CASE NO. AP-77,063

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JAMES CALVERT,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

ON DIRECT APPEAL FROM THE
241ST JUDICIAL DISTRICT COURT
SMITH COUNTY, TEXAS

BRIEF OF APPELLANT

DOUGLAS H. PARKS
State Bar No. 15520000
321 Calm Water Lane
Holly Lake Ranch, Texas 75755
(214) 521-2670
(903) 769-3465 (fax)

DAVID W. DEBRUIN
Admitted *Pro Hac Vice*
Jenner & Block, LLP
1099 New York Avenue, N.W.
Washington, D.C. 20001
(202) 639-6015

Attorneys for Appellant James Calvert

ORAL ARGUMENT REQUESTED

IDENTITIES OF PARTIES AND COUNSEL

James Calvert, Appellant

Jeffrey L. Haas, Appellant's trial counsel

Jason Doyle Cassel, Appellant's trial counsel

D. Matt Bingham, III, District Attorney

April Sikes, First Assistant District Attorney

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

This is a mandatory appeal from a conviction and sentence of death, which sentence was imposed on October 14, 2015. CR-25:5713. This brief is timely filed as per order of the Court of Criminal Appeals dated October 2, 2017.

REQUEST FOR ORAL ARGUMENT

Oral argument is respectfully requested. Appellant James Calvert was convicted and sentenced to death. There are numerous substantial issues, the record is exceedingly large, and oral argument will assist the Court to gain a full understanding of the case.

INTRODUCTION TO ISSUES PRESENTED[1]

Appellant James Calvert was convicted of shooting his ex-wife Jelena Sriraman six times, and leaving her home with the couple's 4-year old son **XXX**.[2] Calvert had no significant prior criminal record. He did, however, have a history of depression and mental illness.

The most significant issues in the case were (1) whether Calvert was guilty of murder or capital murder, and (2) if convicted of capital murder, the sentence Calvert

[1] To provide some context for the "Issues Presented" that follows, Appellant provides this brief introduction to the case and overview of issues, which Appellant includes in his word count.

[2] This minor child, featured prominently throughout the trial, will be referenced in this brief as "**XXX**" in accordance with Tex. R. App. Proc. 9.10. The couple's older daughter will be referenced as "**YYY**." Calvert's older son, by his first wife, will be referenced as "**ZZZ**."

would receive and whether he would be sentenced to death. The death penalty is properly reserved for the most extreme offenses, and only when imposed through procedures that are reliable and fair. The trial in this case was, respectfully, filled with prejudice and error, and it deprived Calvert of a fair determination of whether he was guilty of capital murder and should be sentenced to death.

In the most extreme incident, Calvert was subjected during trial to a severe and unnecessary 50,000-volt electric shock from a security device, simply because he had failed to stand when addressing the court. In a recent 2016 case, a state judge in Maryland was *prosecuted* by the Department of Justice and convicted of a violation of 18 U.S.C. § 242 in connection with a similar incident. This is not conduct for which the State of Texas should be known. The trial court had lesser alternatives, and allowing bailiffs to use a 50,000-volt shock device in these circumstances shocks the conscience and contributed to a violation of Calvert's right to a fair trial.

But this incident is far from the only significant issue. The trial was filled with improper and highly prejudicial testimony. For instance, a prominent witness for the State in the penalty phase was David Logan, a decorated military veteran who was stabbed in the eye with a pencil by a prison inmate while working at a Texas correctional facility, leaving Logan blind in that eye. The incident had nothing to do with Calvert, and yet Logan's testimony, along with a gruesome x-ray showing

the pencil still embedded four inches into Logan's brain, was admitted over objection. The entire trial was laced with highly prejudicial and improper conduct by the State.

This case also involves fundamental issues concerning the right to counsel in a death penalty case. Before trial, Calvert raised concerns regarding his court-appointed counsel. The court refused to consider appointing new counsel, but accepted Calvert's response that he then would waive counsel and proceed *pro se*. The court recognized that "I've never seen this before in a capital murder case where the State's seeking the death penalty." RR-21:80. Waiver of counsel in a highly-charged, complex death penalty case should not be permissible, just as a criminal defendant does not have a right to waive counsel on appeal. But in any event, the trial court erred in finding a knowing, voluntary, and intelligent waiver of the right to counsel here, for several reasons. One, the record before the trial court showed that Calvert had longstanding psychiatric issues, and the court failed to explore those issues in an adequate adversarial hearing. Two, Calvert made clear he did *not* wish to waive counsel, but only had problems with his existing counsel that were not adequately explored. The consequence of Calvert's waiver of counsel was predictable: Calvert did not receive a fair trial or proper determination of whether he should be sentenced to death precisely because he attempted to represent himself, putting his psychiatric issues on full display. Calvert was an obsessive-compulsive,

highly annoying criminal defendant. But these are not reasons for which he should be executed.

These are only some of the points of error in this case. These errors deprived Calvert of a fair trial, both on the issue of whether he was guilty of capital murder, and particularly on the ultimate issue of whether he should be sentenced to death. Calvert respectfully requests this Court to reverse the judgment below and remand for a new trial.

ISSUES PRESENTED

Point of Error No. 1: The trial court violated Calvert's rights to substantive and procedural due process by allowing him to be subjected to a 50,000 volt electric shock during trial for conduct that did not warrant such treatment, particularly when the court had far less drastic alternatives.

Point of Error No. 2: The trial court erred by refusing to grant a mistrial after the electric shock incident.

Point of Error No. 3: The trial court erred in reinserting Haas and Cassel as counsel, after Calvert had accused them of unethical conduct and attacked their performance.

Point of Error No. 4: This court should limit the *Faretta* rule and hold that a defendant in a capital case in which the state is seeking death cannot waive his constitutional right to counsel.

Point of Error No. 5: The trial court erred in finding that, despite his mental health issues, Calvert was competent to waive his right to counsel and represent himself at trial in this death penalty case.

Point of Error No. 6: The trial court erred in failing to appoint independent counsel on the question whether Calvert was competent to represent himself at trial in a death penalty case.

Point of Error No. 7: The trial court erred in finding a voluntary waiver of Calvert's right to counsel without adequately addressing Calvert's complaints with his appointed counsel or considering other alternatives.

Point of Error No. 8: Even if a valid waiver of counsel originally was found, proceedings before trial showed that, as a result of his mental health issues, Calvert could not adequately represent himself in a capital trial.

Point of Error No. 9: To the extent Calvert had a right to proceed *pro se*, both the state and the trial court improperly impaired and interfered with that right by making inappropriate comments regarding Calvert's performance as counsel during trial, and by undermining his efforts to represent himself.

Point of Error No. 10: To the extent Calvert had a right to proceed *pro se*, the trial court improperly *terminated* that right for conduct that did not pose any security risk and had not obstructed trial proceedings.

Point of Error No. 11: The prosecution engaged in egregious misconduct during closing argument in the guilt stage of the trial.

Point of Error No. 12: The prosecution engaged in egregious misconduct during closing argument in the penalty stage of the trial.

Point of Error No. 13: The trial court erred by allowing irrelevant and prejudicial testimony and questioning throughout the trial that was calculated to inflame the jury and deprive the defendant of a fair trial.

Point of Error No. 14: The trial court erred, under both Texas law and the Confrontation Clause of the Constitution, in admitting the hearsay testimony of Judith Lester, the therapist of –*XXX*–.

Point of Error No. 15: The trial court erred in admitting State Exhibit 4, –*XXX*–'s treatment records with Lester.

Point of Error No. 16: The trial court also erred in allowing Lester to testify regarding her personal opinions and impressions, and regarding –*XXX*–'s current feelings.

Point of Error No. 17: The trial court committed reversible error in admitting extensive and prejudicial hearsay statements of the victim, Jelena Sriraman.

Point of Error No. 18: The trial court committed further prejudicial error in allowing extensive additional prejudicial testimony by Debbie Calvert based on an improper ruling that Calvert had "opened the door" to such testimony.

Point of Error No. 19: The trial court erred in permitting the prosecution, over Calvert's repeated objections, to elicit opinion testimony and commentary regarding Calvert's statement to the police.

Point of Error No. 20: The trial court abused its discretion when it admitted irrelevant and prejudicial evidence of firearms found in Appellant's automobile at the time of his arrest.

Point of Error No. 21: The evidence was insufficient to find Appellant guilty of murder in the course of kidnapping or attempted kidnapping.

Point of Error No. 22: The trial court erred in refusing to instruct the jury regarding the statutory affirmative defense to kidnapping.

Point of Error No. 23: Calvert was denied his right to a unanimous verdict, in violation of both the Texas and U.S. Constitution, when the trial court refused to use a special verdict form as requested by defense counsel, thereby allowing the jurors to fail to agree unanimously on the underlying offense needed to establish capital murder.

Point of Error No. 24: The trial court committed reversible error by admitting irrelevant and highly inflammatory evidence concerning a violent attack that severely injured a witness, a state correction officer, when Calvert had no involvement in the incident.

Point of Error No. 25: The trial court erred in allowing improper opinion testimony and other improper evidence at the penalty phase hearing.

Point of Error No. 26: The Texas capital sentencing statute's definition of "mitigating evidence" is unconstitutional because it limits the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of the capital murder.

Point of Error No. 27: The Texas capital sentencing statute's definition of "mitigating evidence" is unconstitutional, as applied to Appellant, because it limits the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of the capital murder.

Point of Error No. 28: The trial court erred in refusing to strike venirepersons Bressman, Malone, and Welch.

Point of Error No. 29: The trial court deprived Calvert of his right to be present at all essential proceedings in his case when the court excused several prospective jurors at a time when Calvert was not present.

STATEMENT OF FACTS

A. The Incident

On October 31, 2012, Calvert shot his ex-wife Jelena Sriraman several times at her home. The couple had two children, **YYY** and **XXX**. At a family court hearing on October 19, 2012, Ms. Sriraman was authorized to move the children up to 500 miles from their present home in Tyler, which would allow her to move to Houston with the children. As a result, Calvert's visitation with his children was reduced. RR-128:177-84; SX-27, SX-28.

The State elicited hearsay testimony from **XXX**'s counselor, Judith Lester, that **XXX** told her: "He heard a knock at the door. The door opened, and then his father shot his mother." RR-128:59. Two witnesses, Shonda Emmert and Robin Dickerson, separately heard the shots, and both saw a man carry **XXX**, then 4-years old, from Ms. Sriraman's home and get into a white car. RR-132:65-74; RR-137:23-35. Both witnesses testified that the man they saw looked like Calvert. Emmert and Dickerson went to the home, found Ms. Sriraman, and called 911. Shortly after the incident, a police bulletin was issued for Calvert and the vehicle.

Later that same day, Det. Raymond Spoon of the West Monroe, Louisiana, police department, who had not heard the bulletin, saw Calvert driving on an interstate and thought he might be transporting drugs. RR-139:87-88. Det. Spoon pulled out behind Calvert, who immediately tried to exit the interstate, committing a traffic infraction in the process. RR-139:88-89. Det. Spoon activated his flashers, but Calvert did not stop and a police chase ensued, including other police vehicles. One officer passed Calvert and testified he looked "dazed" and was "[j]ust staring at us. Normally when people run from us, they don't just stare at you." RR-140:184. Ultimately, Calvert was trapped. He did not immediately exit the vehicle, and he had a pistol between his legs, which he did not use. RR-139:163-64. An officer grabbed the gun, and Calvert was pulled from the car. RR-139:165-67. **XXX** was in the back seat, in his car seat. Officer Justin Cummings, who pulled the gun from Calvert's lap, testified that Calvert "made a very conscious statement of 'Just don't shoot my child.'" RR-140:186.

In addition to being found with **XXX**, Calvert also had the firearm still in his possession that testimony later showed was used in the shooting, as well as Ms. Sriraman's cell phone, which had been in her possession that day.

From the outset, Calvert was a difficult and non-compliant prisoner, but there was no actual violence. At the scene of his arrest, Calvert was "passive resistant" and "stiffened up," making it difficult to place him in a squad car. RR-142:55. At

the station, he removed a metal grate in his holding cell and held it "like a weapon," but did not attempt to use it. RR-145:88-89, 94.

Calvert had a history of abusive behavior, both with Ms. Sriraman and with Deirdre Adams, his first ex-wife. He had two previous misdemeanor convictions for assault on a family member and violation of a protective order, but no other criminal record. CR-1:170. Calvert also had a history of mental health issues, as described further below.

B. Pretrial Proceedings

On November 5, 2012, Calvert was indicted on three capital murder charges: (1) murder in the course of kidnapping; (2) murder in the course of burglary; and (3) murder in the course of robbery. CR-1:1. Calvert was held in lieu of posting bail set at $25 million. The State filed notice of election to seek the death penalty. CR-1:94.

The court appointed Jeff Haas as first chair counsel for Calvert, and Jason Cassel as second chair counsel. CR-1:22, 63. Haas promptly filed a motion to appoint a psychologist/ psychiatrist to assist in the defense. Supp. CR-1/3:119. But not long after being appointed, on February 20, 2013, Haas filed a motion to withdraw, stating that he and Calvert "have difficulty communicating" and Calvert had requested him to file a motion to withdraw. CR-1:79. The court conducted an *ex parte* hearing on February 28, 2013. RR-5. Haas stated there might be a plea of

not guilty by reason of insanity, and that there were a number of things Calvert wanted to pursue that Haas believed were premature. RR-5:9-12. Calvert was sworn, and he explained that "Sir, I just feel that he [Haas]'s going to sell me out, and he's already decided on what my fate is going to be," and that Haas "has a set predestined plan." RR-5:21-22, 26. The court indicated it would not replace Haas with other counsel, and Calvert stated he would rather proceed *pro se* than continue with Haas. RR-5:22. The court directed Calvert to continue to work with Haas.

Pretrial proceedings continued, and the State filed notices of 449 witnesses it might call and 236 expert witnesses. CR-1:102, 120. The State produced voluminous discovery, including extensive electronic media. Prior to trial, jail officials reported that a search of Calvert's cell, which was part of a shared nine-cell block, yielded a paperclip that purportedly had been bent into a handcuff key, nail clippers, and a razor. RR-10:5-6; RR-162:29-32.

On November 14, 2013, Haas advised the court that Calvert wished to proceed *pro se*. *See* RR-12:3. The court immediately solicited recommendations from the State and defense counsel for a psychiatrist to assess Calvert's competency to waive counsel. Supp. CR 2/3:144, 145. The State recommended Mitchell Dunn or Stephen Thorne; defense counsel recommended Tom Allen or Tim Proctor. *Id*. The court selected Dunn. Supp. CR 2/3:119.

Dunn conducted an examination of Calvert, reviewed extensive psychiatric records, and prepared a report. Supp. CR 2/3:120. Dunn diagnosed Calvert with "Major Depressive Disorder, Recurrent, in Partial Remission" and "Personality Disorder Not Otherwise Specified, with Antisocial and Obsessive-Compulsive Features." Supp. CR 2/3:124. Dunn described that Calvert "has a history of rigid behaviors, consistent with obsessive-compulsive personality features." Supp. CR 2/3:125. Despite these facts, Dunn offered his opinion that Calvert was competent to waive his right to counsel in a death penalty case. Supp. CR 2/3:128. At an extensive hearing on February 6, 2014, the court refused to appoint other counsel and allowed Calvert to proceed *pro se*, after an extensive description of the dangers of doing so. RR-13; RR-14. Dunn did not testify at the hearing, and neither Calvert, Haas, or Cassel on the one hand, nor the State or the court on the other, questioned Dunn's opinion. In allowing Calvert to proceed *pro se*, the court retained Haas and Cassel as "standby counsel."

From the moment Calvert began to represent himself, pretrial proceedings became enormously protracted and difficult, and those proceedings made clear that Calvert could not represent himself in a death penalty case and still receive a fair trial. At an early hearing, the State informed the court that Calvert had been placed on a suicide watch at the jail. RR-21:25. But consistent with Dunn's report that Calvert had "a history of rigid behaviors, consistent with obsessive-compulsive

personality features," Calvert also filed a constant barrage of pretrial motions. At a hearing on December 4, 2014 – some ten months after Calvert proceeded *pro se*, and still more than eight months before trial – the court noted to Calvert "I think we're pushing up towards a hundred pretrial motions you're filing." RR-44:23-24. Many of Calvert's motions were bizarre and incomprehensible, *see*, *e.g.*, Supp. CR 3/3:145, but many also concerned Calvert's poorly-informed but also severely-restricted efforts from a jail cell to review the State's voluminous discovery and electronic media materials, to have access to a computer, and to somehow prepare for a death penalty trial – all rendered even more difficult because Calvert's own investigators and experts often appeared not to be working zealously enough, and Calvert either sought to replace them or they moved to withdraw. *See*, *e.g.*, Supp. CR 1/3:76; Supp. CR 2/3:11; Supp. CR 1/3:230.

Calvert's behavior led to constant friction with the court. Among other things, Calvert was persistent in pretrial hearings to attempt to get all his numerous and often convoluted objections on the record, as the court tried to rule on objections and move forward. This led to problems, because the court required Calvert to sit down as soon as the court had ruled, but to stand when making objections and addressing the court. *See*, *e.g.*, RR-20:5-6; RR-124:24-26.

Calvert at times expressed frustration regarding when he was supposed to stand or sit. For instance, Calvert once asked: "I have a question for the Court as

far as protocol and so forth. I was standing up just a minute ago, and I was addressing the Court – . . . I would just ask the Court, am I supposed to sit down now?" RR-131:160. Calvert also objected to the fact that sheriff deputies often bumped him while he was attempting to speak or forced him into his chair, and "goad me into being upset, as I'm already stressed out enough as it is." RR-124:24-25. Calvert tried to explain at one hearing:

> If I'm arguing my objections on my – or my motions or whatever, I have the right to stand up. And I've been ordered by the Court to stand up in doing so. So when I'm trying to do this, it disrupts my ability to be able to present my arguments and my objections and so forth. I've never been a disruption, as far as being to any security risk whatsoever. I stand right here in front of this table where I am now… I'm pretty passive and sitting right here. I may be in active argument with the Court arguing my motions, but that does not make me a security risk per se.

RR-124:26-27.

Because of these difficulties and frictions, which appear throughout the record, the State contended at a pretrial hearing on April 21, 2015, that Calvert should be "removed as his own lawyer." RR-70:115. In one pretrial hearing, the State addressed Calvert as "butthead." RR-44:113. Long before trial even started, the proceedings in this case were a train wreck, and it was clear Calvert could not represent himself and receive a fair trial.

But more significant, the State took advantage of Calvert as a *pro se* litigant, and the court allowed it. This in turn led to reactions by Calvert, which then were

used against him in his own death penalty trial. *See*, *e.g.*, RR-162:153-154; RR-163:6-13.

For instance, one extended sequence shows how Calvert was harmed through his efforts to proceed *pro se* and the State's response. Many of Calvert's pretrial motions concerned the fact that a computer Calvert was given to use at the jail – which had all his trial preparation materials – was taken away, and it took months before Calvert was able to get it back. Then in another incident, a search was made of Calvert's jail cell; certain of his trial preparation materials were seized or photographed; and those materials later were produced by the State *back* to Calvert as discovery. RR-63. What followed shows how Calvert's good faith efforts to represent himself ultimately led to evidence the State used to contend he should be executed.

Calvert asserted that the materials taken from his cell and produced back in discovery contained his protected work product, including information about potential defense witnesses, and he filed motions to dismiss the indictment for prosecutorial misconduct and to disqualify the District Attorney. RR-63; CR-9:2177, 2187. At a hearing on the motions, Calvert called himself as a witness and attempted to introduce as exhibits the discovery he had received back from the State of items taken from his cell. The State raised inapplicable objections that the exhibits contained "hearsay" and could not be "authenticated" by Calvert, which the court

sustained. RR-63:28, 86, 136. The State also argued Calvert waived his work product rights by testifying and asked him on cross to disclose *other* witnesses; Calvert objected, but the court overruled Calvert's objection. RR-63:42-43. The hearing was a farce, and it showed how Calvert was taken advantage of as a *pro se* litigant. But matters got worse.

The hearing continued to a second day, and Calvert continued to argue for the admissibility of his exhibits, finally making a comment, "If the Court can understand this case law, it's very clear." RR-64:37. The court immediately lectured Calvert and ordered him not to make such comments "or we'll just stop the hearing and you can go back and sit in your cell." RR-64:37. Perhaps concerned of his own frustration and possibility of speaking out, Calvert responded, "[t]hat sounds good, Your Honor. Let's do that." RR-64:37. After Calvert repeated that "I'll just go back to my cell" and stating he was willing to hold his motion until trial, RR-64:38, Calvert then went mute and refused to speak again or respond further to the court. RR-64:39-48.

There was another pretrial hearing five days later. RR-66. At that hearing, Calvert again complained about trial preparation material taken from his cell, some of which he had not gotten back. RR-66:75-76. Calvert also complained that the State had brought to the previous hearing several of his potential defense witnesses, and he stated that by doing so the State was harassing his witnesses. RR-66:77-78.

Calvert pressed the point, trying to explain himself. RR-66:78-83. At one point, after the court ruled that the State could subpoena any witness to a hearing, Calvert was pushed down into his chair as he continued speaking. RR-66:81, 83. The court then asked Calvert whether he had anything else, and Calvert responded, "Your Honor, if you ruled against me, you're not allowing me to argue that particular motion, then it's done." RR-66:84. The court then, by its own description, "talked loud to him because I wanted him to sit down because I had ruled," RR-66:85-86, but the court ultimately said again, "if you want to go forward on this motion, go ahead." RR-66:84. Calvert responded and said, disrespectfully, "Skeen, I'm done with you, man" and "I'm done with you, Skeen." RR-66:84-85. The court immediately ordered Calvert taken back to the jail, and stated proceedings would continue two days later. RR-66:85-86.

At that hearing, the court lectured Calvert he could lose his right to proceed *pro se* with disrespectful comments, the court addressed other issues, and the hearing was adjourned to the following day. RR-67. There, the court again addressed the search of Calvert's cell and his motions arising out of that search. RR-68. At the end of the hearing, the court coordinator indicated that the exhibits Calvert had tried to introduce earlier were missing, and she believed Calvert may have taken them back with him. RR-68:258. These were simply "Bates stamped photos" the State had produced in discovery. *Id*. The court asked Calvert whether he had them, and

he stated that he did not. RR-68:258-59. Calvert explained, "somebody gave me a list ... and I − I've looked through everything I can find, and I haven't − I don't have them." RR-68:260. But Calvert stated he was happy to search his materials again. He emphasized to the court:

> I don't know. I have − I have looked for them. I don't have them. That's all I know. *I'll look again. I don't mind doing that. My jail cell is in a wreck right now. I'm trying to get it back together, and obviously will have to go through a lot of my paperwork. And I'm sure they'll turn up if I have them*; if not, then it's not my responsibility.

RR-68:262 (emphasis added).

Despite this offer, the court responded, "if I need to, I'll just have the sheriff go through, look and see if he can find them in your cell. I mean, do you have them or not or do you know?" RR-68:262-63. Calvert reiterated, "I don't mind looking again, but my paperwork is in a state of chaos right now.... I will have everything in line next Tuesday and be able to tell the Court definitively if I have them or not." RR-68:263. Despite this, the State contended it would be "a good idea" to have "the sheriff's office go through and look at Mr. Calvert's things." RR-68:264. Calvert repeated, "If the Court would give me until Tuesday to go through − " RR-68:264. Yet the State pressed to have the sheriff search through Calvert's papers, before he "shreds them and puts them in a garbage bag." RR-68:264-65. Calvert stressed he had no incentive to shred the very materials he sought to have entered as exhibits: "Your Honor, I don't have − I would not shred anything like that. Those exhibits

have to be on the record and entered. I just need a little bit of time." RR-68:265. The court responded it had "no problem" ordering the sheriff to search Calvert's papers, causing Calvert to complain "that's going to be a violation obviously of my work product...." RR-68:265. The State continued to press for a search of Calvert's cell, and the court agreed: "I order a search of the cell." RR-68:266.

The next hearing was four days later. RR-70. The State called a Sheriff's Department employee who testified that "[w]e took everything from his cell, as ordered by the Judge, and proceeded to go through his contents." RR-70:14-15. Calvert declined to participate or cooperate with the search. SX364. Ultimately, the Lieutenant came to an envelope that had the missing exhibits and other papers. RR-70:15-16. Based on the testimony, the State moved the court to hold Calvert in *contempt*. RR-70:114. In response, Calvert argued it made no sense to suggest he had committed a malicious act, because "those items in evidence being D1 through D7, *were all items of evidence offered by me*. So *I need those in the court record* for appellate reasons.... So for me to do this on purpose would have served no − no reason whatsoever other than − I don't know. There's no reason for me to do that." RR-70:116 (emphasis added). Calvert explained he had picked up a lot of papers in court and had stuck them in an envelope, RR-70:117, and he apologized:

> So if I − if I did this, Your Honor, I'm sorry. I don't know what else to say other than that. I was willing to look for these items. The Court − the record will show that, that I didn't have a problem looking for it....

> So I'm just asking the Court to understand that what happened is an accident, and I'm sorry. I don't know what else to say. It's not something that would have made sense for me to do it maliciously.

RR-70:118-19. The court nevertheless found Calvert in contempt, for what "the Court finds to be your deliberate actions in secreting these exhibits." RR-70:127. The court also sentenced Calvert to "[t]he maximum I can give you is six months. You've got six months for contempt of court for your actions." RR-70:128. And as described below, the State relied heavily on this very incident, and others like it, as further reason why Calvert should be executed.

Another extreme example of the court's failure to appropriately manage and respect Calvert's untrained efforts to represent himself occurred immediately before trial, at a hearing on August 24, 2015. RR-125. Calvert requested that two women he had subpoenaed for trial be excluded from the courtroom under the rule on witnesses, and he called himself as a witness to lay a foundation as to why he believed their testimony would be relevant. RR-125:68-71. The State then cross-examined Calvert, claiming he had just waived his Fifth Amendment right for all purposes and badgering him to confess to the crime. RR-125:80-89. In just one question (of what went on for 10 pages of transcript), District Attorney Bingham hounded Calvert:

> Well, Mr. Calvert, you know, here's the deal, is you always think you run things, and you don't. So here's the question: If you didn't shoot her, just say so. That's not incriminating you. If you did not shoot

> Jelena on October 31st, 2012, then why don't you lean your mouth up to that microphone and say: No, I didn't shoot her? It doesn't incriminate you to say, I didn't shoot somebody, so just say it.

RR-125:85. The court overruled Calvert's objections to this question and every other question the District Attorney asked. This was the environment in which Calvert attempted to proceed *pro se*.

