jury likely believed²³⁶ that they must reach a majority of 10 before finding the mitigating factor of lack of future dangerousness or finding sufficient mitigation. There is an intolerably high

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

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

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

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

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

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

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

RR 41, 2 CR 540-41.²³⁹ Combined with the instruction’s mandatory language -- the jury “shall” answer “yes” or “no” on the verdict form -- this response was unduly coercive and violated Mr. Estrada’s rights to be free of cruel and unusual punishment, to have his jury consider and give effect to his mitigation, to fair and individualized sentencing, to a fair jury trial, and to due process of law.²⁴⁰

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

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

²³⁹ According to counsel’s motion for a new trial, the jury’s death verdict followed in 30 minutes. SCR2 3.

²⁴⁰ *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) (“[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration.”).

²⁴¹ *See Smalls v. Batista*, 191 F.3d 272, 279 (2d Cir. 1999) (requiring “admonish[ment] . . . not to surrender . . . conscientiously held beliefs.”); *see also Howard v. State*, 941 S.W.2d 102, 124 (Tex.Crim.App. 1996) (approving instruction to “debate the issue in good faith, to reconsider their own views and **to change such views only if this could be done without violence to the juror’s individual conscience**”) (emphasis added); *Martinez v. State*, 131 S.W.3d 22, 41 (Tex. App.-San Anton. 2003, *reh’g overruled*) (similar).

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

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

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

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

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

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

²⁴³ See *id.*; *Rodriguez*, 758 S.W.2d at 788.

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

The Eighth Amendment gives jurors no such discretion. The United States Supreme Court’s “cases have established that the sentencer may not be precluded from considering, **and may not refuse to consider**, any constitutionally relevant mitigating evidence.” *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (emphasis added) (citations omitted). Indeed, the Court has held that such mitigating circumstances as a defendant’s “good conduct in jail ... **is . . . by its nature relevant to the sentencing determination.**” *Tennard*, 542 U.S. at 285, 287 (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)) (emphasis added)). Here, Appellant presented evidence of his good jail conduct as well as other inherently mitigating factors such as his good nature, willingness to help, thoughtfulness, caring, and good job performance. 23 RR 123, 127, 132-35, 139-141.

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

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

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

The trial court erred by overruling Appellant’s objection to the statutory charge requiring proof beyond a reasonable doubt of a “probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” Art. 37.071 § 2 (b)(1). *See* 1 CR 268-72. Appellant correctly argued that this instruction diluted the reasonable doubt standard.²⁴⁴

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

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

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

²⁴⁴ See U.S. Const. amends. VI, VIII, XIV. The State was constitutionally obligated to prove this special issue beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476-477; *Ring*, 536 U.S. at 609. In *Apprendi*, the Supreme Court interpreted the constitutional due-process and jury-trial guarantees to require that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. *But see Rayford v. State*, 125 S.W.3d 521, 534 (Tex.Crim.App. 2003) (rejecting this claim).

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

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

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

Tracking the statute, the trial court instructed the jury to answer the second special issue by deciding whether “there [is] a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.”²⁴⁶ 2 CR 555 (tracking Art. 37.071 §

²⁴⁵ *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (refusing to apply harmless error where the jury was improperly instructed on the burden of proof at the guilt/innocence phase).

²⁴⁶ Although not required for preservation, counsel objected to this unconstitutional aspect of the statute in pretrial motions. 1 CR 88-90; 2 CR 391, 441.

2(e)(1)). The statute violates the Eighth Amendment by requiring the defendant to disprove a death sentence is warranted. Under this scheme, once future dangerousness has been established under the first special issue, Art. 37.071 § 2 (b)(1), “death is to be deemed the appropriate penalty unless the defendant proves otherwise,” creating a “‘presumption of death’ in violation of the Eighth Amendment.”²⁴⁷ Reversal is required because this burden-shifting statute constitutes structural error. *Sullivan*, 508 U.S. at 281. In the alternative, in this close case, the State cannot prove the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 23-24. This Court should reverse.

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

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

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

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

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

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

The court erred by refusing Appellant's request for a charge that the jury could consider any residual doubt about his guilt as a mitigating circumstance. 1 CR 275-76. The Supreme Court recently left open whether capital defendants have a constitutional right to argue residual doubt evidence at sentencing. *See Oregon v. Guzek*, 546 U.S. 517 (2006).²⁴⁹ Given "abundant evidence accumulated in recent years" of exoneration of death-row inmates,²⁵⁰ "the evolving standards of

²⁴⁸ *See, e.g., Kennedy*, 128 S. Ct. at 2661 (citing "future dangerousness" inquiry as narrowing function).

²⁴⁹ This Court has cited the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164, 167 (1988), for the proposition that the "federal constitution does not require reconsideration by capital sentencing juries of 'residual doubts' about a defendant's guilt." *Blue v. State*, 125 S.W.3d 491, 502 (Tex.Crim.App. 2003) (citing *Franklin*). The *Blue* decision was before the Supreme Court in *Guzek* clarified that "*Franklin* did not resolve whether the Eighth Amendment affords capital defendants such a right." *Guzek*, 546 U.S. at 525. Moreover, in *Blue*, the admissibility of residual doubt evidence and counsel's ability to argue it was not at issue because the defendant in that case was permitted to do both. 125 S.W.3d at 502-03.