Calvert was unquestionably a difficult, paranoid, obsessive-compulsive *pro se* litigant and jail inmate. But as an untrained *pro se* litigant, Calvert also tried to prepare a defense, protect what he perceived to be his work product, and preserve objections. And there *was* a defense Calvert was trying to prepare and protect; as he explained at one hearing, he was focused most heavily on trying to compile "mitigating and exculpatory" videos, photographs, and evidence concerning "my friends, my family, my relationship with my ex-wives, my kids, and all doing certain activities such as going to the circus, going to the fair, going to putt-putt, going to the park over at Rose Rudman, going to the lake, going out of state to Kentucky and Ohio on visits." RR-68:204-05; RR-68:255 ("There are mitigating and exculpatory items that are videos, home videos, pictures of me, pictures of me with my kids, my kids, and there's many, many hundreds if not thousands of videos.").

C. Trial Proceedings

The following is a brief summary of key portions of the trial proceedings. Additional facts are presented where appropriate in the specific points of error that follow.

1. Guilt Phase

With Calvert as *pro se* counsel, the trial proceeded much like the pretrial proceedings. Just as Calvert had filed countless pretrial motions, he objected to everything at trial, somehow attempting to preserve every potential issue for review. At one point, the State commented that Calvert had made 41 objections in 15 minutes. RR-131:163.

Many of Calvert's objections during trial were bizarre. Calvert sought to examine one witness, Shonda Emmert, regarding her address and date of birth, claiming he had reason to believe Emmert might not actually be the person she claimed to be. RR-132:99-101. Similarly, with regard to a police witness, Justin Cummings, Calvert moved "to have the officer show actual identity of himself and have it on the record." RR-140:174. Calvert repeated that he wanted the officer "[t]o actually show his identity, that he is actually the person that he purports to be." RR-140:174 Calvert asked at one point to make certain objections by stating the word "foxtrot," RR-150:37, 40, and he objected "to hearsay in total, as far as any things that would – any letters of the alphabet that would compose words that would

be asserted to be truthful at any time," RR-129:60-61. All of this occurred before the jury, and these kinds of questions and behaviors were constant.

In terms of evidence, the State opened its case by calling Judith Lester, a therapist for **XXX**, who was then seven years old. Over Calvert's objection, the court allowed Lester to testify about hearsay statements **XXX** had made concerning the incident, without any showing by the State that **XXX** was unavailable or unable to testify directly. The court then allowed Lester to testify further regarding her own opinions of the impact of the incident on **XXX**.

The State also called several witnesses to testify regarding extensive hearsay statements made by the victim, Ms. Sriraman, including that she was "terrified" of Calvert.

The State called numerous police officers from West Monroe, Louisiana, regarding the circumstances of Calvert's arrest. But for each witness, District Attorney Bingham asked numerous irrelevant and prejudicial questions regarding **XXX** and the police officers' own children. The prosecutor asked one officer, "Do you keep a picture of **XXX** in your home?" and asked him to explain why. RR-140:129-30. He asked another officer about his own children. RR-141:83-87. With another officer, the prosecutor asked: "And as you went back there and saw that little boy pulled out of the car, being a father yourself, it did make you mad, didn't it?" RR-142:51-52. And then there were extended speeches by the prosecutor, as

well, as stated to another officer: "And I assume you know probably – of course, y'all don't – you don't need a pat on the back, but you know what y'all did that night was tremendous in locating **XXX**, and then what you did for him after you got him away from that scene was – I mean, you really made a difference, and you know that, I hope." RR-142:136-37; RR-142:141 ("[Y]ou obviously will get into the fight, but you have a big heart as well. Were you mad when you saw **XXX** in the back of that car and what he'd just been subjected to – "). Improper questions and testimonials like this from the State occurred throughout the trial; additional examples are provided throughout this brief.

The State also called numerous crime scene officers and technicians. Again, District Attorney Bingham used these witnesses to make highly prejudicial, argumentative speeches before the jury, and he was allowed to review the crime scene evidence over and over again. *See*, *e.g.*, RR-158:38-39 (questioning of medical examiner) ("Is there any – can you think of another word to describe – I mean, what she's experiencing in her body before the headshot physiologically, the – the shooter has fired a projectile that's torn through both her lungs, her back, her kidney, her liver. She's gut shot. She's shot in the back. Is there any other word to describe what she's experiencing other than awful and horrific? I mean, how do you describe something like that?").

Both the State and the trial court made repeated, disparaging comments about Calvert's attempts to represent himself as a *pro se* litigant, all before the jury. District Attorney Bingham claimed that Calvert "makes these ridiculous-looking faces," RR-151:78, and that he "doesn't care what the Court says or what the rules are," RR-153:10. At one point, the District Attorney remarked: "In his zero years of trying cases in the courtroom – and I'm just trying to say – we object to his incessant objection." RR-132:56. Similarly, the trial court let its views be evident. After Calvert's first cross-examination, with regard to Calvert's request to have the witness subject to recall, the court stated in the jury's presence, "I don't want to use the word 'waste,' but I don't want to take up any more of the jury's time on this…." RR-128:104. At the conclusion of his cross of another witness, Calvert tried to state that he had additional questions he wished to ask from videos, which were not accessible to him. The court responded: "Do you have any more questions for the witness as you stand there right now before this jury? That's my question to you. And I don't need a speech." RR-141:81.

Just like the pretrial proceedings, the trial also involved constant friction regarding whether Calvert stood up or sat down properly, as he attempted to make his objections and preserve his record. *See*, *e.g.*, RR-136:76-78 (Calvert: "I object to what's happening here…. [Officer] Sheffield is pressing me down, and I am just trying to make objections. And then the jury is viewing that.").

In one noteworthy instance, District Attorney Bingham asked a police officer, "Do you remember that Halloween in reference to your daughter? … And what was significant? I mean, I know all Halloweens anytime with your child, your daughter, is significant, but as far as that Halloween, tell me about that." RR-141:83. Calvert stood to object to the obviously improper question. RR-141:83. The court responded: "That's overruled. Have a seat." RR-141:83. Calvert tried to state his objection on the record: "Can I get – " RR-141:83. The court interrupted: "It's overruled. Have a seat." RR-141:83. Calvert repeated: "Can I just get my objections in, Your Honor?" RR-141:83-84. The court responded: "It's overruled." RR-141:84. At this point Calvert stated, referring to the court security officer: "Then I object to this person – " The court again interrupted: "*Listen to me*. *Listen to me*. Your objection to that question is overruled. That's the Court's ruling." RR-141:84 (emphasis added). Calvert repeated: "Then I also object to this officer – " The court again interrupted: "I said have a seat, so when I say have a seat, you have a seat. Go ahead, Mr. Bingham." RR-141:84. District Attorney Bingham then continued: "Do you recall – go ahead. I'm sorry, Officer Cummings. It was the first Halloween that your daughter, who's about one-and-a-half, was walking?" RR-

141:84. The testimony continued on, regarding how Officer Cummings' young daughter had spent that particular Halloween. RR-141:84-85.[3]

The friction regarding Calvert's failures to sit or stand as the court wanted came to a head before the conclusion of the State's case. Shortly before trial commenced, the court had advised Calvert: "I consider you a security risk. Any capital murder defendant in a courtroom is a security risk. That's why you're shackled up. That's why you're going to have a shock belt on with 40,000 volts in it, and a man sitting right behind you is going to have the trigger." RR-124:28. And Calvert in fact wore an electric shock device throughout the trial.

On the afternoon of September 15, 2015, during an argument with the jury excused, the court stated to Calvert (and in the presence of the security officers): "These deputies are not going to put up with you. *You know the remedy they have got*." RR-155:71 (emphasis added). The court later repeated that if Calvert did not behave "properly," "[t]he deputy has got a shock device in their hand…. [T]hey will use whatever means they have to control you." RR-155:75. The court also made clear this warning extended to the court's instructions regarding "proper court

[3] The court routinely overruled virtually every objection made by Calvert. District Attorney Bingham asked one witness, "*If you had to guess* who this wallet belonged to, who would it be?" RR-150:26 (emphasis added). Calvert objected, stating: "It calls for speculation." *Id*. The court overruled the objection. In contrast, the court sustained virtually every objection made by the State.

decorum," including when Calvert should stand and sit. RR-155:76-77. Calvert complained about being touched and handled by the deputies, and he stated: "If I'm sitting here, I'm no security threat." RR-155:77. The court responded: "*I'm not talking a security threat*. I'm talking about you listening to me. When the jury comes in, stand up. When you object, stand up. When the Court rules, sit down." RR-155:77 (emphasis added).

Later that day, the court excused the jury, and stated: "*Be seated*. The jury is out of the courtroom." RR-155:221 (emphasis added). The judge asked Calvert a question, and Calvert gave a short response, apparently without standing. The court then told Calvert to "[s]tand up when you talk to the Court." RR-155:221. Then, while the *court* was talking, and without Calvert stating anything more, two sheriff deputies told Calvert on the record to "stand up" and the transcript then reads: "***Shock bracelet activated on defendant.***" RR-155:221 (emphasis in original). Calvert did not present any security threat, and in fact he was sitting down. The lead officer present, Captain Caraway, later testified and acknowledged that Calvert was not making a move toward the District Attorney, the court, or any court personnel; he simply "was being disrespectful" and "wasn't standing up when he was supposed to and wasn't sitting down when he was supposed to." RR-163:27-28. Although the jury had just been excused, the court later acknowledged that "[t]his Court, of

course, cannot say how far up the hall or – how far up the hall the jury went…." RR-157:24.

After Calvert was shocked with 50,000 volts of electricity, he made a statement: "I'm sure the Court very much enjoyed that." RR-155:221. Based on that statement, the court terminated Calvert's *pro se* right and reinserted Haas and Cassel as counsel. RR-155:221-22. Calvert stated: "I was just shocked, Your Honor. I was just shocked." RR-155:222. The court reiterated its ruling that Haas and Cassel were "back in as counsel." RR-155:224. Calvert attempted to say, "Can I just say – " but the court interrupted and said, "We are in recess." RR-155:224.

The following day, the court adjourned the proceedings until September 28, 2015. RR-156. When the parties returned on that day, Haas moved for a mistrial. RR-157:15. With regard to the shock incident, Haas, who was present when it happened (and throughout the trial), stated: "God knows, if the jury, which I highly suspect, did here the screams that Mr. Calvert let out after he was zapped." RR-157:16-17. Haas also argued: "The record should also reflect, if it doesn't – and I certainly understand the frustration of the security personnel, but there were times where the security personnel, in the presence of the jury – and I might add that what I'm talking about all occurred in the presence of the jury – were basically, in my opinion, putting – pushing Mr. Calvert's buttons. They were forcing him down and pushing him up…. At no time, in my opinion, was Mr. Calvert a security threat.

However, security personnel did take it upon themselves, without instruction from the Court, to impose their sense of discipline on Mr. Calvert." RR-157:16-17. Haas also based his request for a mistrial on the fact that "there have been comments made by the District Attorney's Office in response to objections or making objections that just didn't go to the objections but were basically extrajudicial comments that interjected new facts in evidence that, frankly, should not have been in the view of trial counsel. The – the Court, at times, in my opinion, have made comments on the weight of the evidence." RR-157:16.

All of these things, Haas argued, "basically abrogated basically the very fairness of this trial." RR-157:16. Counsel noted that the Supreme Court has emphasized that a sentence of "death is different," and "basically I'm asking the court to grant this mistrial because I think Mr. Calvert's due process rights have been basically violated." RR-157:17. The court denied the motion, stating it had given Calvert "warnings after warnings." RR-157:21, 26.

The guilt phase continued largely without incident after Haas and Cassel were re-inserted as counsel for Calvert. Calvert did not act out or interfere with the proceedings. After the State rested, defense counsel moved for a directed verdict on the charges of murder in the course of kidnapping and murder in the course of robbery, on the ground that "there's just no evidence in the record to suggest that the intent to commit robbery or kidnapping prior to or during the commission of the

offense is present in this case." RR-161:4, 5. The State agreed to dismiss the charge of murder in the course of robbery. RR-161:10-11. The court denied the motion with regard to the charge of murder in the course of kidnapping. RR-161:14. As a result, the jury was instructed on both murder in the course of kidnapping and murder in the course of burglary. CR-25:5631-32. Defense counsel moved for a special verdict form, "given the unique set of facts in this situation and that we're dealing with the alleged abduction of Mr. Calvert's child." RR-161:42. The court denied that request. RR-161:45. The verdict form allowed the jury to find Calvert simply "GUILTY of the offense of **CAPITAL MURDER** as charged in the indictment." CR-25:5641.

At the charge conference, the court also ruled it would not instruct the jury on the statutory affirmative defense to kidnapping. RR-161:25-37.

After the defense motion for a directed verdict was denied, the defense rested without presenting any evidence. RR-161:50.

Closing arguments by the State were exceptionally improper and prejudicial. The prosecution referred to Calvert as "the evil that sits in this courtroom," "monsters that sit over there," and "selfish coward," among other demonizations. RR-161:125, 135, 141-42. Referring to Ms. Sriraman and her children, the prosecution implored the jury: "They need us to be here. Don't you want to stand up for them? Don't you wish you could have protected them?" RR-161:142-43.

The prosecution reconstructed the crime with no support in actual evidence: "Did **XXX** call out as he was taking him out of that carport, 'Mama; mama'? I think he did. I think the evidence supports that he called out for her. He loved her. A lot of little boys love their mamas. I submit to you the evidence clearly supports that with the last bit of pure will and strength she had, she tried to look at **XXX** when he called, 'Mama,' and she tries to raise her head, but he put a bullet through the back of it." RR-161:134. The prosecution commented on Calvert's demeanor: "See him laughing and smirking and shaking his head." RR-161:126; RR-161:123 ("[T]hat's what you've got right there, sitting right there with a smirk on his face most of the trial. You saw it. That's a killer. That's evil."). The prosecution injected itself into the case: "So let it impact you. It should. It's personal to me, and I pray to God it's personal to you." RR-161:140; RR-161:150 ("We're all here. We're all speaking for her. But the truth is we can only do so much … only you can hold him accountable. I told you earlier I know it. I know he's guilty of capital murder."). Above all, the prosecutors preyed on the jury's emotions, and pleaded with the jury to decide the case *based* on prejudice and emotion: "Did the thought of him holding **XXX** while he shot Jelena make you sick to your stomach? Did it take your breath away? Did it make you cry?" RR-161:141; RR-161:125 ("Should it make you have feelings of prejudice against that selfish coward? Yes. If it doesn't, we have failed miserably. That's ridiculous.").

In their closing, defense counsel acknowledged the sufficiency of the evidence to convict Calvert of murder, but focused on the weakness of the evidence that Calvert had the intention to kidnap **XXX** at the time of the murder. In addition, given evidence that Calvert had knocked before entering, counsel argued the weakness of the evidence of forced entry into the home, as needed to find murder in connection with burglary. RR-161:113-21.

In the course of their deliberations, the jury sent one note: "We request to see the report(s) from **XXX**['s] counselor entered as evidence." CR-25:5643. The jury then returned its verdict, finding Calvert guilty of the offense of "capital murder" "as charged in the indictment." CR-25:5641.

2. Penalty Phase

The State called 24 witnesses in the penalty phase. Thirteen of those witnesses were Sheriff's Department personnel who testified regarding Calvert's behavior at the jail, in transport to or from the jail, or in courtroom proceedings, during the time that Calvert was proceeding *pro se*. Calvert was a difficult inmate who often was uncooperative – at times to the point of needing to be carried or wheeled into the courtroom, *see*, *e.g.*, SX361, SX362 – and at times insulting to guards. But the State's witnesses repeatedly acknowledged that Calvert was never physically assaultive. RR-162:114 ("he never physically assaulted anybody"); RR-163:18 ("[n]o incidents whatsoever of Mr. Calvert ever assaulting an inmate or assaulting a

guard"); RR-163:114 (never known Calvert to be violent to anybody at the jail); RR-163:160; RR-164:146 (witness not aware of Calvert ever punching, hitting, kicking a guard, or anything like that, or inciting others).

And several deputies reported they had no problems with Calvert. RR-163:75 (Denice Johnigan: Calvert never disrespectful); RR-163:99 (Linda Adams: "I've never really had a problem with him, no, sir."); RR-163:126 (Dwight Murr: "I never had a problem with Mr. Calvert."); RR-163:146 (Jason Jones: "No, sir, I never had any problems with him."); RR-164:137 (Larry Wiginton: "for the most part, he was very respectful to me").

There was extensive testimony about a search of Calvert's cell at the Smith County jail, in connection with a search of a nine-cell block. All the inmates in the block were removed from their cells, and a search of all the cells yielded various items, several of which were then attributed to Calvert. RR-162:31-32; SX351. Items attributed to Calvert included a paperclip apparently bent into a handcuff key, a nail clippers, and a razor. RR-162:29-30. The paperclip itself was not introduced into evidence for the jury to inspect and apparently had been lost, RR-164:144-145, and only a photograph was offered. SX350, SX351. With regard to the razor, those were given to inmates at the jail, but then collected. RR-162:29; RR-163:126.[4] The

[4] State witness Dwight Murr volunteered that at the Bradshaw State Jail where he had worked, "Those men have razor blades all the time…. They're allowed them." RR-163:127.

State asked numerous witnesses whether the paperclip and razor were sufficient for them to conclude that Calvert would continue to be dangerous in prison.

Significantly, the State used witnesses from the Sheriff's Department to introduce evidence of Calvert's courtroom behavior in pretrial hearings, when Calvert was proceeding *pro se*. This included extensive evidence about the exhibits Calvert supposedly took, described at length above, and his refusal to assist in the search of his cell after the court refused Calvert's repeated offers to look again for the exhibits. *See* RR-162:154 (questioning by State concerning "*those six stolen exhibits from court*" (emphasis added)); SX364 (video of search and Calvert's belligerent response); RR-163:7-13 (further questioning by State, "So he has stolen these things from a court proceeding, yet he's barking out orders and accusations about everything everyone else is doing wrong.") *but see* RR-164:140-141 (Calvert working on computer, with legal materials spread out, at time of search).

The State selected videos that had been made of pretrial proceedings and asked a Sheriff deputy who had been present in court to opine whether the videos showed "times in this courtroom where Mr. Calvert's conduct has not been appropriate?" RR-164:184. The State went so far as to ask: "I'll just ask you this: True statement that Judge Skeen has been abundantly patient with James Calvert?" RR-164:185. Deputy Vandergriff responded: "That is too true. He's been very patient." *Id*. The State went on at length regarding its opinion, and soliciting the

opinion of another witness, Deputy Sheffield, regarding Calvert's behavior in pretrial hearings:

> Sikes: Mr. Calvert, when he didn't get his way about hearing the motion that he wanted heard that day, he would argue back and forth, back and forth with the Judge, or then he'd just remain silent.
>
> Sheffield: Yes.
>
> Sikes: Was that a disrespect – disrespectful motion or gesture to you?
>
> Sheffield: Definitely.
>
> Sikes: When you would see Mr. Calvert sit there and Judge Skeen – do you believe Judge Skeen deserves more respect than that?
>
> Sheffield: He sure does.

RR-164:230. Although the State elicited extensive testimony chastising Calvert for arguing with the court during pretrial hearings and trying to get the deputies to stop touching him, *see*, *e.g.*, RR-164:186-192, 195-208, 225-236, the State did not show any video or ask any questions about the time it addressed Calvert in court as "butthead." RR-44:113.

The State also elicited testimony at the penalty-phase hearing from Deputy Sheffield about the electric shock incident during trial. RR-164:211 ("Tell the jury what happened.").

Apart from Calvert's conduct at the jail and in court, the State also called witnesses at the penalty phase associated with the Texas Department of Corrections,

who had no connection to Calvert. As described briefly above, one witness, David Logan, provided extremely graphic and prejudicial testimony about an incident – having nothing to do with Calvert whatsoever – in which an inmate had stabbed Logan in the eye with a pencil, leaving the pencil deeply embedded in Logan's brain. RR-164:8-61. Logan was paid to testify. RR-164:9. Similarly, the State asked another witness, Jason Jones, about an incident (again having nothing to do with Calvert) in which a prison guard "got his throat cut ear to ear." RR-163:138, 145; *see also* RR-163:138 ("How about the man that was just thrown off the second tier and beat to death with a picket?"). The State also argued and presented testimony, through TDC Assistant Warden Stephen Bryant, that because TDC apparently *chooses* to allow persons convicted of capital murder but not sentenced to death to have "the same rights" as "if I'm a thief and I got a 50-year sentence or a felony DWI that's enhanced," RR-162:11 – including the ability to watch TV, have recreation, have family visits, go to school, RR-164:65-74 – this is somehow relevant to how the jury should determine the statutory special issues in Calvert's case.

Another theme of the State at the penalty phase was that *anyone* sentenced to life in prison had no reason *not* to be violent and dangerous. Thus, the State "asked" Captain Caraway: "Let me ask you this: He's been convicted of capital murder. Say that you went over there and – I mean, what, really, can you do to him now?

He's looking at life or death now." RR-163:39. Caraway responded, "Nothing." *Id.*; RR-163:91 (State questions to Denice Johnigan: "But really what are you going to do to him? He's looking at the death penalty or life without parole. I mean, he could stick a knife in a guard, and there's nothing y'all can do to him, right? ... He's kind of got immunity, true?").

Apart from the 15 witnesses who were jail or correctional personnel, the State also called seven witnesses – including Calvert's first wife Deirdre Adams, two former girlfriends, Calvert's estranged sister Debbie Campbell, and two friends of Ms. Sriraman – largely to describe Calvert's relationship with women. In general, these witnesses testified that Calvert treated women badly. There were incidents of physical abuse, in the late 1990s, involving Ms. Adams, particularly one incident in which Calvert had pushed and dragged Ms. Adams, the police were called, and Calvert pleaded guilty to a misdemeanor assault. RR-165:99-114.[5] With regard to the assault conviction, Ms. Adams acknowledged that Calvert had apologized for hurting Ms. Adams; that it was Calvert who had called 911; and that Calvert later successfully completed his probation. RR-165:153-159. In addition to the serious incidents of physical abuse involving Ms. Adams, the testimony concerned significant verbal and psychological abuse (including serious threats) of other

[5] Ms. Adams also testified that Calvert had choked her and one time put a gun to her head. RR-165:105.

women Calvert had known, and a non-violent violation of a protective order. *See* RR-167:27-28 (Calvert's violation of protective order involving Ms. Sriraman consisted of driving by house one time, and another time holding up sign saying "I love you, Pooh Bear," but not doing anything threatening or physical on either occasion); RR-167:97-100. There also was extensive testimony associating some of Calvert's abusive or erratic behavior to times when he had not taken medicine prescribed for his psychiatric issues. *See* RR-165:34-35, 116-118, 136-138; RR-166:37.

The State also asked Kimberly Johnson, a friend of Ms. Sriraman, "how did you feel when you heard about" the shooting, and then: "So let me just ask you this: I mean, you've testified she was – she lifted people up. She was obviously a great person … great mother. I mean, what is it you want this jury to hear about Jelena? What would you want them to remember about Jelena?" RR-167:76-77; *see also* RR-167:159 (question of Laura Jackson, friend of Ms. Sriraman: "What do you miss about Jelena?").

Finally, the State called two witnesses to testify regarding Calvert's psychiatric issues, neither of whom had ever treated or even interviewed Calvert. With regard to the first witness, Dr. Edward Gripon, the State again turned to Calvert's decision to proceed *pro se* and his behavior as a *pro se* litigant as somehow relevant to the penalty phase issue whether he should be sentenced to death. Thus,

the State asked Dr. Gripon: "You had the chance to observe the defendant. You got to see him firsthand as he acted in court, the things he did representing himself. Was there things about that that was probative to you?" RR-167:195-196. Gripon responded: "Well, certainly. I mean, you could see characteristics. Probably wanting to be one's own lawyer is either somewhat paranoid or somewhat narcissistic or a combination of both because that's a little unusual." RR-167:196. Gripon continued, apparently describing Calvert: "A very controlling individual, a very excessive individual, a person who is overly organized, he's extremely rigid, extremely rigid." *Id*.

The State again asked Gripon about times Calvert had not been "respectful of the Court," even though "Judge Skeen obviously has been extremely patient with him." RR-167:198.

In addition, after asking Gripon to describe Calvert's psychiatric conditions, the State asked Gripon to opine on ultimate issues in the case, including: "But, I mean, as far as when the jury is looking at these diagnoses and *does that mitigate the defendant's actions in shooting his wife* or … I mean, just what I'm saying is, *is it relevant to these things at all, as far as his culpability*?" RR-167:210 (emphasis added). And: "There's nothing in this case – bottom line Doctor – be the last question I have, and I appreciate you being here. We all know what he's done. Is

there any valid medical or psychiatric – anything psychiatric that excuses his conduct?" RR-167:241-242.

The second psychiatrist and last witness for the State was Dr. Michael Arambula. RR-168:15-126. Arambula again addressed Calvert's behavior as a *pro se* litigant, testifying that Calvert "had trouble behaving in court, obeying a district judge. He had big issues with that. And that's because of his personality." RR-168:40. And although Arambula supposedly was *not* called to offer "an ultimate opinion" as to Calvert's future dangerousness, RR-168:6-7, he testified that because of "how he [Calvert] interacts," then "when a woman, in particular, per his records, doesn't do what he wants, then she's going to be at risk of being assaulted, threatened, restrained, in order to – or else he could control the situation by threatening, restraining, choking, hitting, any of those things to control it…. So that's how we are taught to assess these risks for future acts of violence." RR-168:42; *see generally* RR-168:44-58, 87-105. Much of the State's questioning concerned Calvert's behavior as a *pro se* litigant, particularly the incident when the court required his cell to be searched, rejecting Calvert's offer to look for the missing records himself. At one point, the State summarized its theory: "He's awaiting trial on this ultimate issue of guilt, and he's still acting this way. I don't know. I mean, do you look at that as an incentive?" Arambula responded: "Well, I look at it as

personality pathology, because we all get it, but he doesn't get it, and that's the reason." RR-168:94-95.

After the State rested, the defense called one witness, Jason Calvert. RR-169:10-106. Jason was Calvert's cousin and the current custodian of Calvert's two minor children, **YYY** and **XXX**. RR-169:10-13. He testified that Calvert had been a great father to his oldest son **ZZZ**, that he was a great father to **YYY** and **XXX** – "Good, attentive, showing them how to do things, coaching them … coaching the kids, showing them right from wrong" – and that the most important thing to Calvert was "being a good father." RR-169:16, 18-19.

Defense counsel then advised the court he would not call other defense witnesses, although Calvert disagreed with that decision. RR-170:10-11. Calvert stated that "I also disagree that you're not offering more evidence as far as pictures, videos and so forth that I believe that you could have done without calling more witnesses," and that, at least in part because of that, he would exercise his Fifth Amendment right and not testify in the penalty phase. RR-170:11.

In closing arguments, the prosecution again transgressed virtually every boundary courts have recognized. Among other things, the State repeatedly commented on Calvert's failure to testify, emphasizing multiple times, "And there's no remorse…. Where's the acceptance of responsibility?... Where's the remorse?" RR-171:139-140. The State worked to inflame the passions of the jury and to have

jurors identify with the victim, making statements like: "The mamas on this jury, y'all know, don't you?... Y'all know what happened. 'Mama. Mama. Mama.' And with everything she's got, she raises that little head. Can you hardly stand that? I can't. She raises that little head up…. She raises her head to answer her baby, and what does she get for it? This one right here (indicating). He shattered the very brains of **XXX**'s mother right in front of him." RR-171:138-139; *see also* RR-171:142-143 ("I want you to think about those last minutes, I do, too."); RR-171:143 ("And how dare a jury in Smith County tell him otherwise."); RR-171:144 ("Should it be emotional to you? Yes. To every one of you. Every one of you. Because she deserves it."). The State again demonized Calvert, calling him a "[c]old-blooded, calculated, manipulating monster" and "[t]here it sits, and it goes by the name of James Calvert. Evil in its purest form." RR-171:130, 142.

The jury answer special issue one "yes," special issue two "no," and the court sentenced Calvert to death.

SUMMARY OF ARGUMENT

As summarized in the Introduction to the Issues Presented, *see supra* 1-4, this case presents numerous substantial issues, and Calvert is entitled to a new trial. Calvert presents in this brief a total of 29 distinct points of error. Appellant will not attempt to summarize each of those issues here. Fundamentally, Calvert was denied a fair trial because the trial court erred in finding that Calvert had adequately waived

his right to counsel and could proceed *pro se* in a complex, highly charged death penalty case. Calvert had known psychiatric issues and could not properly waive his right to counsel. *Indiana v. Edwards*, 554 U.S. 164 (2008); *Chadwick v. State*, 309 S.W.3d 558 (Tex. Crim. App. 2010); *Davis v. State*, 484 S.W.3d 579 (Tex. App. – Fort Worth 2016, no pet.). In addition, Calvert made clear he did *not* want to waive counsel, and a waiver should not have been found in these circumstances. *Renfro v. State*, 586 S.W.2d 496, 500 (Tex. Crim. App. 1979); *Burgess v. State*, 816 S.W.2d 424 (Tex. Crim. App. 1991).

But even more significant than an improper and inadequate waiver of the right to counsel, the entire record in this case shows that both the State and the trial court abused Calvert's *pro se* right. Both the State and the court made comments before the jury about Calvert's performance as a *pro se* defendant. More important, the State engaged in repeated and excessive misconduct in its questioning of witnesses, and Calvert's appropriate attempts to object were all rejected out-of-hand by the trial court, simply as a matter of course. This led to constant friction as Calvert attempted to make his objections on the record, with courtroom deputies enforcing when Calvert should sit or stand, often physically pushing him in front of the jury. Ultimately, this led to an incident in which Calvert was subjected to a 50,000-volt electric shock simply because he remained *sitting* when speaking to the court, when just seconds earlier the court had told him to sit. The incident itself is egregious –

indeed, a similar incident recently resulted in a federal court *conviction* of a state court judge – and warrants a new trial. But even more, it shows the extent to which this entire trial failed to comport with basic standards for the conduct of criminal proceedings, which exist as a matter of both Texas and federal law.

To the extent Calvert had a right to proceed *pro se*, that right was unduly impaired, and ultimately taken away for an inadequate reason. *Scarbrough v. State*, 777 S.W.2d 83, 94 (Tex. Crim. App. 1989). And even after defense counsel improperly were reinserted into the case, in the middle of the trial, extreme prosecutorial misconduct in the questioning of witnesses and in closing arguments continued – and the trial court continued to overrule virtually all objections. In the course of these proceedings, Calvert was denied a fair and proper determination of critical issues in the case: whether he was guilty of murder or capital murder, and whether he should be sentenced to death.

ARGUMENT

For the convenience of the Court, Appellant's Points of Error are organized as follows:

Electric shock incident issues:	Points of Error Nos. 1-3
Pro se / right to counsel issues:	Points of Error Nos. 4-10
Extreme prosecutorial misconduct issues:	Points of Error Nos. 11-13
Significant evidentiary issues:	Points of Error Nos. 14-20

Directed verdict / jury instruction issues:	Points of Error Nos. 21-23
Penalty phase issues:	Points of Error Nos. 24-27
Other issues:	Points of Error Nos. 28-29

ELECTRIC SHOCK INCIDENT ISSUES

POINT OF ERROR NO. 1

THE TRIAL COURT VIOLATED CALVERT'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS BY ALLOWING HIM TO BE SUBJECTED TO A 50,000 VOLT ELECTRIC SHOCK DURING TRIAL FOR CONDUCT THAT DID NOT WARRANT SUCH TREATMENT, PARTICULARLY WHEN THE COURT HAD FAR LESS DRASTIC ALTERNATIVES.

A. Facts

The trial court often was frustrated with Calvert, and most frequently regarding Calvert's failures to stand and sit as the court instructed. Calvert was to sit when examining witnesses, stand when addressing the court, and sit when the court had ruled. These directions are simple enough in the abstract, but at times were complicated in practice when Calvert, a *pro se* litigant, sought to get all his untrained objections on the record (which required him to stand), but the court believed it had heard enough and ruled (which required Calvert to sit). At other times, Calvert may have failed to stand or sit as instructed either out of distraction from the intensity of trial, frustration with the court, or other reasons. But Calvert's failures to sit or stand as instructed presented no threat to courtroom security or disruption of trial

proceedings. And if Calvert failed or refused to sit and stand as instructed, the court had alternative measures – it could require him to sit at all times; it could ignore or excuse some deviations from its courtroom rules; or it could determine whether these infractions were so important as to justify a revocation of Calvert's *pro se* right.

Instead, the court allowed sheriff deputies to administer a severe electric shock to Calvert, after threatening that this would occur. The jury itself had just left the courtroom and was likely outside in the hallway when this occurred and Calvert screamed. The incident was widely reported in the local press.

Prior to the shock incident, the court threatened Calvert by warning him what the deputies controlling his shock belt would do to him: "These deputies are not going to put up with you. *You know the remedy they have got*." RR-155:71 (emphasis added). The court soon reiterated that if Calvert did not behave "properly," "*[t]he deputy has got a shock device in their hand.... [T]hey will use whatever means they have to control you*." RR-155:75 (emphasis added). The court also made clear this extended to the court's instructions regarding "proper court decorum," including when Calvert should stand and sit. RR-155:76-77. Calvert complained about being touched and handled by the sheriff deputies, and he stated: "If I'm sitting here, I'm no security threat." RR-155:77. The court responded: "*I'm not talking a security threat.* I'm talking about you listening to me. When the jury

comes in, stand up. When you object, stand up. When the Court rules, sit down." RR-155:77 (emphasis added).

Later that day, the court's warning was carried out. Calvert was subjected to a severe electric shock for addressing the court while seated. This high-voltage electrical shock was inflicted on the record, in the courtroom, at the end of testimony for the day. The jury had been excused just moments before. According to the court, although the door was shut behind the jury, he had no idea "how far up the hall the jury went." RR-157:24.

The record is clear that deputies administered a strong and debilitating electrical shock to Calvert simply because he spoke to the Court while seated. The transcript shows that, immediately after the jury left the courtroom, the court stated: "*Be seated*. The jury is out of the courtroom." RR-155:221. The court immediately asked Calvert a question, "Where were you going with that, Mr. Calvert? You've still got Detective Shine's report." RR-155:221. Calvert gave a short (and respectful) response, apparently without standing up: "Your Honor, I understand Detective Shine doesn't remember everything that's before him. Obviously that would be next to impossible." The court asked, "Next to impossible to what?" and Calvert responded, "For him to be able to – " RR-155:221. The record then shows the following occurred, while the *court* was speaking:

Court: Stand up when you talk to the Court. All they need you to do is stand up when you talk to the Court. That's what lawyers do. They stand up. Mr. Haas, he's –

Captain Caraway: Stand up.

Sgt. Shoemaker: I told you to stand up.

Captain Caraway: Stand up.

(Shock bracelet activated on defendant.)

RR-155:221.

The court reporter's audio recording is not part of the record, and Calvert's scream when shocked with 50,000 volts is not reflected in the transcript. A contemporaneous news account reported that he screamed for approximately five seconds.[6] Standby counsel Haas, who was present in the courtroom when the incident occurred, later argued to the court: "God knows, if the jury, which I highly suspect, did hear the screams that Mr. Calvert let out after he was zapped." RR-157:16-17.

It is undisputed that Calvert was punished for no reason other than remaining seated while speaking to the court. He was not doing anything threatening. As Captain Ralph Caraway (who was in charge of securing Calvert and was present in the courtroom) later testified:

[6] *See*, *e.g.*, http://www.kltv.com/story/30036181/judge-administers-calverts-shock-belt-terminates-self-representation.

Q. At the time he was zapped … he wasn't making a move toward the DA. He wasn't making a move toward the Court. He wasn't making a move toward any court personnel. He was basically being, in your mind, disrespectful and wasn't standing up when he was supposed to and wasn't sitting down when he was supposed to, correct?

A. Yes, sir.

Q. Fair statement?

A. Yes, sir.

RR-163:28. Captain Caraway testified that the reason for administering the high-voltage shock was that Calvert "was being disrespectful in court." RR-163:27. According to Captain Caraway, he had already told his team "we're not putting up with it," and he was on the verge of giving the order himself to administer an electrical shock to Calvert, but then-Sergeant Shoemaker gave the order first. RR-163:27. Captain Caraway added he was "perfectly fine" with Shoemaker's order. RR-163:27.

At set forth above, the State elicited testimony at the penalty-phase hearing from Deputy Sheffield about the electric shock incident. RR-164:211.

B. Given That Calvert Was Not Shocked As A Security Measure And The Court Had Less Drastic Means To Protect Court Decorum, The Electric Shock Incident Violated Calvert's Substantive And Procedural Due Process Rights.

This case involves the intentional administration of an electric shock device because a defendant failed to stand when addressing the court. Shortly before trial,

the court advised Calvert he would be shackled with a shock belt with 40,000 volts in it. RR-124:28. A sheriff deputy testified that the device worn by Calvert actually transmitted 50,000 volts. RR-164:181. Cases have described that an apparently comparable electric shock device "delivers a 50,000-volt, three to four milliampere shock lasting eight seconds" and that "[o]nce the belt is activated, the electro-shock cannot be shortened." *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1234 (9th Cir. 2001). The device "causes incapacitation in the first few seconds and severe pain during the entire period." *Id*. It is suspected of having triggered a fatal cardiac arrhythmia. *Id*.

Counsel for Appellant is not aware of any case upholding administration of an electric shock device on a criminal defendant for failing to stand when addressing the court. But in a recent case in Maryland, a state judge was prosecuted by the Department of Justice – and convicted – for allowing an electric shock device to be used in similar circumstances. *See* Press Release, U.S. Att'y Office for the District of Maryland, *Former Charles County Circuit Court Judge Pleads Guilty to Civil Rights Violation* (Feb. 1, 2016), *https://www.justice.gov/usao-md/pr/former-charles-county-circuit-court-judge-pleads-guilty-civil-rights-violation*. As then-U.S. Attorney (and now Deputy Attorney General) Rod J. Rosenstein stated: "Disruptive defendants may be excluded from the courtroom and prosecuted for

obstruction of justice and contempt of court, but force may not be used in the absence of danger." *Id.*

In *Hawkins*, the court upheld an injunction barring use of an electric shock device in court proceedings "where no threat to security exists." 251 F.3d at 1242. In *Wrinkles v. State*, 749 N.E.2d 1179, 1194-95 (Ind. 2001), the Indiana Supreme Court went further and declared that "henceforth stun belts may not be used on defendants in the courtrooms of this State. This is so because we believe that the other forms of restraint listed above can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." *See also Stephenson v. Neal*, 865 F.3d 956, 959 (7th Cir. 2017) (directing vacation of death sentence because defendant's having to wear a stun belt, even though never activated, "contaminated the penalty phase of the trial").

Although Calvert was an indisputably difficult and annoying *pro se* litigant, nothing in this case justified the use of the electric shock device. The trial court had ample alternatives, as set forth above. Administration of the device in these circumstances violated Calvert's substantive due process rights and constitutes structural error, requiring reversal. It is established that "egregious official conduct" offends the Fourteenth Amendment guarantee of substantive due process, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), or conduct that "shocks the

conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). This qualifies. Indeed, as established by the recent case in Maryland, the conduct is itself criminal. Structural error, requiring reversal, is conduct that causes "fundamental unfairness" either (1) directly to "the defendant in the specific case," or (2) because it pervasively undermines the judicial system itself, the "systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Here both prongs are met.

The conduct at issue also should be found to constitute a violation of the Eighth Amendment of the United States Constitution, a violation of Art. I, Sec. 13 of the Texas Constitution (prohibiting the infliction of cruel or unusual punishment), and a violation of Art. I, Sec. 19 of the Texas Constitution (prohibiting deprivations of life, liberty or privileges except by the due course of the law).

POINT OF ERROR NO. 2

THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL AFTER THE ELECTRIC SHOCK INCIDENT.

Following the shock incident, the trial court terminated Calvert's *pro se* right and re-inserted Haas and Cassel as counsel. Haas promptly moved the court for a mistrial. RR-157:15. The grounds for a mistrial, made by counsel who had been simply watching the trial to that point, are significant. With regard to the electric shock incident, counsel argued:

> The record should also reflect, if it doesn't – and I certainly understand the frustration of the security personnel, but there were times where the security personnel, in the presence of the jury – and I might add that what I'm talking about all occurred in the presence of the jury – were basically, in my opinion, putting – pushing Mr. Calvert's buttons.
>
> They were forcing him down and pushing him up, indeed, shocked him, although that didn't take place in the presence of the jury. God knows, if the jury, which I highly suspect, did hear the screams that Mr. Calvert let out after he was zapped.
>
> At no time, in my opinion, was Mr. Calvert a security threat. However, security personnel did take it upon themselves, without instruction from the Court, to impose their sense of discipline on Mr. Calvert.

RR-157:16-17. Counsel acknowledged that "I understand that there's been a lot of time, a lot of inconvenience" spent on the trial to that point, but emphasized that "as the Supreme Court said … death is different. And basically I'm asking the Court to grant this mistrial because I think Mr. Calvert's due process rights have been basically violated." RR-157:17.

Counsel also moved for a mistrial for a separate reason. Counsel stated as an observer that "[t]here were some things that happened that basically abrogated … the very fairness of this trial." RR-157:16. Counsel continued that in particular, "there have been comments made by the District Attorney's Office in response to objections or making objections that just didn't go to the objections but were basically extrajudicial comments that interjected new facts in evidence that, frankly, should not have been in the view of trial counsel." RR-157:16. Counsel further

stated, "the Court, at times, in my opinion, have made comments on the weight of the evidence." RR-157:16.

The trial court erred in denying the motion for a mistrial. RR-157:26. For the reasons set forth above, the electric shock incident was a watershed event that was antithetical to the most fundamental concepts of a fair and proper trial. There was no way to know whether the jury had heard Calvert's screams and would be affected in their assessment of the sentence he should receive. Certainly, if the jurors heard Calvert's screams and realized that the assessment of the court itself was that Calvert was "bad" enough to subjected to a severe electric shock right there during trial, the message to the jury was that this person was "bad" enough to be sentenced most harshly, as well. As defense counsel acknowledged, counsel was presented with a Hobson's choice. Defense counsel did not ask for the jury to be questioned about the shock incident, stating that "all that would do is it would draw attention to the situation." RR-157:26. The court should have granted a mistrial because Calvert was subjected to a severe electric shock for inadequate and impermissible reasons, and the trial court could not find that the jury did *not* hear Calvert's screams. As the court acknowledged, "[t]his Court, of course, cannot say how far up the hall or – how far up the hall the jury went." RR-157:24.

A mistrial also was warranted because the entire shock incident was precipitated by constant friction whether Calvert would "stand" or "sit" properly,

which became an irrelevant and inappropriate side show throughout the trial. As argued below in Points of Error Nos. 4-8, Calvert should not have been allowed to proceed *pro se* in this death penalty trial. And the court's management of his difficult *pro se* representation, which ultimately led to a 50,000-volt electric shock incident simply because he remained sitting when addressing the court, shows that the trial of this case had gotten far off the rails and should have been reset.

For all these reasons, counsel was correct in seeking a mistrial because "Calvert's due process rights have been basically violated." RR-157:17. In addition, a mistrial also should have been granted for the additional reasons raised by counsel, which are authenticated in other points of error. *See* Points of Error Nos. 9, 13. Calvert was entitled to a trial at which appropriate objections to the constant, highly prejudicial questions and comments from the State would be sustained, rather than being overruled by the court simply because they were coming from an irritating *pro se* litigant. Yet that is what the record shows happened in this case.[7]

[7] As the Points of Error below show, Calvert made numerous objections throughout the trial as he proceeded *pro se* that were appropriate objections, but virtually all of his objections were overruled by the trial court as a matter of course. By the same token, virtually every objection made by the State to Calvert's questions was sustained, also as a matter of course. Many examples of this are shown in the Points of Error below. But there are countless more examples, because they occurred constantly, throughout the trial. It is impossible in one brief, even one that is beyond length, to highlight all the instances where the trial court inappropriately overruled a proper objection made by Calvert, and inappropriately sustained an improper objection made by the State. Again, numerous examples as set forth in the detailed and multiple Points of Error that follow.

Finally, a mistrial also should have been granted because it was unreasonable to force counsel to assume responsibility for a trial for which so much already had transpired. As Haas indicated, this trial had been a circus, and there was no way counsel could develop and implement a trial strategy so late into the trial. To force counsel into a case so late was largely equivalent to continuing the trial with no counsel at all: there effectively was nothing counsel could do, no new strategy or approach that could be developed. Counsel's hands had been tied. If the court felt compelled so late in the trial to require Calvert to proceed with counsel, the court also was compelled to grant a new trial where counsel could perform effectively as counsel.

Calvert's right to a mistrial following the electric shock incident is governed by the same Texas and federal constitutional provisions cited with respect to Point of Error No. 1: Art. I, Sec. 13 and Sec. 19 of the Texas Constitution; the Fourteenth Amendment of the United States Constitution (substantive due process); and the Eighth Amendment. In addition, with regard to the unfairness of the trial proceedings up to that point, *see* Points of Error Nos. 9 and 13 below, and authorities cited therein.

But there also are many more. And both individually and together, they added to the prejudice that Calvert faced in the trial. Calvert was made to look obstreperous and difficult, even when he was attempting as an untrained *pro se* litigant to make objections and protect his rights.

POINT OF ERROR NO. 3

THE TRIAL COURT ERRED IN REINSERTING HAAS AND CASSEL AS COUNSEL, AFTER CALVERT HAD ACCUSED THEM OF UNETHICAL CONDUCT AND ATTACKED THEIR PERFORMANCE.

In numerous pretrial filings and at pretrial hearings, Calvert accused Haas and Cassel of ineffective assistance, unethical conduct, and other wrongs. *See*, *e.g.*, RR-13:48 ("I've already filed grievances with the State Bar on Mr. Haas."); RR-13:8 ("There's been a variety of other matters as well that I've documented and that I've sent a copy to him and I've sent a copy to the grievance committee of the State Bar as well."); CR-2:464 (filing by Calvert expressing that "Defendant asserts that the relationship between himself and Haas, is at best strained, trustless, very problematic, and does not benefit Defendant" and attaching, as Exhibit A, written acknowledgement from State Bar of Texas of grievance filed by Calvert against Haas); CR-6:1472 ("Defendant's Motion for Court to Change the Selection of Assignment of 'Standby Counsel,'" detailing alleged improper disclosures of confidential information and other wrongs by Haas and Cassel); CR-22:5244.

Given the very personal allegations that had been made against them, it was unreasonable and improper for the court to force Haas and Cassel back into the case, in the middle of the trial, as counsel for Calvert. There clearly was a conflict of interest between Calvert, Haas, and Cassel, and in these circumstances it was unreasonable to conclude that Haas and Cassel could zealously represent Calvert

going forward in the case. Counsel had a disqualifying conflict of interest as a matter of both Texas and federal law. "A disciplinary proceeding brought by a client against counsel creates an actual conflict of interest." *Garner v. State*, 864 S.W.2d 92, 99 (Tex. App. – Houston [1st Dist.] 1993, writ. ref'd). As a result of the clear conflicts between Calvert and his appointed counsel Haas and Cassel, *see also infra*, at 77-82, the trial court erred in reinserting Haas and Cassel as counsel for Calvert in the middle of the trial. *Id*.; *Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003); *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

***PRO SE* / RIGHT TO COUNSEL ISSUES**

POINT OF ERROR NO. 4

THIS COURT SHOULD LIMIT THE *FARETTA* RULE AND HOLD THAT A DEFENDANT IN A CAPITAL CASE IN WHICH THE STATE IS SEEKING DEATH CANNOT WAIVE HIS CONSTITUTIONAL RIGHT TO COUNSEL.

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that a defendant in a criminal case has a constitutional right to waive the assistance of counsel and to proceed *pro se*. The case was decided over vigorous dissents, *id*. at 839 (Burger, C.J., dissenting) ("[T]he integrity of and public confidence in the system are undermined when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel."); *id*. at 849 (Blackmun, J., dissenting) ("I do

not believe any amount of *pro se* pleading can cure the injury to society of an unjust result."), and the doctrine has evoked strong criticism.[8]

Significantly, the constitutional right to represent oneself in a criminal proceeding is not absolute. In *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), the Supreme Court held that a criminal defendant does *not* have a constitutional right to waive the assistance of counsel on appeal and to proceed *pro se*. The Court noted that "[n]o one, including Martinez and the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient." *Id*. at 161. The Court continued that "[o]ur experience has taught us that a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney." *Id*. (internal quotation marks omitted). Indeed, although noting that "there are, without question, cases in which counsel's performance is ineffective," the Court emphasized that "[e]ven in those cases, however, it is reasonable to assume that counsel's performance is more effective" than what an unskilled defendant could provide. *Id*. Reviewing *Faretta* and its progeny, the Court concluded that "[e]ven at the trial level ... the

[8] *See*, *e.g.*, Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. Rev. 621 (2005); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self-Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 Seton Hall Const. L.J. 483 (1996).

government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id*. at 162. And "[i]n the appellate context, the balance between the two competing interests surely tips in favor of the State." *Id*. Thus, the Court in *Martinez* held that "the overriding state interest in the fair and efficient administration of justice" outweighs a criminal defendant's interest in self-representation on appeal. *Id*. at 163.

Counsel for Appellant are aware of no reported case in which this Court has addressed, on the merits, whether or under what circumstances a criminal defendant in a death penalty case should be allowed to waive the assistance of counsel. By its very nature, the imposition of a death sentence requires even more reliable and rigorous procedural protections, and surely "the overriding state interest in the fair and efficient administration of justice," *id*., outweighs a defendant's potential interest in self-representation in such cases. Death penalty litigation is inherently complex; only a small subset of *lawyers* are qualified to handle such cases. The stress of being on trial for one's life also renders it all the more impossible to attempt to serve as one's own lawyer. As this case abundantly shows, through all of the Points of Error raised here, a defendant in a death penalty case simply cannot represent himself adequately; a *pro se* defendant cannot raise appropriate objections and ensure a fair trial; and allowing defendants to proceed *pro se* in such cases imposes enormous costs and burdens on the entire judicial system, including trial

courts and local jails. This Court should rule that a defendant in a death penalty case cannot waive the assistance of counsel consistent with the constitutional demands of Due Process and the Eighth Amendment, any more than a defendant is allowed to waive counsel on appeal. *Scheanette v. State*, 144 S.W.3d 503, 505 n.2 (Tex. Crim. App. 2004). Just as this Court had power to restrict the *Faretta* right in *Scheanette*, it has power to do so in capital cases in which the State is seeking death. *See also Indiana v. Edwards*, 554 U.S. 164 (2008) (State has power to restrict waiver of counsel by defendant with mental health issues, discussed *infra*). The right to the effective assistance of counsel guaranteed by both Art. I, Sec. 10 of the Texas Constitution and the Sixth Amendment of the United States Constitution is too critical to be forfeited in a case in which the State is seeking death, as a matter of both Texas and federal law.

POINT OF ERROR NO. 5

THE TRIAL COURT ERRED IN FINDING THAT, DESPITE HIS MENTAL HEALTH ISSUES, CALVERT WAS COMPETENT TO WAIVE HIS RIGHT TO COUNSEL AND REPRESENT HIMSELF AT TRIAL IN THIS DEATH PENALTY CASE.

(together with) POINT OF ERROR NO. 6

THE TRIAL COURT ERRED IN FAILING TO APPOINT INDEPENDENT COUNSEL ON THE QUESTION WHETHER CALVERT WAS COMPETENT TO REPRESENT HIMSELF AT TRIAL IN A DEATH PENALTY CASE.

A. Background and Legal Standard.

At a minimum, waiver of counsel in a death penalty case must require an exacting assessment that a defendant truly has made a competent, knowing, intelligent, and voluntary waiver. Even if the assistance of counsel can be waived in a capital case, the record here strongly showed that Calvert had mental health issues that would impair his ability to represent himself, and the trial court did not conduct an appropriate, adversarial hearing to ensure that Calvert could waive counsel despite his mental health impairments.

Both the Supreme Court and this Court have recognized a significant limitation on any criminal defendant's right to proceed *pro se*, even in a non-capital case, which arises when a defendant's mental health issues would jeopardize his or her right to receive a fair trial without the assistance of counsel.

The Supreme Court addressed this issue at length in *Indiana v. Edwards*, 554 U.S. 164 (2008). In that case, the Court recognized there is a significant difference between mental competence to represent oneself at trial and competence to *stand* trial or even plead guilty, as was at issue in *Godinez v. Moran*, 509 U.S. 389 (1993). In *Godinez*, the Court had held that competence to waive counsel *and to plead guilty* must be measured by the same standard as competence to stand trial. *Id*. at 398-99. But in *Edwards*, the Court held that *Godinez* did *not* compel the same standard for measuring the defendant's competence to waive counsel and "to conduct trial

proceedings." 554 U.S. at 173.[9] With regard to that question, the Court held the inquiry was different: "In certain instances an individual may well be able to satisfy [the] mental competence standard [to stand trial], for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id*. at 175-76. The Court noted that in *Faretta*, it had cited a state court decision limiting the right of self-representation where mental health issues existed that "would ... deprive" the defendant "of a fair trial if allowed to conduct his own defense." *Faretta*, 422 U.S. at 813 n.9 (internal quotation marks and citation omitted). The Court in *Edwards* noted that the American Psychiatric Association (APA) had emphasized in an *amicus* brief, without dispute, that

> Disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.