²⁵⁰ *See Baze*, 128 S. Ct. at 1551 (2008) (Stevens, J., concurring) ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

decency that mark the progress of a maturing society,” *Roper*, 543 U.S. at 561, demand that jurors be permitted to consider residual doubt before imposing the ultimate sentence. See U.S. Const. amends. VI, VIII, XIV. This rule, moreover, is constitutionally required where, to secure a sentence of death, Texas must prove future dangerousness, i.e. “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” Art. 37.071, § 2 (b)(1). Any evidence offered by the defense tending to disprove such future dangerousness – including evidence that the defendant was not guilty – would certainly be relevant and admissible in a Texas sentencing proceeding, and the jury should have been so instructed. *Skipper*, 476 U.S. at 5 n.1.

Moreover, as Appellant argued below, 1 CR 275-76, he had a right under Texas law to this instruction.²⁵¹ This Court should find as a matter of state law that capital defendants have a right to a residual doubt instruction.²⁵² Texas has a compelling interest in minimizing the possibility of executing an innocent person, an interest that would be served by permitting consideration of residual doubt.

²⁵¹ See Tex. Const. art 1, §§ 10, 13, 19, 29; Art. 37.071 § 2 (e)(1) (requiring capital sentencing juries to determine whether “sufficient mitigating circumstance or circumstances [exist] to warrant ... a sentence of life imprisonment,” including “the circumstances of the offense”).

²⁵² This Court is not bound by the Supreme Court’s decisions on the issue of residual doubt. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex.Crim.App. 1998). This Court should follow numerous of its sister jurisdictions in allowing the jury to consider residual doubt. See *Smith v. Black*, 904 F.2d 950, 968-69 (5th Cir. 1990), vacated on other grounds, 503 U.S. 930 (1992); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004) (and cases cited therein); *United States v. Davis*, 132 F. Supp. 2d 455 (E.D. La. 2001) (same); *State v. Webb*, 680 A.2d 147, 188-189 (Conn. 1996); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) *State v. Hartman*, 42 S.W.3d 44, 53-57 (Tenn. 2001) (reversing defendant’s death sentence due to preclusion of residual doubt evidence). See also Recommendation VII, *Mandatory Justice: Eighteen Reforms to the Death Penalty*, *The Constitution Project*, (judge should instruct jury that it may consider lingering doubt as mitigating factor) (<http://pewforum.org/deathpenalty/resources/reader/23.php3>) (last visited Oct. 29, 2008); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (demonstrating that “[r]esidual doubt’ over the defendant’s guilt is the most powerful ‘mitigating’ fact” for juries considering a death sentence).

By blocking consideration of mitigation evidence, the trial court committed structural error. *Nelson*, 472 F.3d at 314-15.²⁵³ In the alternative, reversal is required under the “some harm” test applicable when there has been an objection. *Abdnor*, 871 S.W.2d at 731-32. The jury’s consideration of residual doubt here was key. Lacking evidence that Mr. Estrada intended to kill the fetus, the evidence of guilt of capital murder in this case was weak. See Points 19, 20. Permitting the jury to consider residual doubt concerning Mr. Estrada’s guilt may well have tipped the scales in this close case to life. This Court should reverse.

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

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

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

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

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

Mr. Estrada presented mitigating evidence of his peaceful, respectful, and cooperative jail record and professional and personal life. By blocking consideration of mitigation evidence with this instruction, the trial court committed structural error. *Nelson*, 472 F.3d at 314-15.²⁵⁷ In the alternative, the instruction egregiously harmed Mr. Estrada by erroneously allowing the jury to

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

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

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

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

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

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

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

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

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

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

As Appellant objected below, 2 CR 388, his indictment was deficient because it did not contain grand jury findings of special issue one.²⁶⁰ Under Article 1, § 10 of the Texas Constitution, a criminal defendant need not “answer for a criminal offense, unless on an indictment of a grand jury.” Under Article 37.071, a capital defendant can receive a death sentence only if his jury finds the requisite special issues. Thus, before the State could seek a death sentence against Appellant, a grand jury had to find the future dangerousness special issue (effectively an aggravating factor), which is “the functional equivalent of an element of a greater offense.” *Ring*, 536 U.S. at 609 (internal quotation marks omitted).²⁶¹ In *Ring*, the Court held that statutory aggravating factors making a defendant death eligible are elements of the charged capital offense.²⁶²

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

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

²⁶¹ Because of *Ring*, federal courts now agree that aggravating circumstances must be found by a grand jury under the Fifth Amendment. See, e.g., *United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005) (*en banc*).

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

²⁶³ See *United States v. Resendiz-Ponce*, 425 F.3d 729, 732-33 (9th Cir. 2005), *rev’d on other grounds*, 549 U.S. 102 (2007).