Edwards, 554 U.S. at 176 (quoting Brief for APA, at 26). The Court in *Edwards* also underscored that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without

[9] As the Court emphasized: "To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue." *Edwards*, 554 U.S. at 173.

the assistance of counsel." *Id*. "To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id*. at 176-77.

For these reasons, the Court concluded in *Edwards*:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness *to the point where they are not competent to conduct trial proceedings by themselves*.

Id. at 177-78 (emphasis added).

This Court adopted the principles of *Edwards* in *Chadwick v. State*, 309 S.W.3d 558 (Tex. Crim. App. 2010). *Chadwick*, like *Edwards*, was a non-death penalty case. In *Chadwick*, the trial court had found the defendant competent to stand trial, but refused to allow him to proceed *pro se*. This Court affirmed, holding that "[t]he evidence in this case supported implied findings of fact that Chadwick's mental illness was severe enough to render him incompetent to proceed *pro se*, even though the trial judge deemed him competent to stand trial." 309 S.W.3d at 562. In

affirming the trial court, this Court noted that in the course of a pretrial hearing, "Chadwick interrupted his attorney several times. Chadwick objected several times, even as the judge granted the motions filed by his attorney." *Id*. Chadwick also had asked whether it would be "inappropriate to curse [the court] with every Israeli curse there is," and then uttered such a curse. *Id*. This Court also noted that, immediately before trial, Chadwick "engaged in a rambling monologue in which he launched personal attacks on the prosecutor, the judge, the bailiffs, judges from prior cases, and his attorney." *Id*. Based on all this, the trial court had denied Chadwick's request to represent himself, noting on the docket that he "could not properly conduct trial with Defendant representing himself." *Id*. In an initial affirmance, the court of appeals also had taken note of "several incoherent *pro se* written motions." *Id*. Given all these circumstances, this Court agreed that the trial court had not abused its discretion in denying Chadwick the right to represent himself.

Recently, in *Davis v. State*, 484 S.W.3d 579 (Tex. App. – Fort Worth 2016, no pet.), the Court of Appeals reversed a conviction in a non-capital case on the ground that the record did not support the trial court's determination that the defendant had the capacity to waive counsel and to represent herself at trial. In that case, the trial court appointed a psychologist to assess the defendant's competence, and the psychologist reported that the defendant had "a diagnosable mental illness/emotional disturbance"; that his impression of that illness was that it was an

"unspecified personality disorder"; that the defendant's level of impairment was "[m]ild to moderate"; and that "[h]er actions are not due to any psychotic mental processes and her behaviors are best understood to be of a volitional nature." *Id*. at 581-82. At a pretrial hearing, the trial court asked the defendant a number of questions about her understanding of her rights and her responsibilities in representing herself. The defendant responded that she understood it is generally unwise to represent yourself, but she said "I do not have trust that I would be appropriately represented." *Id*. at 584-85. She explained that her "trust was broken with the system," consistent with a bizarre conspiracy theory she had expressed to the court. *Id.* The trial court found the defendant competent to waive counsel and to proceed *pro se*.

The Court of Appeals reversed, and its decision is significant in three respects. One, the court held that the trial court violated article 46B.006 by failing to appoint counsel for the defendant before the competency evaluation. *Id*. at 586. Two, the court held that the defendant's waiver of counsel was not voluntary, but rather "was based on her fear that the attorney would be part of the system of harassment" that she believed existed against her, and that the record did not support that "a realistic account of her capacity to represent herself established any such capacity." *Id*. at 585. Three, the court found deprivation of counsel in these circumstances to be a structural error, which is "automatically reversible." *Id*. at 586-87.

Under the authority of *Edwards*, *Chadwick*, and *Davis*, the record in the instant case shows that the trial court erred as a matter of both Texas and federal law in finding that, despite clear mental health issues, Calvert was competent to waive his right to counsel and to serve as his own lawyer in a highly-charged, complex death penalty trial. In addition, the court erred by failing to appoint independent counsel to address whether Calvert could represent himself in a death penalty trial.

B. Facts.

The record in the instant case establishes the following. From the time of his arrest, there were questions in this case about Calvert's mental health. And almost immediately, he had problems with his appointed counsel. Calvert's initial presentment occurred on November 5, 2012, and lead counsel Jeffrey Haas was appointed the following day. CR-1:22.[10] On December 7, 2012, Haas filed a motion to appoint a psychologist/psychiatrist to assist the defense. Supp. CR-1/3:119. On February 20, 2013, Haas filed a motion to withdraw as counsel, stating that "Counsel and the Defendant have difficulty communicating so the Defendant request[s] that Counsel for the Defendant file this Motion to Withdraw." CR-1:79. At an *ex parte* hearing on February 28, 2013, Haas identified a potential plea of not guilty by reason of insanity, and he identified a number of things Calvert wanted to pursue (such as

[10] On December 4, 2012, Jason Cassel was appointed second chair counsel. CR-1:63.

to file a notice of intent to raise an insanity defense and to seek a change of venue because of prejudicial TV coverage) that Haas felt were premature. RR-5:9-12. Calvert told the court, "we're not able to communicate − I want you to withdraw" and "that's why we're here." RR-5:12. The court responded, "[w]ell, you better start working at communicating because ... I have heard nothing in this hearing ... to cause the Court to discharge Mr. Haas as your lead attorney." RR-5:21. Calvert persisted: "Sir, I just feel that he's going to sell me out, and he's already decided on what my fate is going to be.... I feel so strongly against this that I'd rather represent myself pro se than continue on with Mr. Haas, and I have that right." RR-5:21-22. Calvert continued to press and re-press his point, finally stating that Haas "has a set predestined plan." RR-5:23-26. The court declined to grant Haas's motion to withdraw and simply said to Calvert, "what I'm telling you is you make your best effort to communicate" and "you need to continue to see if you can work with Mr. Haas." RR-5:24, 28.

In the months that followed, the case became increasingly complex. The State filed an intention to seek the death penalty, CR-1:94, and notices of 449 lay witnesses it "may call ... in its case in chief" and 236 identified expert witnesses. CR-1:102, 120.

On November 14, 2013, Haas advised the court that Calvert wished to proceed *pro se*. *See* RR-12:3. That same day, the court apparently asked both the State and

defense counsel to recommend a psychologist to examine Calvert, and the State recommended Dr. Mitchell Dunn or Stephen Thorne. Supp. CR-2/3:144. Defense counsel recommended two other experts, Tom Allen and Tim Proctor. Supp. CR-2/3:145. The court appointed Dunn to conduct the examination, providing him with "a CD with discovery material" that apparently included psychiatric records of Calvert. Supp. CR-2/3:119.

At an *ex parte* hearing on November 19, 2013, the court advised Calvert that it would appoint a psychiatrist or psychologist to assess whether Calvert had the ability to knowingly and competently waive his right to counsel. RR-12:5. Calvert challenged the court to "cite the law that provides for that, because there is none." RR-12:7. The court reiterated that it would order the exam, and it was up to Calvert to decide whether to participate. Calvert responded: "I'm just − I just want it on the record that I object to having to be forced with that under the grounds of the state-invested power of the Judge solely to knowingly and intelligently make that decision, and that there's been no submission of any inquiry or anything to raise an inquiry of competency...." RR-12:11.

Dunn conducted the examination, and Calvert participated. In his report to the court, Dunn identified that he had reviewed significant psychiatric records of Calvert, including, among other things, psychiatric treatment records dating back to 2009, a psychological examination completed in 1999, and records from an

admission to a psychiatric unit in 2011. Supp. CR 2/3:120, 121. None of these records are included in the record. In his report, Dunn stated that "Calvert began seeing a psychiatrist, Dr. Bates, in 1998 or 1999. He was placed on Prozac and later was prescribed Klonopin"; that Calvert had reported that "at one point Dr. Bates diagnosed him with obsessive-compulsive disorder because he would fixate on one thing and be unable to change his focus"; and that Calvert began seeing Dr. Joseph Arisco on July 7, 2009, after treatment was recommended subsequent to a psychological evaluation performed by Dr. Paul Andrews in February 2009." Supp. CR-2/3:123. Dunn diagnosed Calvert with "Major Depressive Disorder, Recurrent, in Partial Remission," and "Personality Disorder Not Otherwise Specified, with Antisocial and Obsessive-Compulsive Features." Supp. CR-2/3:124. Dunn also stated: "In addition, [Calvert] is frustrated if others do not do things exactly as he would want, and he has a history of rigid behaviors, consistent with obsessive-compulsive personality features." Supp. CR-2/3:125.

Dunn discussed with Calvert the advantages and disadvantages of waiving counsel. Supp. CR-2/3:125-28. Ultimately, Dunn concluded that it was his opinion "to a reasonable degree of psychiatric certainty" that Calvert was competent to waive his right to counsel "and to represent himself in a case where he is indicted for capital murder and the State is seeking the death penalty." Supp. CR-2/3:128. It is not clear what psychiatric training allowed Dunn to opine on Calvert's competence to

represent himself in a death penalty trial, despite having "a history of rigid behaviors, consistent with obsessive-compulsive personality features." Supp. CR-2/3:125.

The trial court held a hearing on February 6, 2014 − at first *ex parte* with Calvert and defense counsel alone, RR-13, and then in open court, RR-14. Dunn did not testify and was not examined at either hearing. Significantly, there was no one to challenge or even question Dunn's conclusion, or to point out any potentially inconsistent information in the underlying psychiatric records that Dunn had reviewed (which, as stated above, were not made part of the record). Calvert himself sought to waive counsel − although, as addressed in Point of Error No. 7, only because he explained that Haas and Cassel had been ineffective and the court would not consider appointing new counsel. *See* RR-13:6-50. Haas indicated a willingness to continue to work with Calvert, RR-13:47-48, but neither he nor Cassel advocated against Calvert's expressed desire to replace or remove them, or raised any question concerning Calvert's competence to represent himself in a death penalty case. When the hearing moved to open court, the only concern raised by the State was the adequacy of Calvert's waiver of counsel, given that it was "qualified." RR-14:66; *see* Point of Error No. 7. The court conducted a lengthy examination of Calvert's understanding of the charges against him, the trial process, and the risks of proceeding *pro se*, *see* RR-14:4-54, but the court did not otherwise address whether, given his mental health issues, Calvert was competent to waive counsel and to

represent himself in a death penalty case. With regard to Calvert's mental health record, the hearing was entirely non-adversarial, and the court did not appoint independent counsel to address whether Calvert, given his documented mental health issues, should be allowed to represent himself in a death penalty case.

C. The Trial Court Erred In Finding That, Despite His Mental Health Issues, Calvert Was Competent To Waive Counsel And Represent Himself In A Death Penalty Trial, And In Failing To Appoint Independent Counsel With Regard To The Issue Of Competency To Waive Counsel.

As set forth in Point of Error No. 4, this Court should rule that a defendant in a death penalty case cannot waive the assistance of counsel, any more than a defendant is allowed to waive counsel on appeal. But at a minimum, under the authority of *Edwards*, *Chadwick*, and *Davis*, the trial court erred as a matter of both Texas and federal law in allowing Calvert to waive the assistance of counsel in this case. The court erred for both substantive and procedural reasons.

One, the record adequately showed that Calvert suffered from longstanding psychiatric issues, that he was diagnosed with both a major depressive disorder and a personality disorder with antisocial and obsessive-compulsive features, and that he had "a history of rigid behaviors, consistent with obsessive-compulsive personality features." Supp. CR 2/3:125. None of these facts was contested. On this record, and based on the legal authority set forth above, the trial court abused its discretion in finding Calvert competent to waive counsel and attempt to represent himself in a

highly charged, complex death penalty case. And as demonstrated in virtually all of the other Points of Error in this appeal, the result was disastrous − not only for Calvert, but for the costs and burdens imposed on the court, the State, the local jail, and, most important of all, for the reliability of the outcome.

Two, the court erred in effectively failing to provide counsel for Calvert with regard to the critical issue of whether he was competent, given his longstanding mental health history, to waive counsel and represent himself in a death penalty case. *Davis*, 484 S.W.3d at 586. The record shows that Haas and Cassel did not perceive it as their obligation to address whether Calvert, given his mental health issues, could properly waive counsel in a death penalty case − and they did not. *See* RR-13; RR-14. They admitted they had "just totally shut things down" when Calvert raised again in November 2013 that he wanted to proceed *pro se*, RR-13:16, and indeed, as explained in Point of Error No. 3, Calvert had accused them of being ineffective and had filed a grievance complaint with the State Bar. RR-13:8. To his credit, Haas indicated a *willingness* to continue to work with Calvert, RR-13:47-48, but as counsel he did not address or question Dunn's conclusion that Calvert could represent himself despite his mental health issues. No counsel sought to examine Dunn; no counsel addressed the psychiatric records Dunn had reviewed. What effectively became the most important issue in the case − whether Calvert, a layman, would serve as his own counsel in pretrial, *voir dire*, and trial proceedings in a death

penalty case − was resolved in an entirely non-adversarial proceeding, despite the substantial and longstanding mental health issues identified by Dunn, the expert recommended by the State.

POINT OF ERROR NO. 7

THE TRIAL COURT ERRED IN FINDING A VOLUNTARY WAIVER OF CALVERT'S RIGHT TO COUNSEL WITHOUT ADEQUATELY ADDRESSING CALVERT'S COMPLAINTS WITH HIS APPOINTED COUNSEL OR CONSIDERING OTHER ALTERNATIVES.

A. Background Legal Principles.

To the extent Calvert was able to waive his constitutional right to the assistance of counsel, it is clear that, to be effective, such a waiver must be made (1) competently; (2) knowingly and intelligently; and (3) voluntarily. *Godinez*, 509 U.S. at 400-01; *Faretta*, 422 U.S. at 834-36. The decision to waive counsel and proceed *pro se* is made "voluntarily" only if "the decision is uncoerced." *Godinez*, 509 U.S. at 401 n.12; *Williams v. State*, 194 S.W.3d 568, 576 (Tex. App. – Houston [14th Dist.] 2006) ("To be made voluntarily, the decision [to waive counsel] must be uncoerced."), *pet. granted aff'd*, 252 S.W.3d 353 (Tex. Crim. App. 2008)

"The trial judge is responsible for determining whether the defendant's waiver of the right to counsel is knowing, intelligent, and voluntary." *Fernandez v. State*, 283 S.W.3d 25, 28 (Tex. App. – San Antonio 2009, no pet.) (citing *Williams*, 252 S.W.3d at 356). Further, "[j]ust because a defendant represents to the trial court that

he is informed of his right to counsel, and desires to waive it, does not end the trial court's responsibility." *Id.* A defendant's right to waive legal counsel does not "authorize trial judges across this state to sit idly by doling out enough legal rope for defendants to participate in impending courtroom suicide; rather, judges must take an active role in assessing the defendant's waiver of counsel." *Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984).

Indeed, "[g]iven the fundamental nature of the right to counsel, courts indulge every reasonable presumption *against* the validity of a waiver of counsel." *Fernandez*, 283 S.W.3d at 28-29 (emphasis added); *see also Geeslin v. State*, 600 S.W.2d 309, 313 (Tex. Crim. App. 1980) ("A waiver of the right to counsel will not be 'lightly inferred' and the courts will indulge every reasonable presumption *against* the validity of such a waiver." (collecting cases) (emphasis added)).

Courts have examined critically, and rejected, waivers of counsel where the defendant made clear he did *not* want to waive counsel, but was dissatisfied with existing counsel and would waive counsel only if forced to proceed with existing counsel. In *Renfro v. State*, 586 S.W.2d 496, 500 (Tex. Crim. App. 1979), this Court held: "Although the appellant, upon the court's inquiry, stated that he wished to represent himself, it is abundantly clear from the record as previously set forth that the appellant's decision to do so was based solely on the court's refusal to appoint different counsel and not because he wished to forego his right of representation.

We cannot say, under these facts, that the appellant voluntarily and knowingly waived his right to counsel." *See also Robles v. State*, 577 S.W.2d 699, 704–05 (Tex. Crim. App. 1979); ***Privett v. State***, 635 S.W.2d 746, 749 (Tex. App. – Houston [1st Dist.] 1982, pet. ref'd) ("[W]here the accused is not satisfied with appointed counsel and cannot show adequate cause for the appointment of different counsel . . . he should be required by the court to accept appointed counsel and not be required to represent himself merely on the basis of his dissatisfaction with appointed counsel." (citing *Thomas v. State*, 550 S.W.2d 64 (Tex. Crim. App. 1977))).

This Court reviewed this issue further in ***Burgess v. State***, 816 S.W.2d 424 (Tex. Crim. App. 1991). In *Burgess*, a non-capital case, by the time appellant appeared for pre-trial motions and trial, "the trial court had already dismissed one appointed lawyer and replaced him with another." *Id*., 427. On the day of trial, appellant filed a *pro se* motion requesting dismissal of his second appointed counsel. *Id*. The case was carried over to the next day, but appellant was not successful in retaining new counsel. Appellant then stated that if forced to go to trial, he wanted to represent himself. The trial court advised and admonished appellant of the consequences of that choice; appellant continued to object to counsel and chose instead to represent himself; and appellant then accepted a plea agreement with the State. On appeal, appellant contended that "forcing a Hobson's choice between going to trial with unacceptable appointed counsel and self-representation will

render *any* supposed waiver of counsel involuntary." *Id*., 427-28. This Court disagreed, and it found appellant's waiver of counsel in that case to be voluntary, after proper admonishments concerning *pro se* representation. *Id*., 428. This Court emphasized that "[a] request for a change in counsel cannot be made so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice," and it explained the options available to a trial court "when confronted with an accused who makes an eleventh hour request for change of counsel." *Id*. Among those options, "at its discretion the court can appoint, or allow the accused to retain, new counsel." *Id*. Alternatively, should the court deny new counsel, then the defendant must be allowed to represent himself upon an unequivocal assertion of the right to self-representation after proper admonishment, or the court "must compel an accused who will not waive counsel and does not assert his right to self-representation to proceed to trial with the lawyer he has, whether he wants to or not." *Id*., 429.

B. The Record Is Clear That Calvert Did *Not* Wish To Waive His Right To Counsel And Had Concerns With His Appointed Counsel.

In the instant case, very early on and long before trial, Calvert asked the trial court to appoint new counsel. CR-1:79. Fundamentally, Calvert explained that his problem with Haas was "I just don't think we're able to communicate," RR-5:21, and he complained that Haas was "going to sell me out, and he's already decided on

what my fate is going to be," and that Haas "has a set predestined plan." RR-5:21-22, 26. The court responded that "I haven't heard a thing to support that" and Calvert answered, "Well, no, you haven't heard our conversations obviously." RR-5:22. Calvert explained that he had worked with "many attorneys through my civil processes over the years as well. I just cannot communicate with this man." RR-5:23. The trial court refused even to consider appointing new counsel. RR-5:24, 28.

For additional months Haas continued as counsel. But at a hearing almost a year later, Calvert again expressed his concerns to the court and sought relief. Critically, the relief Calvert sought was not to proceed *pro se*, but to be given a chance with another lawyer. At an *ex parte* hearing on February 6, 2014, Calvert again expressed to the court: "Well, Judge, I still feel the same, and I'm − I will be better off with some other counsel that I can communicate with. There's − on some level there's some personality conflict between me and Mr. Haas that I don't know that we're ever able to overcome." RR-13:6. Calvert also explained that he was not satisfied "with the way the defense was being managed," and in particular he expressed dissatisfaction that the mitigation specialist working with Haas had only met with him one time. RR-13:6. As Calvert described: "But I wrote letters complaining to Mr. Haas of [the mitigation specialist's] performance. He acknowledged it openly multiple times. Nothing was ever resolved." RR-13:6. Calvert described other shortfalls of counsel at the hearing as well. But the court

simply reiterated its previous ruling: "I believe it was clear from one of our earlier ex partes, but the Court is going to deny Mr. Haas' motion to withdraw as lead counsel.... I'm going to deny the motion. I want that clear on the record. I'm talking about I'm denying the motion that Mr. Haas filed at your request, Mr. Calvert, to withdraw." RR-13:18-19.

The court then proceeded to determine whether it would accept a waiver of counsel from Calvert and to admonish Calvert regarding the risks of that decision. But Calvert made clear he did *not* wish to waive counsel. Calvert stated that he would answer the court's questions, but that "I have to answer it very specifically because I don't wish to necessarily represent myself as a matter of free choice. *I wish to have effective counsel* as provided by *Ex Parte McDuffie* and others, *but I don't feel that I'm getting effective counsel right now*. So my only recourse thus, because I've already asked you for a reassignment of counsel 11 months ago, is to now proceed going pro se." RR-13:22 (emphasis added). Calvert reiterated, "I do wish to waive my right to the counsel *that I have*, and *being that I do not feel that it's effective*, that's the reason for my decision." RR-13:24 (emphasis added); RR-13:50 ("this is the only recourse that I feel like I have").

The court proceeded to a second hearing in open court, at which it asked Calvert to sign a waiver of counsel form. The court asked Calvert whether he was "making this request for waiver of counsel clearly, unconditionally, and

unequivocally? Are you doing that and declaring that to the Court, that you want to represent yourself and do not want counsel?" RR-14:54. Calvert responded: "I have a problem with that last part. I want to represent myself, and I do not want counsel. *Per our conversation that we've had previously, the 'and do not want counsel' is not exactly true*. I'd ask that that be removed." RR-14:54-55 (emphasis added). Calvert explained, "'Want,' to me, means desire. As we've talked before, Your Honor, I would want effective assistance of counsel, so − that's not what this says, though." RR-14:55. In a lengthy exchange, Calvert continued to "qualify" the voluntariness of his waiver:

> Court: This says − this − what this says, this says what the Court believes the Court has to find in order to approve the waiver, that it's not conditioned. It's clear, it's unconditional, and it's unequivocal that you want to represent yourself and that you do not want counsel.... In other words, it has to be free, intelligent, knowing, unconditional. This is what you want to do. You want to represent yourself. You do not want counsel. That's what you're telling me.
>
> Calvert: But per our conversation that we've had, the problem was whether or not the counsel was effective or not.
>
> ...
>
> Calvert: I just don't know if I agree with − with − with that. I guess it's okay, as long as I have it on the record that −
>
> Court: Well, everything you've said is on the record in an ex parte hearing. It's been on the record.
>
> Calvert: And I want the Court to understand that it's just −
>
> Court: Well, it's on the record in an ex parte hearing, but it doesn't change − it doesn't change what I have to have if I'm going to

approve the waiver of counsel. Because if you look at the cases, I mean, the cases require an unequivocal − and unconditional, unequivocal waiver. And, obviously, part of that is, is that if you're unconditionally and you're unequivocally declaring that you want to represent yourself, that's what you're telling me, and that you do not want counsel − so if you want to represent yourself, then you're, obviously, telling me you do not want counsel. I mean, that's what I have to be sure of. That's why it's in the waiver.

Calvert: But what you're saying is oversimplified. It would be more appropriate to say I wish − I want to represent myself and that I do not want the counsel that I have.

Court: That's not going to be a waiver. That's not going to be a waiver of your right to counsel, because you − because − and the courts are real clear on this. You don't have a right to select your court-appointed counsel.

...

Court: Your choice right now is to either have − go forward with Mr. Haas and Mr. Cassel representing you as your court-appointed counsel or electing to waive, give up your right to counsel. Just that simple. And if you elect and waive your right to counsel, you're telling the Court you want to proceed without counsel.

Calvert: I just − I just prefer that it be qualified.

RR-14:56-60. Eventually Calvert signed the waiver form, and he received further admonishments from the court. But the record shows that Calvert's waiver was qualified, tied entirely to the court's refusal to replace Haas – even though Calvert had raised early on that there were fundamental problems between Haas and Calvert, including specific failures to pursue a defense case.

Going forward, Calvert continued to seek appointment of counsel other than Haas, rather than proceeding *pro se* in a death penalty case. In a motion filed on

August 13, 2014, Calvert asked the court to, in its discretion, elevate Jason Cassel to "co-counsel" at least for the pretrial phase of the case, and Calvert agreed to waive the fact that Cassel was not formally qualified to serve as lead counsel for a capital murder case with regard to the presentation of mitigating evidence. CR-3:798-801. In addition, Calvert filed a written motion shortly before trial, pleading to *revoke* his waiver of counsel (which he styled as "contingent"), and asserting he had been inadequately advised regarding the difficulties he would face trying to represent himself from the jail. CR-22:5244-69.[11]

C. The Trial Court Failed To Adequately Address Calvert's Concerns With Appointed Counsel, Failed To Explore Other Alternatives, And Erred In Finding A Voluntary Waiver In These Circumstances.

Under the standards of *Renfro* and *Burgess*, the trial court erred in finding a voluntary waiver of the right to counsel in this death penalty case. Unlike in *Burgess*, Calvert had *not* already had two different appointed counsel, and he did not make

[11] In his motion to revoke his waiver of counsel, Calvert stated "Defendant has never-not-wanted diligent, experienced, qualified, effective representative counsel and would challenge 'any assertion existing on the record showing otherwise.'" CR-22:5247 (emphasis in original). He make his motion "contingent" on the trial court not re-appointing standby trial counsel Haas and Cassel, asserting that "After 8 months or so of 'trying to work out' all asserted problems, Defendant could not allow these persons – 'Haas and Cassel' – to fail him so utterly so in a then known to be a Death Penalty Case." CR-22:5246 (emphasis in original). But Calvert also asserted that when he had waived his right to counsel, "(1) He never envisioned; and (2) That clearly he was NOT admonished on" the difficulties he would have trying to represent himself, including difficulties in having private communications with his agents, investigating and obtaining mitigating witnesses, having access to a law library and legal materials, and having timely access to hardware needed to review discovery materials, among other things. CR-22:5253, 5255-57.

"an eleventh hour request for change of counsel." *Burgess*, 816 S.W.2d at 427, 428. Moreover, the trial court failed in this case to adequately consider Calvert's complaints about Haas and Cassel and to consider alternatives, such as to give Calvert one chance to work with other counsel, before accepting Calvert's decision to proceed *pro se* in a highly complex death penalty case solely because he lacked confidence in and could not work or communicate with Haas.

"When a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction…. Failing to conduct such an inquiry is normally reversible error." *Melendez v. Salinas*, 895 S.W.2d 714, 715 (Tex. App. – Corpus Christi 1994, writ. granted). Moreover, "[t]here are certain circumstances in which an accused may, upon a proper showing, be entitled to a change of counsel." *Garner v. State*, 864 S.W.2d 92, 98-99 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd) (collecting cases). For example, substitute counsel should be appointed when there is a "complete breakdown in communication" between the attorney and defendant. *United States v. Simpson*, 645 F.3d 300, 307 (5th Cir. 2011) (observing that "[w]e have previously stated that substitute counsel should be appointed only for 'good cause,' which includes a 'complete breakdown in communication.'" (citation omitted)). The *Simpson* court recognized that "the Ninth Circuit has held that 'to compel one charged with grievous crime to undergo a trial with the assistance of an

attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of … effective assistance.'" *Id.* at 309 n.6 (quoting *Brown v. Craven,* 424 F.2d 1166, 1170 (9th Cir. 1970) (ellipsis in original)). The court then explained, "[t]he error in *Brown*, however, was that the trial court 'did not … take the necessary time and conduct such necessary inquiry as might have eased Brown's … dissatisfaction, distrust, and concern.' The point, in other words, is that the district court must at least consider whether a defendant's concern with his lawyer is justified." *Id.* (internal citations omitted).[12]

In the instant case, the trial court decided early on – at the hearing on February 28, 2013 – that it would not accept Haas's motion to withdraw and appoint other counsel. RR-5:21-24. The court reiterated that ruling on the day it accepted Calvert's waiver of counsel. *See* RR-13:18 ("*I believe it was clear from one of our earlier ex partes*, but the Court is going to deny Mr. Haas' motion to withdraw as lead counsel." (emphasis added)). Although the court urged Calvert to reconsider his request to replace Haas, emphasizing at the hearing on February 6, 2014, that the

[12] As set forth above, the conflict between Calvert and Haas was heightened by the fact that Calvert had filed grievances with the State Bar regarding Haas and had lodged other criticisms and complaints. *See supra*, 57. When a criminal defendant brings a potential conflict of interest to the attention of the trial court, the trial court has an obligation to investigate and determine whether the risk of the conflict of interest warrants remedial action. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978); *see also Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003).

court would be issuing a new scheduling order that would leave additional time for counsel to do the things Calvert wanted, RR-13:10, the court did not seriously entertain Calvert's complaints – including both the breakdown in the relationship between Haas and Calvert (leading to Calvert's submission of grievances to the State Bar) and Calvert's complaints regarding how little had been done to prepare the defense over such an extended period of time – or even consider giving Calvert a chance with other counsel. *See* RR-13:23-24, 34-51. The court erred in failing to do so, and, in these circumstances and as shown by the record quoted above, Calvert's highly-qualified waiver of the right to counsel in an extremely complex, high-stakes death penalty case cannot be found to be free and voluntary.

Moreover, the error here is "structural" and requires a new trial, as a matter of both Texas and federal law. "[P]roceeding to trial, without a knowing, intelligent, and voluntary waiver of counsel … is a structural error, it is not subject to a harm analysis." *Monasco v. State*, No. 06-10-00111-CR, 2010 WL 4214765, at *2 (Tex. App. – Texarkana Oct. 26, 2010, no pet.) (mem. op., not designated for publication); *Williams v. State*, 252 S.W.3d 353, 357 (Tex. Crim. App. 2008); *Cortez v. State*, No. 08-11-00306-CR, 2014 WL 1423339, at *9 (Tex. App. – El Paso Apr. 10, 2014, pet. ref'd) (not designated for publication) ("[I]f a defendant who proceeded to trial *pro se* did not first knowingly, voluntarily, and intelligently waive his right to counsel, the trial court will be reversed for structural error."); *see also McKaskle v. Wiggins*,

465 U.S. 168, 177 (1984); *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013). Certainly, as shown throughout the other Points of Error in this appeal, the entire proceeding and trial in this case was infected with error, exacerbated in significant part by Calvert's misguided attempt to represent himself.

Thus, under both the Texas and federal authority cited herein, the court erred in finding a waiver of the right to counsel in this case, guaranteed under both the Texas and federal Constitution.

POINT OF ERROR NO. 8

EVEN IF A VALID WAIVER OF COUNSEL ORIGINALLY WAS FOUND, PROCEEDINGS BEFORE TRIAL SHOWED THAT, AS A RESULT OF HIS MENTAL HEALTH ISSUES, CALVERT COULD NOT ADEQUATELY REPRESENT HIMSELF IN A CAPITAL TRIAL.

As argued above, the record in this case showed that, as a result of his psychiatric issues, Calvert should not have been allowed to waive counsel and represent himself in a death penalty case, and that he could not and did not make a proper waiver of his constitutional right to counsel in such a high-stakes case. But even if a proper waiver could have been found as of February 2014, Calvert's performance as a *pro se* litigant showed, long before trial, that he could not represent himself and receive a fair trial, which the State remained obligated to provide him.

As shown in the detailed statement of facts above and other points of error below, Calvert frequently was provoked by inappropriate objections or improper

questions by the State, by unreasonable and one-sided rulings by the court, and by courtroom deputies who took it upon themselves to decide when the court's rules required Calvert to sit or stand. And as argued in Point of Error 9, both the State and the trial court failed to respect and accommodate Calvert's untrained performance as a *pro se* litigant. But to the extent Calvert is blamed for inappropriate conduct as a litigant, that conduct was fully consistent with the obsessive-compulsive personality disorder Mitchell Dunn had disclosed to the court; the conduct was manifest long before trial commenced; and the conduct made clear that Calvert should not be allowed to represent himself and there was an adequate basis, under *Indiana v. Edwards*, to require Calvert to proceed with counsel.

To the extent Calvert is blamed for his conduct, indications of his obsessive-compulsive personality disorder and potentially inappropriate conduct were legion before trial. As set forth above, Calvert quickly filed more than 100 motions as a *pro se* litigant, many of which were virtually incomprehensible, obsessed with detail, and repetitive. He was rigid in his behaviors and unable to adapt to external rules, just as Mitchell Dunn had described. As shown above, pretrial hearings were filled with friction and frustration, leading to instances of disrespectful behavior. Critically, if Calvert's performance as a *pro se* litigant was so inappropriate as to provide evidence and justification that he should be *executed* − as the State

contended throughout the penalty phase − then the trial court should have removed Calvert's *pro se* right long before trial ever started.

It is noteworthy that, in the penalty phase, the State contended there was not a single pretrial hearing in which Calvert represented himself in which his behavior was appropriate, but, at the same time, not a single instance of inappropriate conduct by Calvert when he was represented by counsel. The State argued to the court: "But the reality is, the only time there wasn't something [in Calvert's behavior] that I felt like I could have put in 404(b) was when Mr. Haas and Mr. Cassel represented him." RR-165:14.

Calvert's bizarre conduct also was evident at the outset of the trial, and again showed Calvert could not represent himself and receive a fair trial without the assistance of counsel. For instance, in *voir dire*, Venireperson Coats wrote on his jury questionnaire: "I feel Mr. Calvert is guilty of misrepresenting people." RR-103:19. Coats made multiple statements that he had already determined Calvert was guilty. RR-103:19-22. At the conclusion of questioning, the *State* moved to strike Coats for cause, RR-103:37-38, explaining that the "challenge for cause was more of, I guess, trying to help the defendant." RR-103:42. But Calvert "objected" to the State's challenge for cause, and, when standby counsel Haas asked to speak with him, Calvert responded that he did not want to talk to Haas. RR-103:38. Ultimately, the State withdrew its motion, and Coats was sworn as a juror.

Bizarre conduct continued early in the trial itself. Calvert made numerous objections, asking at one point to be allowed to use the code word "foxtrot" to convey his objections. He demanded proof that witnesses were really the persons they said they were. All of this occurred before the jury. For the same reasons, and based on the same authority, that Calvert should not have been allowed to waive counsel and represent himself in a death penalty case, *see* Points of Error Nos. 4-6, the trial court should have terminated Calvert's *pro se* right before letting the trial turn into a circus, and before allowing Calvert's exercise of his *pro se* right to be "disciplined" through administration of a 50,000-volt electric shock. Thus, under the same authority cited in Point of Error No. 7, the court erred in allowing Calvert to continue to proceed without counsel in this case.

POINT OF ERROR NO. 9

TO THE EXTENT CALVERT HAD A RIGHT TO PROCEED *PRO SE*, BOTH THE STATE AND THE TRIAL COURT IMPROPERLY IMPAIRED AND INTERFERED WITH THAT RIGHT BY MAKING INAPPROPRIATE COMMENTS REGARDING CALVERT'S PERFORMANCE AS COUNSEL DURING TRIAL, AND BY UNDERMINING HIS EFFORTS TO REPRESENT HIMSELF.

As set forth in Point of Error Nos. 4-8, Calvert should not have been allowed to waive counsel and represent himself in a death penalty case. But to the extent Calvert *had* the right to represent himself, both the State and the trial court were obligated to *respect* that right. And that remained true even if Calvert was an

annoying litigant, made some inappropriate or too many objections, and had difficulty following in every instance when the court wanted him to sit and stand, so long as he did not present any security threat or prevent the trial from proceeding.

Both the State and the trial court failed to respect Calvert's *pro se* rights in two fundamental respects: one, both the State and the court made inappropriate comments regarding Calvert's performance as a *pro se* defendant; and two, even more fundamental, the State took advantage of Calvert as a *pro se* litigant, and the court allowed it by overruling virtually every objection Calvert made as a matter of course, even when those objections were clearly proper. Calvert's *responses* to the court's rulings, which became a major focus of the State's case at sentencing, cannot be separated from the way he was *treated*. Thus, the State itself was at least partly responsible for many of the incidents the State later introduced against Calvert in the penalty phase. This resulted both in an improper impairment of Calvert's right to proceed *pro se* under the Texas Constitution and the Sixth Amendment, as well as a denial of Calvert's fundamental right to a fair trial under the Fifth Amendment.

As to the first point, examples are legion of inappropriate comments by the State and the court regarding Calvert's performance as a *pro se* defendant. As set forth above, at the conclusion of Calvert's cross-examination of the State's first witness Judith Lester, as Calvert sought to have the witness made subject to recall, the court commented: "I don't want to use the word 'waste,' but I don't want to take

up any more of the jury's time on this...." RR-128:104. District Attorney Bingham commented on Calvert's performance: "In his zero years to trying cases in the courtroom − and I'm just trying to say − we object to his incessant objection." RR-132:56. The District Attorney also claimed that Calvert "makes these ridiculous-looking faces," RR-151:78, and the prosecutor complained that Calvert "doesn't care what the Court says or what the rules are," RR-153:10. All of this occurred before the jury. The courtroom deputies also were involved, deciding on their own when Calvert should stop trying to make his record and should instead sit down. As Calvert complained: "I object to what's happening here.... Sheffield is pressing me down, and I am just trying to make objections. And then the jury is viewing that." RR-136:78. In another instance, as the court excused the jury so it could address a suppression issue, the court commented to the jury: "And basically what you've seen so far, you probably understand why I'm anticipating it will take a while." RR-142:183. There are numerous other, similar examples. *See*, *e.g.*, RR-151:78-79. Whether or not the State, the court, or the courtroom deputies were justified in their frustration over Calvert's performance as a *pro se* litigant, the court had a choice: either find that Calvert was *abusing* his right to proceed *pro se* and take it from him, or require that all parties *respect* Calvert's untrained and potentially misguided efforts to represent himself, to make his record, and to state his objections.

But even more fundamental is the fact that the State took advantage of Calvert as a *pro se* litigant by asking clearing inappropriate questions or commenting on the evidence, which the court allowed by overruling virtually all of Calvert's objections simply as a matter of course. Again, examples appear throughout the record, and many are highlighted in this brief. For instance, as set forth above, when the District Attorney asked a police officer to describe how he had spent the Halloween day of the crime with his own small child, the court immediately overruled Calvert's appropriate objection; the court ordered Calvert to sit down, without even allowing him to state the basis for his objection on the record; and the court then chastised Calvert before the jury: "*Listen to me*. *Listen to me*. Your objection to that question is overruled. That's the Court's ruling." RR-141:84 (emphasis added); *see* full description *supra*, 25-26. *See also*, *e.g.*, RR-150:26 (court overruling Calvert's objection to question, "If you had to *guess* who this wallet belonged to...." (emphasis added)); RR-128:45-48 (discussed *infra*, 156-57); RR-142:51-52; RR-148:18-22.

There are many similar examples; another occurred during the testimony of Detective Craig Shine. This sequence of testimony also shows how the State took advantage of Calvert as a *pro se* defendant, and how the court freely allowed it. Detective Shine had interviewed Calvert in Louisiana after his arrest. Shine identified SX316, a redacted version of SX1, as a video recording of the interview. SX316 was admitted and played for the jury. RR-153:153-155. When testimony

resumed the following day, the prosecution improperly asked Shine to "interpret" Calvert's statement and to offer his opinions about it. Assistant District Attorney Sikes questioned Shine about the videotaped statement:

> Sikes: And he has an inappropriate laughter at times like this is a big game to him.
>
> Shine: Correct.
>
> Calvert: Objection; 403, 404(b).
>
> Court: All of those objections have been previously ruled on before the tape was played. They're overruled again.
>
> Sikes: And he says to you, "Apparently she did."
>
> Shine: Right.
>
> Sikes: Real smart-aleck.
>
> Calvert: Objection; inappropriate comment by the prosecution.
>
> Court: Overruled.
>
> Sikes: Did you believe him to be a smart-aleck?
>
> Shine: I did.
>
> Sikes: Yeah. When he says, "Well, apparently she did," do you believe, as Mr. Calvert's sitting there making those kind of snide remarks, mocking −
>
> Calvert: Objection; inappropriate comment by the prosecutor.
>
> Court: Overruled.
>
> Sikes: Do you believe, as he sits there in that interview room, that he killed Jelena?
>
> Shine: I did.

Sikes: So you're sitting there with a man who has, in your opinion at that time − right?

Shine: Yes, ma'am.

Sikes: − shot to death in the back and the head the mother of his children?

Shine: Yes.

RR-154:57-58. This kind of running, derogatory commentary between the prosecutor and the detective about Calvert's statement continued, RR-154:58-59, with the prosecutor asking, "Ridiculous to you at that point?" and commenting, "he's talking about himself. 'Me, me, me, me.'" RR-154:59. Shine chimes in: "Everybody's done him wrong." *Id*. Calvert again tries to object: "Objection; speculation and misrepresentation of the evidence." *Id*. The court: "Overruled." *Id*.

The running, derogatory commentary continues for pages, with every objection made by Calvert overruled. RR-154:59-63. At one point:

Sikes: Jelena Sriraman's body is where at that point?

Shine: At the Dallas County Medical Examiner's Office.

Sikes: She's laying in a refrigerator unit at SWIFS in Dallas with holes shot through that little body, and he's talking to you about ripping the grate down to prove what a bad system −

Calvert: Objection; misrepresentation of the evidence.

Court: Overruled.

Shine: Right. While complaining about his leg hurting.

Sikes: Goes back to his priority. And it's always James Calvert, right?

Shine: Yes, ma'am.

RR-154:63. In another sequence:

Sikes: Would you consider the statements of James Calvert in his interview to be sarcastic?

Shine: At points, yes.

Sikes: Would you consider them at times to be mocking?

Shine: Yes.

Calvert: Objection; 403, 404(b).

Court: Overruled.

Calvert: Speculation.

Court: Overruled.

Sikes: Would you consider him at times to be inappropriate?

Calvert: Objection; calls for speculation.

Court: Overruled.

Calvert: 701.

Court: Overruled.

Shine: Given the gravity of what we were talking about, absolutely.

RR-154:64-65. Similar questions and testimony, with overruled objections, continued. As a final example:

Sikes: And then at one point, he says, "Well, what if I did do it? Then what difference does it make?"

Shine: Right.

Sikes: Is that part of that − that callous, that coldblooded heart?

Calvert: Objection; calls for speculation; misappropriate comment from the prosecution.

Court: Overruled.

Sikes: Did you believe Mr. Calvert to be callous?

Shine: Yes, ma'am, I did.

Sikes: In fact, you told him at one point −

Shine: I told him that.

Sikes: − "You're a coldblooded killer."

Shine: Yes, ma'am, I did.

Sikes: And that's your honest opinion?

Shine: Yes, it is.

Calvert: Objection, 701.

Court: Overruled.

RR-154:81-82.

Virtually all of this testimony violated the rule of *Rodriquez v. State*, 903 S.W.2d 405, 410 (Tex. App. - Texarkana 1995), that the opinion of a witness is not admissible to interpret the meaning of the acts, conduct, or language of another. The rule is well known to trial courts and trial counsel. The State elicited this improper and prejudicial testimony intended to inflame the jury against Calvert, knowing his objections would not protect him.

These incidents in which Calvert's rights as a *pro se* litigant were ignored were numerous, and are significant for multiple reasons. One, because the court routinely ignored Calvert's *pro se* objections as a matter of course, significant amounts of highly prejudicial testimony were introduced at trial. Two, Calvert was forced to look before the jury as if he were obstreperous and difficult, trying to block damaging testimony, when in fact he was making entirely appropriate objections. Three, and perhaps most important, Calvert did react in frustration at times to the court's rulings, and these responses then became evidence of "inappropriate" and "disrespectful" conduct by Calvert, introduced against him at his own penalty phase hearing. And because Calvert at times failed to "stand" or to "sit" promptly enough as he tried to make his objections (many of which, as shown above, were entirely appropriate), he was often physically pushed down by courtroom deputies, in front of the jury, and then ultimately subjected to a 50,000-volt electric shock. And in another incident, reviewed at length above, Calvert was found to have "stolen" exhibits that he himself had tried to introduce into the record, despite Calvert's repeated offers to conduct a further search for those exhibits. *See supra*, 14-19. And when Calvert then refused to assist in the search of his cell by sheriff deputies ordered by the court, and acted badly, the State used this as evidence that Calvert deserved to be executed. If Calvert had been treated like any non-*pro se* lawyer who

stated he had possibly misplaced exhibits but would look for them at his office, none of this would have ever occurred.

All of these examples taken together show that, to the extent Calvert was allowed to waive his right to counsel and to proceed *pro se* in a critical death penalty case, his rights as a *pro se* litigant were impaired and disrespected. He was taken advantage of by the State, and even well-founded objections were disregarded by the court, out-of-hand. All of this resulted in a deprivation of Calvert's right to counsel, including the right to proceed *pro se*. *See*, *e.g.*, *McCoy v. State*, 112 A.3d 239, 266 (Del. 2015) ("Prosecutorial misconduct that disparages a defendant for making the choice to proceed *pro se* interferes with his right to a fair trial and his right of self-representation."); *Oses v. Massachusetts*, 961 F.2d 985, 987 (1st Cir. 1992) ("[T]he judge's conduct incited the defendant to misbehave. The trial judge should have realized that his sarcasm and pettiness had the effect of pouring gasoline on a fire."). And because impairments of the right to counsel and other errors involving the fundamental fairness and integrity of the trial itself are deemed to be "structural," Calvert is entitled to a new trial. *Scarbrough v. State*, 777 S.W.2d 83 (Tex. Crim. App. 1989); *Davis*, 484 S.W.3d at 586-87; *Weaver*, 137 S. Ct. at 1911; *Davila*, 133 S. Ct. at 2149 (explaining that structural errors include "denial of counsel of choice" and "denial of self-representation").

In sum, to the extent Calvert had a right to proceed *pro se* under *Faretta* and Art. 1, Sec. 10 of the Texas Constitution, that right was violated as a matter of both Texas and federal law.

POINT OF ERROR NO. 10

TO THE EXTENT CALVERT HAD A RIGHT TO PROCEED *PRO SE*, THE TRIAL COURT IMPROPERLY *TERMINATED* THAT RIGHT FOR CONDUCT THAT DID NOT POSE ANY SECURITY RISK AND HAD NOT OBSTRUCTED TRIAL PROCEEDINGS.

To the extent Calvert *had* a constitutional right to proceed *pro se*, the trial court terminated that right for inadequate reasons, which had nothing to do with courtroom security or the ability to conduct trial proceedings as had proceeded to that point. The fact that Calvert made a remark to the court, after being subjected to severe electric shocks, cannot justify denying Calvert the rights he had been granted to self-representation.

After the high-voltage shock was administered, the Judge terminated Calvert's *pro se* representation and reinstated Haas and Cassel as counsel because, recovering from being shocked, Calvert's first words were, "I'm sure the Court very much enjoyed that." RR-155:221. Before Calvert spoke, there was not a single word of whether or not he needed medical attention in the wake of being shocked, nor any discussion as to whether the (literally) stunned Calvert was medically fit to be making any kind of statements at all bearing legal ramifications. Enraged, the

Court terminated the *pro se* representation, and said that the "deputies take what actions they need to take" and that the officers "had to shock you." RR-155:222-23. He repeatedly threatened to send the just-shocked Calvert "to the basement where you can watch your trial on TV." RR-155:222-23.

As the Court recognized in *Heckman v. Williamson County*, 369 S.W.3d 137, 159 (Tex. 2012) (footnote omitted), "[t]he U.S. Constitution implicitly protects this [constitutional] right [to represent oneself], and the Texas Constitution does so explicitly." *See* Tex. Const. art. I, § 10 ("In all criminal prosecutions the accused … shall have the right of being heard by himself…"); *see also* Tex. Code Crim. Proc. art. 1.05 (providing accused "shall have the right of being heard by himself, or counsel, or both"). This Court has emphasized the importance of this right. *Burgess v. State*, 816 S.W.2d 424, 430-31 (Tex. Crim. App. 1991). And critically, this Court held in *Scarbrough* that a violation of this right cannot be harmless error:

> We conclude that under the circumstances appellant was improperly denied his Sixth Amendment right to self representation. Denial of that right "is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless."

777 S.W.2d at 94 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984)); *see also United States v. Davila*, 133 S. Ct. at 2149.

The trial court made no findings that would justify denying Calvert the rights he had been granted to self-representation. As set forth above, after being subjected

to a severe electric shock of 50,000 volts, Calvert made a spontaneous comment, "I'm sure the Court very much enjoyed that." RR-155:221. Calvert's reaction to being shocked by deputies – with a comment made outside the presence of the jury, which may have heard Calvert's screams (*see supra*, 48) but certainly not that comment – is not adequate justification for denying Calvert the rights he had been granted to self-representation. If the sole purpose of the electric shocks, in the admitted absence of any threat to courtroom security, was essentially to bring Calvert into line and ensure that he stood and sat as required for courtroom decorum, then Calvert at least was entitled to demonstrate that he would comply with such rules going forward and thereby avoid being shocked.

This Court should reverse Calvert's conviction and death sentence because he was denied whatever right he had to self-representation. To the extent Calvert had a right to represent himself, that right should not have been taken away based on a comment made, outside the presence of the jury, after being shocked.

The record shows that Calvert would have proceeded differently if he had continued to represent himself. Calvert stated on the record that he did not testify at the guilt phase because he had lost his right to proceed *pro se*: "Yes, Your Honor, I have [made a decision whether to testify], contingent to the fact that I'm not allowed to proceed pro se, then because of that, I've decided not to testify.... [I]f I was

allowed to proceed pro se, I would handle things differently, but in the course that the Court has ruled on, then that's my decision." RR-161:21.

Therefore, to the extent Calvert had a right to proceed *pro se* under *Faretta* and Art. 1, Sec. 10 of the Texas Constitution, that right was violated as a matter of both Texas and federal law.

EXTREME PROSECUTORIAL MISCONDUCT ISSUES

POINT OF ERROR NO. 11

THE PROSECUTION ENGAGED IN EGREGIOUS MISCONDUCT DURING CLOSING ARGUMENT IN THE GUILT STAGE OF THE TRIAL.

(together with) POINT OF ERROR NO. 12

THE PROSECUTION ENGAGED IN EGREGIOUS MISCONDUCT DURING CLOSING ARGUMENT IN THE PENALTY STAGE OF THE TRIAL.

This Court has long-recognized that "the purpose of closing argument is to facilitate the jury in properly analyzing the evidence presented at trial so that it may 'arrive at a just and reasonable conclusion based on the evidence alone.'" *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. 1980) (quoting *Stearn v. State*, 487 S.W.2d 734, 736 (Tex. Crim. App. 1972)). As such, the content of a closing argument must not stray outside of four specific areas: "(1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Alejandro v. State*, 493

S.W.2d 230, 231 (Tex. Crim. App. 1973) (internal citations omitted). This Court has "time and again called attention of the prosecuting attorneys to the danger of departing from legitimate argument as it may result in great harm to the accused which will in such instance require a reversal of the case." *Andrews v. State*, 199 S.W.2d 510, 514 (Tex. Crim. App. 1947). Closing arguments are objectionable, and convictions and penalties are reversible, when a prosecutor uses a closing argument as an opportunity to "arouse the passion or prejudice of the jury by matters not properly before them," *Campbell*, 610 S.W.2d at 756 (quoting *Stern*, 487 S.W.2d at 736), or "place before the jury unsworn, and most times believable, testimony of the attorney," *Alejandro*, 493 S.W.2d at 232.

The Court reviews a trial court's refusal to grant a mistrial in light of an improper closing argument for an abuse of discretion, *see Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004), and looks specifically at three factors: (1) the prejudicial effect of the prosecutor's remarks; (2) the efficacy of any curative instruction by the judge; and (3) the certainty of conviction in the guilt phase or of the punishment assessed in the penalty phase absent the misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). Even in situations in which a defendant fails to object to an improper statement at closing, if "the statements are so prejudicial . . . that no instruction could have cured the harm, then such fundamental error warrants reversal." *Gonzales v. State*, 807 S.W.2d 830, 835 (Tex.

App. – Houston [1st Dist.] 1991, pet. ref'd) (citing *Green v. State*, 682 S.W.2d 271, 295 (Tex. Crim. App. 1984)); *see also Landry v. State*, 706 S.W.2d 105, 111 (Tex. Crim. App. 1985) ("An exception to th[e] [general waiver] rule occurs where an argument is so prejudicial that, had the defendant objected, an instruction would not have cured the harm.").

To be sure, far from every improper statement by a prosecutor constitutes reversible error. However, when a prosecutor's closing "is extreme or manifestly improper" or "injects new facts harmful to the accused into the trial proceedings," *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000), a defendant is denied his basic right to an impartial jury considering only the evidence presented at trial. As discussed at length below, this case presents the rare situation in which a prosecutor's repeated, egregious misconduct during closing argument explicitly *invited* the jury to convict and punish the defendant based on invented "evidence" and personal animus and prejudice. This Court should thus reverse Calvert's conviction and sentence.

A. The Prosecution's Closing Argument In The Guilt/Innocence Portion Of The Trial Contained Numerous Instances of Egregious Misconduct.

1. The prosecutor instructed the jury to invoke the forbidden "golden rule" and to identify with the victims of the crime.

Texas law is clear that a prosecutor may not invoke "golden rule" arguments that "ask jurors to place themselves in the shoes of the victim of the charged offense,

or in the shoes of others affected by it." *Nickerson v. State*, 478 S.W.3d 744, 762 (Tex. App. – Houston [1st Dist.] 2015, no pet.). Such claims do not fit within the scope of any permissible jury arguments but are rather "a plea for abandonment of objectivity." *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985); *see also Boyington v. State*, 738 S.W.2d 704, 709 (Tex. App. – Houston [1st Dist.] 1985, no pet.) (finding, on plain error review, "[t]he repeated urging for the jury to put themselves in the shoes of the victim, unchallenged by any objection, could only be designed to inflame the passions of the jury"). In this case, a central and repeated theme of the prosecution's closing argument was to place the jury in the position of Ms. Sriraman and her children. There could hardly be a more a more obvious violation of this Court's prohibition on "golden rule" arguments.

In *Carter v. State*, No. 01-96-00637-CR, 1998 WL 350104, at *3 (Tex. App. – Houston [1st Dist.] 1998, pet. ref'd) (not designated for publication), the Court concluded that the prosecutor urging the jury to "go back to March 16th when you're lying there and someone points a gun in your face and then pulls the trigger and you're hit in the face" was objectionable "for asking the jurors to consider themselves as the victim." Here, the State did precisely that, and more:

> You picture what it was like that morning in [Ms. Sriraman's] house ... and she's terrified, and that door comes kicked open?... Bam comes the door, and there he is, her worst nightmare, holding a gun. Where's she going to go? Do you see her little house? Where is she going to go? She's trapped....

> *I want you to think about these things.* I know they're hard....
>
> It's bam comes the door. He's got a gun.... There's screaming. There's crying. *Can you imagine?...*
>
> She knew what was coming when she got hit in the back. *There's no mistaking being shot with a bullet.* She knew he had her.
>
> I submit to you she was just trying to get further away from **XXX** and the danger and what she knew he was going to see, and she slumped on the floor, and she tried to breathe, and that pathetic killer shot her in the stomach. *I don't know how you look at the trajectory rods and not think about the pain that she was in*, the intentional killing.... That's physical stuff. *I want you to think about the pain she was in mentally*.
>
> Her 4-year-old little boy, **XXX**, in the little blue sweatshirt and his little striped pants, she knows he's watching it. She knows he's being stolen by the man that put those bullets in her body, and there wasn't anything she could do. *Y'all get that, right?* She's trapped. And as she laid there dying, *I tell you what she knew. 'Nobody's coming to help me. Nobody.' Can you imagine?*
>
> If you want to know the evil that sits in this courtroom that goes by the name of James Calvert, *you think about that last shot*.

RR-161:130-35 (emphasis added).

Nothing within this prolonged statement summarized validly-introduced evidence, answered arguments put forth by Calvert, or asked the jury to faithfully apply the law. Rather, this hypothesized account of Ms. Sriraman's final moments was intended to force the jurors to identify and empathize with the victim and her son. But these purely emotional considerations are legally irrelevant to the question of Calvert's guilt or innocence and, worse, served to inflame the jury, making it *harder* for them to objectively analyze the evidence and indeed to separate real

evidence from the prosecutor's hypotheses about what Ms. Sriraman may have thought or said during the attack.

Similarly, Texas courts have emphasized that "'[j]urors may not be representatives of the complainant, as opposed to representatives of the community,'" and thus "arguments suggesting that the jury should bow to victim demands run the risk of improperly seeking to evoke the jury's emotions." *Franklin v. State*, 459 S.W.3d 670, 682 & n.8 (Tex. App. – Texarkana 2015, pet. ref'd) (quoting *Dorsey v. State*, 709 S.W.2d 207, 201 (Tex. Crim. App. 1986)). In *Franklin*, therefore, the court found that a prosecutor encouraging a jury to "fight for those little girls" constituted an impermissible "plea for abandonment of objectivity." *Id.* at 682 (internal quotation marks omitted).

Here, again, the prosecutor went well beyond the bounds of acceptable argument in imploring, and indeed instructing, the jury to cast aside objectivity and replace it with vengeance guided by emotion. Near the end of her closing argument, the prosecutor asked the jury to fight for the victim and her family: "I ask that you stand up for them," RR-161: 53, and she consistently deputized the jury to serve as the voice of the victim. Having begun her argument by describing Ms. Sriraman as the "victim that was forever silenced," RR-161:123, the prosecutor told the jury in closing: "You get the chance to say to Calvert what I just said: 'You're not going to silence me. I've still got a lot of fight left in me.' You tell him that." RR-161:152.

The State showed the jury a blowup of Ms. Sriraman Jelena with her children, and said: "*I'm going to tell you that's why you're here. Do you see her? Look at her children. Look at little **XXX**.* Not forever silenced, but too young." RR-161:123-24 (emphasis added). The prosecutor identified the day of closing argument as "Jelena's day," when she would finally "be remembered as more than five words on an indictment." RR-161:126-27. "I know you care about **XXX**," she said, RR-161:143, and referring to the family as a whole said: "*They need us to be there. Don't you want to stand up for them? Don't you wish you could have protected them?*" RR-161:142-43. The prosecutor argued further:

> *You stand up for Jelena. You stand up for **XXX**. You want her picture back up, come back in with your verdict....*
>
> *Somebody ought to*. It's about time. And I'll tell you this: I'm a little bit jealous of you. What an honor it is in our system, this system we've loved for so many years, *what an honor that you get the chance to stand up for those people in that picture....*
>
> You tell [Calvert]: "I know you did it." And you sign that line, and you do it quickly and confidently, and let's come on back in here and get to it....
>
> *I ask that you stand up for them.*

RR-161:152-53 (emphasis added).

It is hard to imagine a more explicit appeal for the jury to take the side of the victim. The prosecutor *told* the jury to "stand up for" Jelena, and to give voice to Jelena who had been "silenced" by the defendant. These statements were not a

dutiful recounting of the evidence, nor a proper instruction to faithfully apply the law as written to the conduct as proved. To the contrary, the prosecutor baldly appealed to the jury's sense of bias and emotion, and invited the jury to be guided by vengeance on behalf the victim and her children. This Court has prohibited prosecutors from doing exactly this.

2. The prosecutor urged the jury to convict Calvert based on a portrayal of the murder that had no basis in the evidence.

A basic element of a fair conviction is that a defendant be convicted on the evidence alone, not invented facts or falsely hypothesized theories. *See*, *e.g.*, *Watts v. State*, 371 S.W.3d 448, 459 (Tex. App. – Houston [14th Dist.] 2012, no pet.) ("Convictions cannot be had on the invention or fabrication of evidence."). As such any "[a]rgument injecting matters not in the record is clearly improper," *Berryhill v. State*, 501 S.W.2d 86, 87 (Tex. Crim. App. 1973), and such an argument can be all the more prejudicial to the defendant when it occurs during closing with little if any opportunity for the defendant to introduce evidence disproving the false claims.

In Calvert's trial, the prosecution not only preyed upon the jury's emotions and passions as set forth above, but engaged in a totally falsified reconstruction of the crime. In describing Ms. Sriraman's last moments, the prosecutor argued:

> Did she grab **XXX** up? Did [Calvert] snatch **XXX** from her? Did she scream? Did she cry? Did she beg him not to shoot? Did **XXX** scream: "Don't shoot my mommy"?... I submit to you *she's running for her*

> *life*. She wants to live, and she wants the danger away from her child. *You think? Sure does*. Because that's what good mamas do....
>
> Did **XXX** call out as he was taking him out of that carport, "Mama; mama"? *I think he did. I think the evidence supports that he called out for her.* He loved her. A lot of little boys love their mamas.
>
> I submit to you the evidence clearly supports that with the last bit of pure will and strength she had, *she tried to look at **XXX** when he called, "Mama," and she tries to raise her head, but he put a bullet through the back of it.... [Calvert]'s holding him. "Mama. Mama. Mama." She raises her head, one last shot*....
>
> The evidence tells you that the last words he ever head from his mother's mouth were cries and gasps and screams or gurgling, not "mommy loves you." *His last memories of his mother are blood and bullets and brain matter*."

RR-161:131, 134-35, 144 (emphasis added).

The prosecutor undoubtedly considered the emotional impact her description of a distraught child calling for his dying mother would have on the jury. And, having heard this vivid narrative, the jury may well have formed the mistaken belief that the prosecutor's statements were based on the evidence as introduced. They were not. To the contrary, there was a not a shred of evidence supporting the prosecutor's description of what **XXX** or his mother said to each other in these final moments. By nevertheless laying out a detailed and methodical description of events as she imagined them, the prosecutor blatantly violated the prohibition against "inject[ing] new facts harmful to the accused into the trail proceeding." *Wesbrook*, 29 S.W.3d at 115.

3. The prosecutor heaped personal abuse upon Calvert, again transgressing boundaries this Court has repeatedly set.

It has long been the rule in Texas that "there is abundant room for legitimate discussion of the testimony and the law applicable, without indulging in personal abuse of the man who is at the bar of justice." *Swilley v. State*, 25 S.W.2d 1098, 1099 (Tex. Crim. App. 1929); *see also Stevison v. State*, 89 S.W. 1072, 1073 (Tex. Crim. App. 1905) ("[A]buse is not argument, and vituperation is not logic."). Castigating a defendant in personal and demeaning terms, particularly before a jury, serves "no legitimate purpose except to jeopardize the State's case on appeal." *Tompkins v. State*, 774 S.W.2d 195, 217 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (1989). Accordingly, this Court has consistently "observed the well established rule which prohibits prosecutorial argument that is abusive or inflammatory." *Grant v. State*, 472 S.W.2d 531, 534 (Tex. Crim. App. 1971).

The prosecution in Calvert's case plainly contravened this prohibition. During closing, the prosecution referred to Calvert as a "coward" or "cowardly" eleven times, declaring at one point: "Throughout the defendant's vicious, violent, and I'll tell you cowardly − because that's what he is, that man right there; never met a bigger one − cowardly act, he took a mother from her two children...." RR-161:72; *see also*, *e.g.*, RR-161:80 ("There's the coward, James Calvert, with a smile on his face and a gun in his hand."); RR-161:82; RR-161:102 ("And the coward, this man

− you are such a coward − shoots her in the back, in the back."); RR-161:125; RR-161:131. Only five years ago, this Court rejected exactly the same characterization of a defendant – as "this coward right here" – as improper. *Velez v. State*, No. AP-76,051, 2012 WL 2130890, at *29 (Tex. Crim. App. June 13, 2012) (not designated for publication). Nothing in the prosecution's invocation of this hyperbolic insult makes it any more permissible here.

The prosecution compounded this improper personal abuse with a range of other impermissible and inflammatory statements. The prosecutors repeatedly referred to Calvert as "evil," referring to him as "the evil that sits in this courtroom," RR-161:135, and: "That's a killer. That's evil." RR-161:123. The State called Calvert a monster, instructing the jury: "Go back to when you first heard those things, because that is the awful, mean, murdering world that we've worked in for all these years created by monsters that sit over there." RR-161:141-42. And they characterized Calvert as worse than an animal: "You know, even animals in the wild protect their children. But not James Calvert," RR-161:143, notwithstanding that Calvert did not physically harm his child during the incident. *See Tompkins*, 774 S.W.2d at 217 (finding that prosecutor's comparison of the defendant to "an animal" was improper).

By communicating their disdain for Calvert, the prosecution invited the jury to convict based on personal animus as opposed to the facts as proven. This is exactly what a prosecutor is not permitted to do under the law.

4. The prosecutor improperly commented on Calvert's nontestimonial behavior, both apart from and with reference to the exercise of his Sixth Amendment right to self-representation.

"The long-established rule governing prosecutions for crime in Texas is that the accused is to be tried upon the merits of each case alone, and proof of extraneous crimes or of specific acts of misconduct by the accused is generally not admissible." *Wilson v. State*, 819 S.W.2d 662, 664 (Tex. App. – Corpus Christi 1991, pet. ref'd). Concomitant with this basic requirement is the rule that "[a] defendant's nontestimonial demeanor is irrelevant to the issue of his guilt." *Good v. State*, 723 S.W.2d 734, 737 (Tex. Crim. App. 1986). Using "a defendant's behavior in the courtroom to establish guilt violates [this] fundamental requirement," because it invites the jury to render a conviction on something other than evidence of guilt. *Id.* at 737 n.4. As this Court recognized in *Good*, commentary on a defendant's in-court actions are "an invitation for the jury to convict a defendant based on rank speculation of bad character rather than evidence of guilt." *Id.* at 737. Again, the prosecution in Calvert's case flatly violated this prohibition, and it did so in two distinct ways.

First, the prosecution specifically called out Calvert's courtroom demeanor to incite the jury's prejudice against him. The prosecutor urged: "Y'all saw how he acted in this courtroom. Can you imagine being married to him?" RR-161:72-73. And, at the start of rebuttal, the second prosecutor picked up the same theme, arguing: "I'll tell you this: I won't be quiet. Silence me. *See him laughing and smirking and shaking his head.* Keep on doing it." RR-161:126 (emphasis added). The prosecutor continued: "*He can sit there and mumble 'that's not right' all he wants*. You think it's right, it's right." RR-161:148 (emphasis added). "And make no doubt about it," the prosecutor continued, "that's what you've got right there, *sitting right there with a smirk on his face most of the trial. You saw it. That's a killer. That's evil*." RR-161:123 (emphasis added). These comments introduced irrelevant and highly prejudicial considerations into the jury's calculus.

Second, the prosecution violated Calvert's Sixth Amendment rights by commenting on his in-court behavior, specifically as it related to his right of self-representation. In *Hawkins v. State*, 613 S.W.2d 720, 728-29 (Tex. Crim. App. 1981), this Court made clear that under Texas law:

> [N]either the Supreme Court nor this Court has ever indicated that an accused who is exercising his independent constitutional right to represent himself is fair game for the State and its witnesses. Indeed, if the right is to have any practical meaning, its actual exercise must be honored 'out of that respect for the individual which is the lifeblood of the law' as much as the initial decision.... [A]n accused is entitled to give his best effort to be effective counsel for himself without

> demeaning characterizations or innuendos that would or should not be permitted against a licensed trial counsel.

While a "self-defending accused has no right to ask for a reversal because he alienated the jury while doing so," the prosecution may not prejudice jurors' own observations by making "demeaning characterizations or innuendos" that in practical effect nullify the self-representation right. *Hawkins*, 613 S.W.2d at 728 (internal quotation marks omitted). Here, not only did the prosecution make demeaning remarks regarding Calvert's self-representation, but it freely admitted it was doing so in open court.

For example, when Calvert's counsel objected to the prosecutor's description of Calvert's "smirking" throughout trial, the prosecution apparently sought to justify its actions by noting it was merely "commenting on when he represented himself." RR-161:123. Likewise, in asking the jury to recall delays in the proceedings caused by Calvert's self-representation – an issue totally irrelevant to Calvert's guilt or innocence in any event – the prosecution commented: "He chose it. Don't you remember all those weeks we were here? He chose it. *And I will comment*. Do you remember all the times when he said things like: Oh, I'm just trying to get to the truth. And what did I say? Let's get to it." RR-161:123 (emphasis added). Later, the prosecutor similarly stated: "I always worry that the reality of what a victim endures can get lost in long days of testimony, *especially so in this case where the*

days and the weeks have been unnecessarily, needlessly long and drawn out by James Calvert." RR-161:128 (emphasis added). By criticizing Calvert's obviously less-than-professional skill at serving as his own counsel, the prosecution improperly infringed on Calvert's self-representation right. *See also Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010).

5. The prosecutor committed misconduct by making extreme and excessive appeals to passion and sympathy.

The prohibitions on "golden rule" arguments, heaping personal abuse on defendants, and calling attention to a defendant's courtroom behavior, all are variants of the basic rule that a jury should not be encouraged or incited to convict a defendant based on passions or prejudices divorced from validly introduced evidence of a crime. *See*, *e.g.*, *Pena v. State*, 129 S.W.2d 667, 669 (Tex. Crim. App. 1939); *Coble v. State*, 871 S.W.2d 192, 205 (Tex. Crim. App. 1993).

Not only was the prosecution's guilt phase closing argument filled with a variety of excessive appeals to passion, sympathy, and prejudice as described above, but the State *explicitly* instructed jurors to consult their emotions and biases in deciding Calvert's guilt or innocence. That fact, even apart from the litany of other violations the prosecution committed, makes this case extraordinary and merits reversal. In closing, the prosecution argued to the jury:

> Should it make you − the evidence that we put in in all these weeks, should it make you feel sympathy for the victim, Jelena, and **XXX**? It should, if we've done our job.
>
> *Should it make you have feelings of prejudice against that selfish coward? Yes.* If it doesn't, we have failed miserably. That's ridiculous.

RR-161:125 (emphasis added). In no uncertain terms, the prosecution directed the jurors to abandon any remaining objectivity: "You can take your common sense in with you, and *you can definitely view the evidence with your emotions*." RR-161:137 (emphasis added). And the prosecutor did not stop there:

> Don't forgot − you know how loud a .40-caliber is? Can you imagine in that little carport, in that little kitchen, when that first shot rang out, bam, bam, bam, six shots. That's the reality. That's the result. *So you let it impact you. It should. It's personal to me, and I pray to God it's personal to you.*

RR-161:140 (emphasis added). Twice in short succession the prosecutor asked jurors, in reference to inflammatory recitations of the evidence, "How did it make you feel?" RR-161:141. The prosecution continued:

> I want you to remember that sick-to-your-stomach feeling when you learned that that selfish killer shot her in the back, in the back, and he looked her in the face and pulled that trigger over and over and over and over again. Did the thought of him holding **XXX** while he shot Jelena make you sick to your stomach? Did it take your breath away? Did it make you cry?

RR-161:141.

The jury's emotions and "feelings" regarding the evidence are not merely irrelevant but a consideration this Court has long sought to *exclude* from jury

deliberations. *See Russell v. State*, 242 S.W. 217, 218 (Tex. Crim. App. 1922) ("[R]emarks calculated to arouse the prejudice or sympathy of a jury should be carefully avoided by attorneys for both sides, and this is especially true in cases involving the death penalty."). Here, the prosecution *encouraged* prejudice and bias on the part of the jury, and *invited* them to consider their emotions as they assessed the evidence.

6. The prosecution committed misconduct by invoking personal experience and authority to assess Calvert's guilt.

In addition to intentionally inflaming the passions and prejudices of the jury and encouraging them to consider "facts" found nowhere in the record, the prosecution also abused the "powerful weapon" of closing argument by invoking their "highly esteemed officer" to proffer their own assessments of Calvert's guilt. *See Vargas v. State*, 79 S.W.2d 860, 861 (Tex. Crim. App. 1935). Under Texas law, "[i]t is error for any attorney to argue his personal opinion of the case." *Hurd v. State*, 513 S.W.2d 936, 941 (Tex. Crim. App. 1974), *overruled on other grounds*, *Rutledge v. State*, 749 S.W.2d 50 (Tex. Crim. App. 1988); *see also Baldwin v. State*, 499 S.W.2d 7, 9 (Tex. Crim. App. 1973) (holding that the prosecutor's statement that "I think that he's guilty" was outside the realm of proper summation). Yet despite this clear and long standing rule, the prosecution here argued: "*As a*

prosecutor, who's worked on this case a lot of hours, I saw [**XXX**'s drawing], and I thought the State rests." RR-161:129 (emphasis added). The prosecution continued:

> I'll tell you equally on the other side of the scale [this case] is as easy legally as it is for you to decide. This isn't our case. *We've tried some. This isn't one of them. This isn't a hard case. Legally, it doesn't get any easier than this.... Don't you waste a single solitary second on believing that this is a hard case....*
>
> When is the first time you thought to yourself he did it? I want to bet a long time ago, right? *He did it*. Had you ever sat here one second of all these weeks and thought to yourself: Oh, I'm not sure about this? *No. No. That's how you know it's so easy....*
>
> I submit to you that the evidence in this case has blazed a wide, smooth, super easy, straight road that leads from here right over there to that man in that white shirt and tie. There's your killer. Got any doubt about it? Any? Forget reasonable doubt. Do you have any? No. No, you don't have any. He did it. That's your capital murder defendant right there. *I know it. You know it. He knows it.*

RR-161:135, 137, 139 (emphasis added). The prosecutor could not have been more unequivocal: she had a lot of experience, had decided Calvert was guilty, and believed the jury should make the same finding. She also instructed the jury on how it was to conduct its deliberations: "You have been led to a correct, rock-solid, no-doubt-about-it guilty verdict of capital murder. So you make it confidently, and you make it swiftly. You send a message to him. Say 'this wasn't hard. This was pretty easy. We know you did it.'" RR-161:151. The impartiality of impressionable jurors "unused to court procedure," *Vargas*, 79 S.W.2d at 861, the very value protected by

not allowing prosecutors to couch their argument in terms related to their experience and expertise, was completely disregarded.

Under well-established Texas law, "the State may not argue that the community at large or a particular segment of the community expects or demands a guilty verdict or a particular punishment." *Carmen v. State*, 358 S.W.3d 285, 300 (Tex. App. – Houston [1st Dist.] 2011, pet. ref'd) (citing *Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990)); *see also Bothwell v. State*, 500 S.W.2d 128 (Tex. Crim. App. 1973) (holding that a jury argument referring to community expectations of a particular result constitutes reversible error and cannot be cured by a jury instruction to disregard). Yet here, the prosecution not only emphasized its own belief in Calvert's guilt but, worse, implored the jury to convict Calvert on behalf of the community at large: "Several times I've thought to myself: Does he think that we're [the State and law enforcement] just a bunch of idiots? The answer to that question is: Sure does." RR-161:138. But, the prosecutor concluded: "James Calvert underestimated the idiots from Smith County because here we are. The case is clear cut. The facts are horrific. Thank God we're not as stupid as he thought we were...." RR-161:148. Moreover, the prosecutor effectively demanded the jurors to join the State's team and become part of the effort to prosecute and imprison him: "Now the job of trying to seek justice belongs to you. You know that old saying about the chain is only as strong as its weakest link? Never more true in law

enforcement." RR-161:149-50. And again, "We're [the State and law enforcement] all here. We're all speaking for her. But the truth is we can only do so much.... [O]nly you can hold him accountable. *I told you earlier I know it. I know he's guilty of capital murder. You know it*." RR-161:150 (emphasis added). But this argument totally misstates the role of the jury, namely to impartially evaluate the evidence and return a verdict consistent with governing law – not, particularly in a capital case, to join sides with the State and become a "link" in its chain.

* * * * *

The prosecution engaged in obviously improper conduct throughout its closing arguments, in violation of well-known and long-established Texas law as cited above. In addition, the prosecution's arguments violated federal due process requirements. *See*, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985). Given the magnitude, extent, and egregious nature of the misconduct, the errors also cannot be found to be harmless. *Chapman v. California*, 386 U.S. 18, 23 (1967).

B. The Prosecution Engaged In Repeated, Similar, Egregious Misconduct During the Penalty Phase Closing Arguments.

The prosecution transgressed virtually every boundary this Court has placed on closing arguments during the guilt phase of Calvert's trial, and it did the same during the penalty phase closing arguments as well. As demonstrated through the examples below, the prosecution went out of its way to impugn Calvert personally

and to have the jury render a verdict of death based on emotional appeal and hypothesized facts, as opposed to the evidence properly introduced and the relevant special issues defined by Texas law. Thus, at a minimum, Calvert's sentence of death should be reversed.

1. The prosecutor impermissibly commented on Calvert's failure to testify.

Commentary about a defendant's failure to testify violates the Fifth Amendment privilege against self-incrimination and the equivalent statutory right under Texas law. *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011); Tex. Const. art. 1, § 10; Tex. Code Crim. Proc. art. 38.08 ("[T]he failure of any defendant to … testify shall not be taken as a circumstance against him" or "be alluded to or commented on by counsel."). In *Dickinson v. State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984), this Court explained that Article 38.08 is violated when a prosecutor uses language that "was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify." Thus, a statement such as "[y]ou haven't seen one iota of remorse, one iota of shame," is improper because it would "permit[] jurors to infer lack of remorse from the exercise by the appellant of his constitutional right to remain silent." *Id.* at 322, 325; *see also Swallow v. State*, 829 S.W.2d 223, 225 (Tex. Crim.

App. 1992) ("Testimony as to contrition or remorse can only come from the accused."), *overruled by Randolph v. State*, 353 S.W.3d 887 (Tex. Crim. App. 2011).

During the penalty stage of the proceedings, the prosecutor focused her argument on the defendant's personal feelings of remorse and, in so doing, she improperly called the jury's attention to Calvert's decision not to testify:

> *And there's no remorse*. He sits over there ... shaking his head at me. *Where's the acceptance of responsibility*? Even Mr. Haas stood up here and told you, "We understand; we get it" was the words he used. Really? Because the last time we were standing here, he was arguing that he was what? Not guilty. So when did they get it? Where's the responsibility when he's pulling the trigger six times, when he's changing the license plates?

RR-171:139-40 (emphasis added). In *Bower v. State*, 769 S.W.2d 887, 906 (Tex. Crim. App. 1989), *overruled on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991), this Court found almost identical statements – "Not one single bit of remorse for what he did. Look at him. Do you see him right now? Do you see him feel bad for what he did? Does he feel bad?" – to have improperly commented on the defendant's failure to testify. Unlike in *Bower*, where the error was cured when the trial court sustained the appellant's objection, here defense counsel's objections were overruled and the prosecutor continued on: "Where's the remorse?" RR-171:140.

In *Griffin v. California*, the Supreme Court emphasized that although a jury may find a defendant's failure to testify significant, the State cannot invite the jury

to make that inference: "What the jury may infer, given no help from the [State], is one thing. *What it may infer when the* [*State*] *solemnizes the silence of the accused into evidence against him is quite another*." 380 U.S. 609, 614 (1965) (emphasis added). Here, using language drawn almost directly from cases in which this Court has found prosecutors to have improperly commented on a defendant's silence, the State violated Calvert's Fifth Amendment and Texas law rights and the trial court refused to take any curative measures, notwithstanding defense counsel's objections.

2. The prosecution again violated Texas's "golden rule" by instructing the jury to identify with the victim and her children and by inflaming the passions and prejudices of the jury.

As set forth above, Texas law is clear that a prosecutor may not invoke a "golden rule" argument that asks jurors to consider the case from the perspective of the victim or others affected by the crime. *Nickerson*, 478 S.W.3d 744. Like with guilt-stage argument, the prosecutor invoked the golden rule repeatedly during the penalty stage closing, in a blatant attempt to encourage the jury to avenge the victim, as opposed to faithfully apply the law when considering the appropriate penalty. The prosecutor emphasized:

> Y'all know what happened. 'Mama. Mama. Mama.' And with everything she's got, she raises that little head. Can you hardly stand that? I can't. She raises that little head up.... She raises her head to answer her baby, and what does she get for it? This one right here (indicating). He shattered the very brains of **XXX**'s mother right in front of him....

> That fear that she felt when he said, I want you to think about those last minutes, I do, too. That's what this crime is about.
>
> It's about bam in the back. You're down there. You're in the corner. Bam in the stomach. Bam, bam. That's tortious. He executed her, because he wanted **XXX**, and he didn't want her to move. And how dare a jury in Smith County tell him otherwise.
>
> When you look at it from her perspective, help wasn't coming. I told you that. Help wasn't coming. And she knew **XXX** was with him....
>
> But the reality of what Jelena Sriraman endured, that's the mannequin right there. This is painful to look at, and she's a mannequin. Painful to look at. Can you imagine? Imagine physically what it would feel like just to be shot once in the back. I think the emotional part was probably pretty tough....
>
> I'm going to pass the case to you. I know you'll go back there and finish your job. I know it's been hard for some of you who try to save children for a living, who are moms, dads.

RR-171:138-149.

Likewise, and again similar to the misconduct that occurred throughout the guilt phase, the prosecution inflamed the passions and prejudices of the jury by placing them in position of Ms. Sriraman's children. For example, the prosecution argued: "**YYY**'s a victim. She never got to say goodbye to her mom. **XXX**, to me, is a victim in a class all alone. Little 5T Garanimals sweatshirt that his mama put on him that morning." RR-171:138. These statements, alone, sought to inflame the jury to the point where they were unable to objectively weigh the appropriateness of the death penalty, but the prosecution took it further still. Asking the jury to situate themselves "back on the day that you got the yellow [jury notice] card in the mail,"

RR-171:141, the prosecutor asked: "If I had shown you the crime scene photos then, would they have made you sick to your stomach? If I told you what we found out about the ballistics, about Jelena raising her head up in answer to **XXX**'s call, would it have broken your heart then? It would have, and it should now." RR-171:142. And even if a juror was somehow able to divorce emotion and inflamed passions up to this point, the prosecutor *instructed* the jury to allow their emotions to guide them when she asked: "Should it be emotional to you? Yes. To every one of you. Every one of you. Because she deserves it." RR-171:144-45.

These comments did not merely ask the jury to place themselves in the victim's position, but they went a step further by hypothesizing characteristics of the crime for which there was no record evidence and by urging the jury to be guided by their emotions in settling on a sentence. Particularly in the sentencing phase, when the jury has the delicate task of weighing mitigating and aggravating evidence to assess the reprehensibility of a crime and a defendant's future dangerousness, the combination of "golden rule" arguments and appeals to passion and emotion made it impossible for the jury to objectively carry out its appointed task.

3. The prosecution again committed error by referring to Calvert as a "coward," a "monster," and the personification of "evil."

As described above, this Court has long held it is reversible error for the prosecution to personally attack or impugn the defendant or demonize him in the

eyes of the jury. *Swilley*, 25 S.W.2d at 1099. While a jury may form its own opinions about a defendant in light of his crime, and particularly a violent murder such as this one, a prosecutor cannot influence that decision-making process by abusing or demeaning the defendant in front of the jury. *Velez*, 2012 WL 2130890, at *29 (reference to defendant as "this coward right here" improper). But, as with the guilt stage, the prosecution personally attacked Calvert repeatedly and at length. For example, the prosecution fixated on the notion that Calvert was "evil" and reminded the jury of this fact at every turn throughout the penalty stage closing: "They know the real James Calvert, *the evil that sits over there*." RR-171:120 (emphasis added); RR-171:141 ("You have heard weeks and weeks of the evil that sits over there, goes by the name of James Calvert."); RR-171:142 ("But I tell you this: Evil exists in this world. That's why we do what we do. And if you've never stared into the face of it, take a good long look. There it sits, and it goes by the name of James Calvert. Evil in its purest form."). Likewise, as it did in the guilt phase, the prosecution heaped insult upon insult on Calvert, calling him a "[c]old-blooded, calculated, manipulating monster" and "the heartless coward." RR-171:130, 141.

It is almost difficult to describe the extent to which these comments went beyond the permissible bounds of discussing the gravity of the crime and the defendant's propensity for future dangerousness, and instead vilified and abused the defendant in order to inflame the jury's passions and prejudices against him. In so

doing, the prosecution again made it impossible for the jury to properly evaluate the evidence presented in light of the applicable standards for the death penalty, and denied Calvert the right he has under Texas and federal law to be sentenced to death only if a jury appropriately weighs the applicable special issues.

4. The prosecution again improperly commented on Calvert's non-testimonial behavior.

A defendant's non-testimonial behavior during trial is irrelevant to the question of guilt, or to the appropriate penalty a defendant should receive. *Good*, 723 S.W.2d at 737. Commentary by a prosecutor on a defendant's in-court demeanor invites a jury to convict or sentence on a basis other than validly introduced evidence. As such, these comments can undermine the entire trial including, crucially, evidentiary rules whose purpose is to prevent extraneous and prejudicial information from influencing a jury to the detriment of the defendant. As with the guilt stage, the prosecution here went out of its way to make Calvert's in-court demeanor a centerpiece of its argument as to why he deserved the death penalty. And, again as with the guilt phase, at times these comments centered upon acts that Calvert took as part of his self-representation.

For example, during their closings the prosecutors repeatedly commented on Calvert's interactions with the judge which, while at times adversarial, certainly did not indicate his propensity for future dangerousness: "But you know what he

continued to do? Come in here, be disrespectful to the Court, disrespectful to the guards. He doesn't care about anyone but himself, and he's never going to change." RR-171:32. Likewise, claiming that Calvert's courtroom behavior was somehow indicative of the threat he would pose to society, despite the absence of any violent conduct by Calvert in the courtroom, the prosecutor continued: "If he wouldn't respect a state district judge presiding over his capital murder case, you think he's going to respect a 19-year-old, 20-year-old ... TDC guard?" RR-171:40; RR-171:24 ("You factor in how he's treated this judge up here."); RR-171:131 ("You know who's in control of this courtroom? That man right there, Judge Skeen, who ... deserves a lot better than what he's had to receive."); RR-171:133-34 ("[H]e has not been cooperative in this setting where there are lots of guards and it's smaller.").

Ensuring that the jury drew *precisely* the impermissible inference that nontestimonial courtroom behavior was relevant, the prosecutor referred to how the jury had "seen how this defendant has acted," something they *only* "saw" in the courtroom, and suggested that these observations should lead them to conclude "how dangerous he is and what he's capable of." RR-171:66. Likewise, highlighting Calvert's specific reactions to statements that were being made, the prosecutor instructed him during her rebuttal closing: "Shake your head no. Keep it up. There you go. You think he's going to be compliant now? He's real compliant now, isn't he? He can sit over there right now and go 'huh-uh,' (shakes head negatively)." RR-

171:134-35. These types of comments were impermissible, even if Calvert's face or gestures expressed disagreement with the prosecutor's inflammatory arguments and demonizations of him.

* * * * *

Again, the prosecution engaged in obviously improper conduct throughout its closing arguments, in violation of well-known and long-established Texas law as cited above, in violation of federal due process requirements, and cannot be found to be harmless. *Caldwell*, 472 U.S. at 339; *Chapman*, 386 U.S. at 23.

POINT OF ERROR NO. 13

THE TRIAL COURT ERRED BY ALLOWING IRRELEVANT AND PREJUDICIAL TESTIMONY AND QUESTIONING THROUGHOUT THE TRIAL THAT WAS CALCULATED TO INFLAME THE JURY AND DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

Throughout the trial, the prosecution repeatedly injected irrelevant, highly prejudicial, and derogatory questioning, testimony, and outright insults that − when viewed individually or in total − were clearly calculated to inflame the jury. This conduct included injecting testimony that was entirely irrelevant, but highly prejudicial, into the guilt phase − including responding officers' feelings about the defendant's young son, and testimony about a hypothetical gun fight between the defendant and police officers, despite there being no evidence of the defendant threatening the officers. The lead prosecutor asked excessively leading questions

about graphic and prejudicial topics throughout the trial, essentially being permitted to testify at will during witness testimony. And both the prosecutor and trial judge made several derogatory comments about the defendant in the presence of the jury, jointly demonstrating disapproval of the defendant beyond the issues at trial. All of this testimony, questioning, and conduct was clearly calculated to inflame the jury.

In allowing this conduct, and often even joining in, the trial court abused his discretion and deprived the plaintiff of a fair trial. Viewed individually, and especially taken as a whole, the consistent stream of errors in this case caused harm to the defendant. The prosecution's closing arguments emphasized the erroneously admitted evidence, demonstrating that there may the errors may have had an effect on the jury's verdict − and certainly that the errors cannot be shown to be harmless beyond a reasonable doubt.

Accordingly, these numerous errors as to relevancy, prejudice, and misconduct require reversal of the verdict in this trial.

A. The Trial Court and Prosecution Inflamed the Jury with Irrelevant and Prejudicial Testimony, and Derogatory Comments Against the Defendant.

Evidence is relevant under Texas law if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Tex. R. Evid. 401. Thus, "to be relevant, evidence must be material and probative." *Henley v. State*, 493 S.W.3d 77, 83-84

(Tex. Crim. App. 2016). Evidence is material only where it is "shown to be addressed to the proof of a material proposition," *id.*; for evidence to be probative, it "must tend to make the existence of the fact more or less probable than it would be without the evidence." *Id.* (internal quotation marks omitted).

Even where evidence is relevant, it must be excluded where "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. A Rule 403 analysis "includes the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *Rolle v. State*, 367 S.W.3d 746, 750 (Tex. App. – Houston [14th Dist.] 2012, pet. ref'd). Evidence may be unfairly prejudicial, and thus subject to exclusion, where it "arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence." *Newland v. State*, 363 S.W.3d 205, 208 (Tex. App. – Waco 2011, pet ref'd).

In considering the capital murder charge against the defendant in this trial, three separate offenses were relevant: (1) murder − whether the defendant intentionally caused the death of Jelena Sriraman; (2) kidnapping − whether the defendant intentionally abducted his son, and (3) burglary − whether the defendant

entered the victim's home without the victim's consent in order to commit a felony theft or assault. As set forth in more detail below, the categories of testimony and evidence described herein were irrelevant to the jury's consideration of the issues underlying the prosecution of these crimes. To the extent they had any probative value, it was far outweighed by the danger of presenting unfair prejudice and needless cumulative evidence.

This irrelevant and unfairly prejudicial evidence and testimony consists of four main categories: (i) testimony from police officer witnesses about the impact of the Defendant's son **XXX** on their own lives; (ii) testimony from police officer witnesses about a hypothetical gunfight that they could have faced from the Defendant, despite no evidence of the threat of such a fight; (iii) excessively leading questions from the prosecution on cumulative, prejudicial topics; and (iv) argumentative and derogatory comments towards the Defendant from both the prosecution and trial court.

1. The witness testimony about the Defendant's son XXX was irrelevant and clearly calculated to inflame the jury.

Throughout the trial, the prosecution repeatedly elicited testimony about **XXX**, the defendant and victim's son, which was entirely irrelevant. Although certain facts about **XXX** were relevant to the case, such as his abduction from his mother's house, the prosecution purposely brought out testimony about the personal

feelings for **XXX** *of the responding officers*, and the officers' feelings about their own children. This testimony had no bearing on any issues on trial, and sought to invoke the jury's sympathy unrelated to relevant evidence.

This irrelevant testimony took up a large portion of the trial, as the prosecution purposely elicited testimony about every Louisiana responding officer's feelings for **XXX**. *See*, *e.g.*, RR-141:123-24 (Officer Downhour's testimony about his own children, and being "sad that [**XXX**] was there"); RR-139:153-54 (Officer Spoon); RR-140:185-87 (Officer Cummings); RR-142:136-37 (Officer Knight). While each of these examples of their personal feelings about **XXX** was irrelevant and prejudicial, certain instances were particularly so. For example, the prosecution had the following exchange during its direct examination of Officer Raymond Spoon:

> Bingham: Do you keep – real quick, I just have about two questions for you. Do you keep a picture of **XXX** in your home?
>
> Spoon: Yes.
>
> Bingham: What made you – I mean, you see a lot of stuff in the job you do. What made you keep a picture of **XXX** in your home?
>
> Spoon: Because he was kidnapped, and his mom was murdered in front of him and − [objection by Calvert overruled by the court] And I have children. And I think it was something good that we did, and it reminds me that God is taking care of us while we work every day.

RR-140:129-30.

The prosecution elicited testimony from Officer Cummings that went beyond simply being irrelevant and prejudicial for his feelings or connection to **XXX**, but described his own personal story about not being able to spend time with his child on Halloween due to the chase, while also evoking a sense of danger to him:

> Bingham: Do you remember that Halloween in reference to your daughter?
>
> Cummings: I do.
>
> Bingham: And what was significant? I mean, I know all Halloweens anytime with your child, your daughter, is significant, but as far as that Halloween, tell me about that.
>
> Cummings: That was the first Halloween my child was walking.
>
> [objection by Calvert overruled by court]
> ...
> Cummings: My ex-wife brought her to the police department. She was dressed up as Cookie Monster. And we went around and got candy from our dispatchers, and then we went to the neighborhoods in the city, and I tagged along.
>
> Bingham: And it wasn't – I guess it was – I don't know when that was on Halloween. I know she's little at the time. But it was after that that – with your badge on, you went out there and attempted and did apprehend the defendant in this case. *And I guess it's significant, because you truly did put your life on the line after being with your little girl and almost getting smoked, didn't you?*
>
> Cummings: Yes, sir.

RR-141:83-85 (emphasis added).

This irrelevant, prejudicial, and drawn out testimony continued, with the prosecution eliciting testimony about how Officer Cummings' uncle is in the West Monroe Police Department and thus they are all "family." RR-141:85. Then, the prosecution returned to Officer Cummings' feelings about **XXX** again, *see* RR-141:86-87 ("Q: That kind of hits home with you when you have a little girl like you did. A: It does.").

Through a series of blatantly leading questions, the prosecution elicited testimony from Officer Downhour about his feelings toward **XXX**, as a father himself.

> Bingham: At the time that chase ended, there was a little 4-year-old boy that had been in the back in the car seat throughout the entirety of the chase.
>
> Downhour: Correct.
>
> Bingham: The defendant in this case, James Calvert, led you all on a chase that was not just dangerous for you but also for the little boy in the back of the car.
>
> Downhour: Absolutely.
>
> [objection by Calvert overruled by court]
>
> Bingham: And as you went back there and saw that little boy pulled out of the car, being a father yourself, it did make you mad, didn't it?
>
> Downhour: It did.

RR-142:51-52. Finally, the prosecution elicited testimony from Officer Knight about her interactions with **XXX** in the precinct, showing that **XXX** had a "place in [her] heart." RR:142:136.

> Bingham: How many times would you say you've thought about **XXX** over the past three – since this happened?
>
> Knight: Numerous times.
>
> Bingham: Wondering how he's doing?
>
> Knight: I would like to know how he is. Wouldn't mind seeing him.
>
> Bingham: All right. Just that little bit of time, in your mind, he's got kind of a place in your heart; you have a bond with him?
>
> Knight: Yes.
>
> …
>
> Knight: And then, after I left the scene and went to the station, then he and I became buddies, and we played at the station and had some snacks and watched TV, just tried to keep him busy.
>
> Bingham: And I assume you know probably – of course, y'all don't – you don't need a pat on the back, but you know what y'all did that night was tremendous in locating **XXX**, and then what you did for him after you got him away from that scene was – I mean, you really made a difference, and you know that, I hope.
>
> Knight: God puts people where they're supposed to be, I believe.

RR-142:136-37; *see also* RR-142:141 ("Q: [Y]ou obviously will get into the fight, but you have a big heart as well. Were you mad when you saw **XXX** in the back of that car and what he'd just been subjected to − A: Very. I was very angry."). Whether the police officers had children of their own, whether they trick-or-treated

with their children, how they personally felt towards **XXX**, and whether they kept a photograph of **XXX** at the station all have no bearing on whether Calvert abducted **XXX**. This questioning should not have been admitted.

In *Janecka v. State*, this Court addressed strikingly similar testimony from a judge who testified as a witness in a murder case, because he had been involved in its prosecution. 937 S.W.2d 456, 473 (Tex. Crim. App. 1996). The witness testified that he had a photograph of the child-victim in the case, which he kept in his office. *Id.* The court held that it was error to permit the witness to "testify about the impact of [the child's] murder upon his life" because the testimony "had no relevance to any issues at trial." *Id.* (finding that the error was not reversible, in part because the defendant had committed "at least four murders for hire"). Similarly, permitting the extensive, analogous testimony quoted above was error in this case.

Furthermore, the nature of the officers' testimony, regarding their personal feelings as parents and their sympathy for a small child, is plainly designed to arouse sympathy in the jury, leading them to decide the case "on an emotional basis and not on the basis of the other relevant evidence introduced at trial." *Reese v. State*, 33 S.W.3d 238, 242 (Tex. Crim. App. 2000) (finding that a photograph of an unborn child was erroneously admitted and noting that "[s]ociety's natural inclination is to protect the innocent and the vulnerable"). The officers should not have been permitted to testify about their own children or their emotional reactions to **XXX**.

2. Testimony about a hypothetical "gunfight" was irrelevant and clearly calculated to inflame the jury.

The State piled on top of the officers' irrelevant personal feelings and tributes to **XXX** by adding their feelings about danger they *could* have faced in a purely hypothetical gunfight with Calvert. Although the State adduced no evidence at trial regarding any aggressive action taken by Calvert towards the officers, or any attempt by him to shoot at the officers, the prosecution asked drawn-out questions multiple times about the danger the Louisiana police officers could have faced, *if* Calvert were to have drawn weapons found in his trunk (evidence concerning which was irrelevant in any event and should have been excluded, *see* Point of Error No. 20):

> Bingham: And obviously.... I have no problem with law-abiding citizens owning these [guns]. I do. But from a police officer's perspective, let me give you a scenario…. When you pull somebody over – say it's a traffic stop – and at times, I've been pulled over.... Do y'all get out of your cars right away when you have a traffic stop?
>
> Williams: Not all the time.... Because, if you stop a car, you want to make sure there's no furtive movements going on. They're not acting a little crazy inside. You kind of survey what you have before you step out.
>
> …
>
> Bingham: You want to try to determine how many people are in the vehicle, look for things like furtive movements, like trying to hide something or making some movements in the car –
>
> Williams: Yes.
>
> Bingham: − that might raise your attention. Have you ever heard the term, "A pistol's great until you can get to your rifle"?

Officer Williams: Yes.

Bingham: If you're in a gunfight, do you prefer to have your .40-caliber pistol or your rifle, like this that you carry?

Williams: My rifle.

Bingham: Let me ask you this scenario: Say that you pulled me over in a car, and I have these weapons loaded in the car loaded with magazines, one in the chamber. And I get out of my car, and I was like, "Hey how you doing?" And I pop the trunk. *If I open that trunk and grab that gun, you're in trouble.*

Williams: Yes.

…

Bingham: These guns in a firefight with a police officer, *you are severely outgunned if I'm approaching you with this weapon* over your .40-caliber Springfield, true?

Williams: Yes. Because using a rifle, you have optics a lot of times on rifles. You can be a further distance away from your target and make more accurate shots than you can with a pistol, generally.

Bingham: And how many rounds do you have in your pistol?

Williams: 16.

Bingham: 16. I have 61 in this one. Will those bullets – do you know if – I know that there are bullets made for this gun that will go right through your vest. Do you know if those rounds like that would penetrate your vest?

Williams: They would be pretty close. I know the 7.62X39 will completely go through a vest.

RR-151:28-31 (emphasis added).

The prosecution elicited similar testimony through leading questions to another responding officer. Here, the State specifically suggested a hypothetical

scenario in which Officer Malmstrom was shot and killed, even though Calvert had *not* done what was being suggested:

> Bingham: If I pop the trunk when I stopped and had loaded firearms in there, like that AR, loaded up, say when I was coming to a stop in my car, if I just pop my trunk, pulled my car into stop and got out and said, Hey, how's it going; sorry I was – and I pulled the trunk up and grabbed ahold of one of those guns, you're dead, aren't you?
>
> Malmstrom: Yes.
>
> Bingham: Because that gun is fully loaded. There's one in the chamber. All I have to do, if the safety's on, is just flip that safety down, and you're – you're done?
>
> Malmstrom: Yes.

RR-153:44-45. Testimony about a police officer facing death would certainly be of concern to a jury, but it bears no relation to what actually occurred in this case. None of the charged offenses involved shooting at police officers, and there was no evidence suggesting Calvert had threatened police officers with any of the weapons in his trunk.

Weighed against this minimal-to-no relevance is the highly prejudicial nature of testimony about violence and threats to police officers, which by its nature arouses sympathy for the State and hostility towards the defendant. In *Madden v. State*, the reviewing court stated the obvious, that it "is true that making threats against the police could be considered inflammatory." 911 S.W.2d 236, 243 (Tex. App. – Waco 1995, pet. ref'd). However, the court held that the defendant in that case was not

unfairly prejudiced because the defendant actually threatened police officers. *Id.* In this case, Calvert did not actually threaten the police with any guns. The testimony was clearly calculated to inflame the jury, and it should have been excluded.

3. The prosecution's excessively leading, repetitious, and graphic testimony was also clearly calculated to inflame the jury.

Throughout the entire witness testimony phase, the prosecution asked extremely leading questions, essentially providing long segments of testimony with the witness giving short answers of agreement. The prosecution used these leading questions to introduce inflammatory testimony, to suggest prejudicial conclusions, and to assemble piles of cumulative, graphic testimony. This testimony was of little probative value − due to its cumulative nature and because most of it came from the prosecutor − and was clearly calculated to inflame the jury.

This tendency was most pronounced with the doctor who testified about the autopsy report, Elizabeth Ventura, and the following witness, forensics expert Howard Ryan. A large portion of the prosecution's questions were extended testimonials about the extent of the damage, characterizing that damage, and then dwelling on it. For example, the following exchange occurred without the witness providing predicate testimony for the leading question.

> Bingham: Is there any – can you think of another word to describe – I mean, what she's experiencing in her body before the headshot physiologically, the – the shooter has fired a projectile that's torn through both her lungs, her back, her kidney, her liver. She's gut

shot. She's shot in the back. Is there any other word to describe what she's experiencing other than awful and horrific? I mean, how do you describe something like that?

Dr. Ventura: Correct. Those terms can be used to describe the pain that she was going through.

RR-158:38-39; *see also* RR-158:34-35. In the following exchange, the prosecution walked through the sequence of shots again, and then introduced, with no predicate, the gruesome phrase "[b]lew her brain matter out her eyeball":

Bingham: She's a small woman. If you wanted to, you could shoot her in the leg. She'd fall to the ground. I guess this is somebody who – it was overkill.... I guess what I'm getting at, if you wanted her out of the way, you could knock her out of the way or hit her with a fist. This is someone that shot her five times, but – I mean, six times; in the head, the back, the liver, the kidneys, the lungs.

Ryan: One of the first things is that – just out – is she's wounded, she's down, and there was a continuation of engaging in gunfire and a closure of the gap.

Bingham: Blew her brain matter out her eyeball.

Ryan: Yes.

RR-158:167-68.

The prosecution walked through the sequence of shots over and over again, consistently dwelling on the graphic details and supplying the necessary conclusions itself, such as intent to kill:

Bingham: I mean, we've got one in the gut, one in the head, one in the back, in the side. I mean, these are – these are all shots that are

placed – do you agree or disagree – very – I mean, these are shots that are placed to really kill and injure – or to kill.

Dr. Ventura: Yes. The gunshot wounds that she sustained were to – the majority, except the one to the arm, were to her trunk, which contains our vital organs.

Bingham: You know, and if you look even at some of these shots, I mean, they're placed within an area − .... These are all placed within an area − taking − the head, obviously everyone knows, you get shot in the head, that's a very critical injury, but even to the body, these are placed within an area on her body − she's very small. What is that? Maybe a foot going up and down this way (indicating)? I mean, it's not like she's shot in the ankle and in the thigh. This is all in this critical area of your heart and your back and your lungs, true?

Dr. Ventura: Correct.

RR-158:29-31. Finally, and absurdly, after either repeating the shot sequence himself or having the witness walk through it multiple times, the prosecution asked the witness to "go through that one more time." RR-158:172. After a sustained objection, the prosecution simply walked through the sequence of shots to the victim with the witness yet again, anyway. RR-158:172-74.

The prosecution asked similarly leading, repetitious, and inflammatory questions for other witnesses. For Officer Williams, the State asked leading questions about the officer's desire to "determine what transpired" with regard to "the lady [who] was shot and killed and murdered." RR:147:89. Bingham asked a lengthy and leading question about why Officer Williams chose to do his job even though he was "underpaid" and had to "walk into a crime scene, look at a lady that's

shot to death, go home and be with your family" – while noting that he "understand[s]" because it's "what I see every day." RR-147:89-90. After not getting the precise response he wanted, Bingham simply supplied it, asking "is it gratifying to you to know that if you solve the case, if you find certain evidence, that someone will ultimately be held accountable for what they've done?" RR-147:90-91.

Bingham inserted his own conclusions into Officer Williams' testimony through the use of leading questions, with regard to the officer's need (or lack thereof) to get a warrant, RR-147:94-96; his need to "clear [the] rooms" of the house to avoid someone "shoot[ing] them in the head," RR-147:98; and the victim's desire to live and the shooter's motivation:

> Bingham: And the significance of that ... is that it's certainly plausible that, before the killer shot her multiple times, she was trying to get away from the shooter inside the kitchen?
>
> Williams: Possibly, yes.
>
> Bingham: Indicating she probably wanted to live?
>
> Williams: Yes, sir.
>
> …
>
> Bingham: That whoever shot her – is there a reasonable inference from the evidence you looked at, that whoever shot her multiple times, to shoot her that many times was clearly motivated by anger? Possibility?
>
> [objection by Calvert overruled]

> Williams: Yes.... [T]o have a, clearly, unarmed victim that is shot multiple times, it makes you think that maybe there's a personal connection.

RR-148:18-22.

The prosecution also dwelt on graphic testimony, essentially testifying in front of the witness about various bloody topics, at length and repeatedly. For example, after discussing the victim's bloody clothing with Officer Williams at length, with Officer Williams only answering in one or two word affirmations, RR-148:142-49, the following exchange occurred:

> Bingham: And you might not feel comfortable testifying, but just imagine in your head, raise her body up − [objection by Calvert overruled] – set her body up, look at the blood swipe from the middle of her back and imagine her sliding down that – sliding down that door leaving that contact transfer from her back, her being in the seated position and that bullet that went in the bottom of that door frame coming right through there. That's − that's −
>
> Williams: It's possible.
>
> Bingham: Possible? Beyond what you have to determine, isn't it?
>
> Williams: Yes, sir.
>
> Bingham: If that was – if that was the case, and I know you can't make that determination – that means whoever shot her shot that lady, poor lady, after she had already been shot in the back and had already fell to a seated position –
>
> [objection by Calvert; Bingham withdraws the "question"].

RR-148:154. These are just a limited number of examples; the trial record is filled with similar examples of improper, leading, argumentative, and highly prejudicial

questions. *See also*, *e.g.*, RR-136:108 (questioning of Calvert's sister, Debbie Campbell) ("And although I think most sisters would want a brother that respects women and would protect women and treat them like they would want their daughter treated, that's not what you have with him, is it?").

Rule 611(c) of the Texas Rules of Evidence prohibits leading questions "except as necessary to develop the witness's testimony." Tex. R. Evid. 611(c). A leading question "either suggests the answer sought by the interrogator or puts words into the mouth of the witness to be 'echoed back' in reply." *Cooley v. State*, No. 01-07-01016-CR, 2009 WL 566466, at *9 (Tex. App. – Houston [1st Dist.] Mar. 5, 2009, pet. ref'd) (not designated for publication). A trial court abuses its discretion in permitting leading questions where the leading questions "resulted in undue prejudice," in that they "had a substantial and injurious effect or influence on the jury in determining its verdict." *Id.*

There can be no legitimate dispute that the questions cited above, in this section and others, are leading questions in that they all suggest the answers within the question, often only requiring a one-word affirmation from the witness. And the trial record shows they were pervasive. Given that fact, and the nature of the highly argumentative and inflammatory leading questions, it is clear that the questions were both designed to, and did, prejudice Calvert. The questions were so repetitious as to have little to no "probative value," balanced against their potential to "impress the

jury in some irrational, yet indelible way" due to their blood-soaked nature. *Rolle*, 367 S.W.3d at 750. Accordingly, the trial court erred by permitting the prosecution's prejudicial and repetitious leading questions. The entire trial in this case was simply one big grandstand of emotion, designed to obscure the legitimate issues in the case: was Calvert guilty of murder, or capital murder? Did the evidence establish an unlawful abduction? Did the evidence establish a burglary? *See infra*, 183-87. Certainly, the State was entitled to prove the murder, and Calvert's responsibility for it. But it was prejudicial error for the State to wallow in the blood, and to appeal to the jury's sympathies and emotions at every turn.

4. The prosecution's derogatory comments about Calvert and the trial court's comments on the evidence were also calculated to inflame the jury.

Finally, the prosecution unfairly prejudiced the jury against Calvert throughout the trial by making derogatory and argumentative remarks about him during witness testimony. Rather than curing the negative impression in the jurors' minds that the State sought to create, the trial judge worsened it by criticizing Calvert and commenting on the evidence in the jury's presence as well. These comments were clearly calculated to inflame the jury, and created the impression that both the prosecution and the trial court were united against the defendant.

First, the prosecution and trial court repeatedly commented, in front of the jury, on Calvert's purported failure to follow proper etiquette, despite being allowed

to represent himself. The prosecution's comments were explicitly insulting, and in one of the most drastic instances, the prosecution stated to the defendant "you killed your wife" as a side comment in front of the jury, not during any testimony by the defendant:

> Bingham: Judge, he makes these ridiculous-looking faces on the record as if to comment to the jury.... And also, be cognizant of the difference between TPD Number 190 and the State's Exhibit Number 190-L, which was the Springfield firearm you killed your wife – ex-wife with.
>
> Calvert: I would object to that improper comment on the ex-wife, Your Honor.
>
> Court: That's the allegation in the indictment. I believe what I'll do, at this time, ... I'm going to recess for 15 minutes so that – I'm sure the jury needs a break.

RR-151:78-79. The court overruled Calvert's objection, essentially indicating its approval of the improper comment by the prosecution. In another instance, the prosecution set out a theme it would repeat throughout the trial and at closing − that Calvert does not "care ... what the rules are":

> Bingham: Judge, we're going to – we're going to object only in that the defendant, because he doesn't care what the Court says or what the rules are, continues to try to get into stuff that he has filed a suppression on and that we have honored.... We'd ask the jury to be instructed to disregard because we have operated in good faith based on what he had filed, and he continues to try to subvert the rules. He doesn't care what they are, what the Court says. He's always trying to backdoor and do something . . .

RR-153:10-11.

Similar to some of the prosecution's leading questions above, the prosecution also made derogatory comments towards the defendant in front of the jury, and then would "withdraw" the statement or question:

> Bingham: And could you tell in this photograph if the killer had, in an act of cowardice, shot her in the back?
>
> Calvert: Your Honor, I'm just going to object to the comment "act of cowardice shot her in the back." Highly prejudicial.
>
> Bingham: I think anyone who would shoot a woman in the back is an act of cowardice, but I'll withdraw my statement, Judge.

RR-147:121. All of the derogatory and prejudicial comments by the prosecutor in this case − calling Calvert a "coward," "ridiculous," and that he "doesn't care" about the rules, and telling him, in front of the jury, that he killed his wife, were clearly calculated to inflame the jury. It was error for the judge to not only refuse to sustain Calvert's objections, but to essentially approve of some of the State's improper commentary.

Finally, the trial court's own repeated commentary on the evidence further demonstrated to the jury that it was aligned with the prosecution's side of the case. Over objections, the court repeatedly described in front of the jury what the "evidence shows" regarding the defendant driving the vehicle in the "chase," and the officers breaking the windows "trying to get the defendant out of the car" as the defendant was "fleeing." RR-140:25, 26, 33, 191. These comments added to the impression given by the trial court throughout the trial of disdain towards Calvert,

and alliance with the State. Regardless what the court may have felt about Calvert or why, the court had an obligation to remain neutral and objective before the jury.

Any remark by the court on the "weight of the evidence" is improper. TEX. CODE CRIM. PROC. art. 38.05. To the jury, "the language and conduct of the trial court have a special and peculiar weight." *Clark v. State*, 878 S.W.2d 224, 226 (Tex. App. – Dallas 1994, no pet.). In this case, the trial court's comments constitute "reversible error" because they "impl[y] approval of the State's argument," "indicate[] ... disbelief in the defense's position," and "diminish[] the credibility of the defense's approach to its case." *Id.* The trial court accomplished all of these ends, both through its commentary on the evidence and its conduct towards the defendant throughout the trial.

***

In sum, the mountain of irrelevant and prejudicial evidence admitted in this case, the prosecutorial misconduct, and judicial commentary all constitute errors at trial. As explained below, these errors, whether examined individually or as a whole, harmed Calvert and deprived him of a fair trial. Accordingly, Calvert is entitled to a new trial.

B. The Trial Court's Errors Were Harmful and Deprived the Defendant of a Fair Trial.

When the trial court has abused its discretion in admitting evidence, as shown above, the reviewing court must determine whether the defendant was harmed by the errors. TEX. R. APP. PROC. 44.2. A defendant is harmed where his "substantial rights" were affected by the errors, including where the errors "had a substantial and injurious effect or influence in determining the jury's verdict." *Booker v. State*, 103 S.W.3d 521, 537 (Tex. App. – Fort Worth 2003, pet. ref'd). "If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 538 (citing *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). In making this determination, the court must consider the errors "in the context of the entire record and not just whether there was sufficient or overwhelming evidence of the defendant's guilt." *Id.*

The reviewing court must also analyze whether the prosecutorial misconduct and judicial commentary in this case harmed the defendant. As to prosecutorial misconduct, the reviewing court must reverse if a "rational trier of fact might have reached a different result if the error and its effects had not occurred." *Haddad v. State*, 860 S.W.2d 947, 955 (Tex. App. – Dallas 1993, pet. ref'd). For erroneous trial court commentary on the evidence, the error is only harmless if the court

determines "beyond a reasonable doubt that the court's error made no contribution to the conviction." *Clark*, 878 S.W.2d at 226 (quoting *Tennison v. State*, 814 S.W.2d 484, 486 (Tex. App. − Waco 1991, no pet.).

As a whole, and individually, the trial court's many errors in this case were harmful to Calvert, requiring reversal of the trial court's judgment. First, the subject matters of the irrelevant testimony and questioning − the officers' desire, as fathers, to protect a small child, and the possibility that they could die in the line of duty at the defendant's hand − were sensitive, inflammatory matters that were likely to affect the jury's consideration of guilt and punishment. *See*, *e.g.*, *Rolle*, 367 S.W.3d at 751 ("Society's natural inclination is to protect the innocent and the vulnerable." (quoting *Reese*, 33 S.W.3d at 239)); *Madden*, 911 S.W.2d at 243 (noting the "inflammatory" nature of "threats against the police"). The prosecution chose to elicit irrelevant testimony on these topics precisely because they were so inflammatory.

Moreover, the prosecution relied heavily on the erroneously admitted evidence, including the sympathy aroused for **XXX** and the hypothetical danger to police officers, in making its case both at the guilt and punishment stage. In referencing **XXX** throughout the closing argument for both guilt and punishment, the prosecution made sure to specifically note the officers' feelings for him. *See* RR-161:143 ("I care about **XXX**. I know you care about **XXX**. The officers do.");

RR-171:140 ("Remember those West Monroe officers.... They cared more about **XXX** than he does."). The prosecution even specifically referenced Officer Spoon carrying **XXX**'s picture. RR-161:144. The prosecution also referenced the fact that one of the officers was not able to take one of his own children trick-or-treating, in the context of discussing the officers' memories of and devotion to **XXX**. RR-161:146-47. The prosecution also relied upon the hypothetical scenario posed during the testimony of several police officers of Calvert potentially taking out weapons and shooting at officers, which he did not do. RR-171:122.

In cases such as this one where the prosecution devotes significant parts of its closing argument to erroneously admitted evidence, reviewing courts have found that the errors were harmful and a new trial was required. *See*, *e.g.*, *Booker*, 103 S.W.3d at 539 (granting new trial where there was "repeated emphasis by the State during trial and closing arguments" on erroneously introduced evidence); *Reese*, 33 S.W.3d at 244 (finding it significant in granting a new trial that the State "used and emphasized [the erroneously admitted evidence] during closing arguments"). Accordingly, the erroneously admitted evidence in this case requires the judgment to be vacated and a new trial for the defendant.

Taken together, the sheer volume of errors in this case regarding witness testimony, improper questioning and commentary from the prosecution, and commentary on the evidence from the trial court requires a new trial for the

defendant. This is true both as a matter of Texas law as cited above, and under federal due process standards. *Caldwell*, 472 U.S. at 339; *Dawson v. Delaware*, 503 U.S. 159, 179 (1992); *United States v. Riddle*, 103 F.3d 423, 435 (5th Cir. 1997); *United States v. Johnson*, 127 F.3d 380, 402 (5th Cir. 1997). In addition, given the magnitude, extent, and egregious nature of the misconduct, the errors also cannot be found to be harmless. *Chapman*, 386 U.S. at 23.

SIGNIFICANT EVIDENTIARY ISSUES

POINT OF ERROR NO. 14

THE TRIAL COURT ERRED, UNDER BOTH TEXAS LAW AND THE CONFRONTATION CLAUSE OF THE CONSTITUTION, IN ADMITTING THE HEARSAY TESTIMONY OF JUDITH LESTER, THE THERAPIST OF –*XXX*–.

(together with) POINT OF ERROR NO. 15

THE TRIAL COURT ERRED IN ADMITTING STATE EXHIBIT 4, –*XXX*–'S TREATMENT RECORDS WITH LESTER.

(together with) POINT OF ERROR NO. 16

THE TRIAL COURT ALSO ERRED IN ALLOWING LESTER TO TESTIFY REGARDING HER PERSONAL OPINIONS AND IMPRESSIONS, AND REGARDING –*XXX*–'S CURRENT FEELINGS.

A. Facts.

The State's first witness was Judith Lester, a therapist who at the time of trial was providing counseling services to **XXX**. The State emphasized that it sought to

call Lester *only* to testify as to statements **XXX** allegedly had made about his mother's shooting, and it also acknowledged that it could not ask her "to give an opinion on whether he's truthful or not truthful." RR-128:17, 28. And when the trial court ruled, over Calvert's objections, that Lester could so testify, the court also stated its understanding that Lester would testify only "about statements made to her by **XXX** relating to the commission of this offense that's charged in the indictment." RR-128:35.[13]

Allowed to go forward, however, the State immediately proceeded to ask Lester questions far beyond and in addition to the limited scope of what **XXX** had said to her about the incident. Thus, in the next questions after District Attorney Bingham asked Lester when she began meeting with **XXX**, he asked: "Was, in your opinion, your treatment of **XXX**, what he perceived really happened real? Was it real to him?" RR-128:45. Calvert objected, but the court overruled. Bingham then proceeded to ask questions like "is **XXX** getting better" and "Does he have a ways to go?" Calvert's objections again were overruled. RR-128:46. The prosecutor then said, before the jury, "I expressed to you I was not going to call him [**XXX**] as a witness, didn't I?" RR-128:46, and he asked, "In your opinion, had I called him as a

[13] In addition to his contemporaneous objections at trial, Calvert filed a motion *in limine* pretrial to exclude hearsay evidence of child witness, raising both hearsay objections and Sixth Amendment confrontation right objections. *See* CR-3:766.

witness to testify here today, you would not have been happy about that, would you?" RR-128:48. Calvert objected, the court overruled, and Lester proceeded to respond that **XXX** was "very sad that his mother has died" and if asked to testify "he would feel very sad about that" and "he would want to run away." RR-128:48; *but see* RR-128:57 (Lester also testified that **XXX** had stated "he thought maybe he'd like to come testify").

The State also offered Lester's treatment records summarizing her sessions with **XXX**. RR-128:49-50; SX-4. Calvert objected on several grounds, including that the records contained "hearsay within hearsay"; the court overruled all the objections and admitted SX-4. RR-128:51. The State then proceeded to ask, again before the jury, "Is it your opinion that it was important to the efficacy of treatment that **XXX** disclose the true identity of his perpetrator," RR-128:52, and the State asked Lester what **XXX** had said about the crime and the perpetrator. In response, Lester instead stated: "During this session, I had **XXX** draw for me how he would feel when he thinks of James killing his mother and then how he feels when he thinks of having to see his father again. And he could readily identify feeling sad when he thinks of James killing Jelena. And he feels like running when he thinks about having to see James." RR-128:54-55.

Moving on to the next therapy session described in SX-4, Lester began to describe that "the family advised me that the trial was going to happen and that they,

at that point, were concerned because he [**XXX**] was a witness, that he may actually be called to testify." RR-128:55. Calvert objected to this additional hearsay, but the court overruled the objection and Lester continued to testify: "So at that point, I started to create a flowchart for **XXX** that showed the trauma event in the center, and out from there, the different agencies, foster care, just what his experience was throughout all of this and began to help him to understand the court and the trial and jail versus prison." RR-128:56.

The District Attorney moved on to the next therapy session described in SX-4, and Lester again explained that "the family was worried about whether he'd have to testify in a murder trial against his father." RR-128:58. Calvert objected to the additional hearsay, but was overruled. Lester responded and again described **XXX**'s current *feelings*, not what he had stated about the incident:

> I engaged him to identify and then draw how he might feel if he had to see his father, James. And this is where he stated that he would feel sad at the thought of seeing his father and commented that he doesn't want to see − he didn't want to see his father at that time.

RR-128:58. Lester explained that in another session she had reviewed again "my recommendation to the family" and that "I want him [**XXX**] to know that I don't want to see him testify in this venue." RR-128:60. With regard to a picture **XXX** had drawn, the District Attorney asked Lester to "describe his demeanor when he's drawing a picture of what he witnessed." RR-128:65. Calvert's objection was

overruled, and Lester responded: "**XXX** is sad. **XXX** misses his mother very much, and he tell me that during session." RR-128:65

Before Lester completed her testimony, Bingham asked several leading, irrelevant and highly improper questions. For example, the District Attorney asked: "What **XXX** went through, would you say, was extremely traumatic for him?" and "Children, unfortunately, in this world, experience a lot of awful things children shouldn't have to experience, but if you had to think of a scenario, that would have to be pretty − I mean, on the dramatic chart, that's a big one, isn't it?" RR-128:82. Bingham asked, "And what you've noticed is a child that is very, very sad?" and "Is − does he feel unsafe at times?" RR-128:83.

In closing, the District Attorney asked "What are your − I guess you'll be going into another probably year of meeting with **XXX** in counseling sessions?" and "Is this − I guess this might be obvious, but this is something **XXX** will deal with − hopefully, you know, he will learn to integrate this, as you talked about, and live a fulfilling life, but these are memories that − and things he will recount and deal with throughout his life, isn't it?" RR-128:84. Bingham then asked: "Ms. Lester, I appreciate what you do for these kids. And like a lot of things you see with kids, it's certainly not fair to **XXX** what he's had to go through, is it?" RR-128:85. Lester dutifully answered each of these questions.

B. The Trial Court Erred, Under Both Texas Evidentiary Law And The Confrontation Clauses Of The Texas And Federal Constitutions, In Admitting The Hearsay Testimony Of Judith Lester, The Therapist Of –XXX–.

At the outset, the trial court erred in allowing Lester to testify regarding statements **XXX** had made to her regarding the incident. The court admitted that testimony on the basis of Tex. R. Evid. 803(4) and the decisions in *Taylor v. State*, 268 S.W.3d 571, 589 (Tex. Crim. App. 2008), and *Munoz v. State*, 288 S.W.3d 55 (Tex. App. – Houston [1st Dist.] 2009, no pet.).

The trial court erred in admitting statements **XXX** made to Lester regarding the incident for four reasons.

First, the instant case is unusual, and different from *Taylor* and *Munoz*, in that Lester testified regarding statements **XXX** had made regarding a portion of the incident in which he was not a *victim*, but rather was only an *eyewitness*. Apart from a few questions on re-direct not at issue here, the State did not ask Lester regarding the alleged kidnapping (in which **XXX** was the purported victim), but rather about the murder of Ms. Sriraman (to which **XXX** was a possible eyewitness). Although the incident unquestionably would be traumatic to **XXX**, particularly because his own mother was shot, there would be trauma any time a child witnessed a brutal shooting. This Court has not yet addressed the circumstances in which otherwise-hearsay statements may be introduced under Tex. R. Evid. 803(4) when the declarant

was merely an eyewitness, and not a direct victim, of the crime for which the testimony is admitted.

Second, and similarly, in both *Taylor* and *Munoz* the child witness *also* testified, in addition to the therapist. Thus, in those cases, the jury had the ability to evaluate the credibility of the witness, and the therapist's testimony provided corroboration for the declarant's personal account. In the instant case, the State did not establish that **XXX** was unavailable to testify or, at a minimum, that testimony would be harmful to him. To be sure, **XXX** was only seven years old at the time of trial; his mother was shot in the incident and his father was on trial; and Lester clearly did not believe that **XXX** should be called as a witness. But Lester also acknowledged that **XXX** had indicated that he might *want* to testify, and she explained various techniques she had used to help **XXX** become more familiar with a courtroom setting if he were *required* to testify. RR-128:56, 83-84. Outside the presence of the jury, the State should be required to establish that a declarant is unavailable to testify or, at a minimum, would be harmed if required to testify, before the State can introduce hearsay statements under Tex. R. Evid. 803(4) when the declarant does not also testify.

Third, and again related to the two points above, the introduction of hearsay statements in this context, when the declarant does not also testify, violates the Confrontation Clause of Art. I, Sec. 10 of the Texas Constitution, and the Sixth

Amendment. In a series of cases, the Supreme Court has emphasized the paramount importance of the constitutional right to confrontation, embedded in the Sixth Amendment. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Calvert invoked that right here. Again, at least absent a showing by the State that the declarant is unavailable to testify or, at a minimum, would be harmed if required to testify − which was not established on the record here − the defendant's Sixth Amendment rights are violated when critical statements from an eyewitness are introduced through a therapist, and the defendant has no opportunity to cross-examine the declarant. "Dispensing with confrontation because [the declarant's] testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes" "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 62, 68-69.

Fourth, with regard to this specific case, the State also failed to make the showing required by this Court in *Taylor*. To qualify as an exception to the hearsay rule under Tex. R. Evid. 803(4), a statement made for the purpose of medical diagnosis or treatment must satisfy two requirements. *First*, the declarant must have understood that the statement was made for the purpose of diagnosis or treatment. *Second*, the declarant must have been aware that proper diagnosis or treatment

depended on the truthfulness of the assertions. *Taylor*, 268 S.W.3d at 589. In the case of an ongoing course of therapy that takes place long after the incidents at issue, this Court has made clear that the State has the burden to show that (1) "it was important to the efficacy of the treatment that the mental-health professional know the identity of the perpetrator," and (2) "the child, prior to the disclosure, understood that importance." *Id*. at 591. The State failed to satisfy these requirements.

The State here attempted to make the showing required in *Taylor* solely through leading and conclusory statements, to which Lester agreed. RR-128:26, 52-53. No foundation or explanation was established for her conclusory responses. The State therefore failed to establish – as it must – an evidentiary basis for the fact that Lester could not properly treat **XXX** without this information.[14] Moreover, the State failed to establish that **XXX** – who was only six years old at the time he began therapy – understood that disclosure of the shooter was important to the effectiveness of his treatment.[15] The only testimony on this point is Lester's response of "yes" to a leading and conclusory question from the State about whether, prior to disclosing

[14] Unlike in a case of child sexual abuse, where the child-declarant is the victim of the offense at issue and the child's safety is a concern, here, the offense about which **XXX** made the statements at issue was not perpetrated against **XXX**, and his removal from the home of the alleged aggressor was not at issue. Regardless of whether he disclosed the identity of the shooter, Ms. Lester still had to treat him for symptoms related to losing his mother and thus, there is no showing that treatment was dependent on the disclosure of the shooter.

[15] This is a separate inquiry from whether **XXX** understood the importance of telling the truth.

the identity of the shooter, it was apparent to **XXX** that disclosure of the perpetrator was important to the efficacy of his treatment. RR-128:52. That statement is insufficient to carry the day. *See*, *e.g.*, *Taylor*, 268 S.W 3d at 592 ("there is nothing in this record that makes it readily apparent that J.B. understood that truthfulness about the identity of her assailant was important to the efficacy of her treatment for those issues"). Nor was there any inherent reliability in the statements **XXX** made to Lester. For instance, he told Lester that his father took him trick-or-treating after the incident, RR-128:99, which is inconsistent with other evidence. Accordingly, the State failed to satisfy its burden of showing that Lester's statements about what **XXX** said qualify as an exception to the hearsay rule, and it therefore was error for the court to overrule Calvert's repeated objections and to admit the testimony.

Collectively, these errors were harmful and require reversal and a new trial. **XXX** was an important witness, not only to the shooting itself but also to the circumstances of the offense and whether it qualified as capital murder. As a result, based on the record in this case and the inadequate showing made by the State, it was harmful error for the trial court to allow Lester to testify regarding **XXX**'s account of what had happened, particularly when the State did not also call **XXX** or establish that it would be harmful for him to testify. *Kelly v. State*, 321 S.W.3d 583, 601-02 (Tex. App. – Houston [14th Dist.] 2010, no pet.); *see also Dawson*, 503 U.S. at 179 ("We have made clear, in particular, that when a state court admits evidence

that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.") (internal quotation marks omitted); *Chapman*, 386 U.S. at 23.

C. The Trial Court Erred In Admitting State Exhibit 4, XXX's Treatment Records With Lester.

For the same four reasons, the trial court erred in admitting State Exhibit 4, **XXX**'s treatment records with Lester. Indeed, as described above, Lester largely testified from the treatment records, and those records were inadmissible for each of the reasons set forth above. In addition, the records contained highly irrelevant, additional hearsay, which is encompassed within the Point of Error that follows. Admission of the records also cannot be found to be harmless error, both for the reasons stated above (and in the point of error below); indeed, the *only* note the jury sent during its guilt phase deliberations was a request to see Lester's treatment records. *See* CR-25:5643; RR-161:157.

D. The Trial Court Also Erred In Allowing Lester To Testify Regarding Her Personal Opinions And Impressions, And Regarding XXX's Current Feelings.

Even apart from the significant issues above, all of which concern the admissibility of statements made by **XXX** to Lester *about* the offense, the trial court here also erred in allowing extensive questioning of Lester and testimony by her that went far *beyond* the scope of those statements. Indeed, the bulk of Lester's

testimony concerned not statements made *by* **XXX**, but rather Lester's *own* opinions and impressions, hearsay involving other family members, and, most significant, **XXX**'s *current* feelings of sadness and fear. The State again asked highly improper, leading, and argumentative questions. All of this was error, and all of it was harmful.

From the beginning, as quoted at length above, the State asked Lester her opinions regarding whether **XXX**'s statements concerning the incident were "real to him," questions regarding his "demeanor," and questions whether "truth-telling" was a vital component of her treatment of **XXX**. RR-128:45, 52, 65. These opinions were not elicited *outside* the presence of the jury to attempt to lay a foundation for Lester's testimony, but rather, as set forth above, all were elicited (and allowed by the court, over objection) *in the presence of the jury*. As the State had said when the jury was not present, "I can't ask you [Lester] to give an opinion on whether he's truthful or not truthful," RR-128:28 − and yet this is precisely what the State asked, and Lester responded, before the jury. Beyond that, as set forth above, the District Attorney asked numerous irrelevant questions regarding **XXX**'s current treatment prognosis and his feelings, all designed simply to elicit sympathy before the jury: "is **XXX** getting better?" "does he have a ways to go?" "what **XXX** went through, would you say, was extremely traumatic for him?" "what you've noticed is a child that is very, very sad?" "these are memories that ... he will recount and deal with throughout his life, isn't it?" RR-128:46, 82-84. In response to these and similar

questions, Lester described that "**XXX** is sad" and "**XXX** misses his mother very much." RR-128:65. But **XXX**'s *current* feelings had nothing to do with what he witnessed during the incident. Similarly, a significant portion of Lester's testimony involved her concern, and the concern of other family members, whether **XXX** would have to testify − which might have been relevant to *whether* **XXX** in fact would be required to testify, but had *no* relevance before the jury.

All of these questions and responses were impermissible, and the court erred in allowing them. Moreover, these questions and responses far beyond the scope of what Tex. R. Evid. 803(4) ever might allow were particularly prejudicial. Once again, the State simply sought to create sympathy with the jury and prejudice for Calvert. **XXX** was perhaps the largest focus for the State throughout the trial, even more than Ms. Sriraman. By creating a trial environment filled with passion and prejudice, the State diffused attention from the substantive issues in the case: in particular, whether the evidence established *capital* murder or merely murder (and later, at sentencing, whether the special issues had been proved). The State's prejudicial conduct deprived Calvert of a fair trial on those issues.

As this Court has explained:

> [A] reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was

> emphasized by the State, and its probable collateral implications.... [T]he reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the juror's decision making.... In other words, a reviewing court must always examine whether the trial was an essentially fair one.

Kelly, 321 S.W.3d at 602 (quoting *Harris v. State*, 790 S.W.2d 568, 587-88 (Tex. Crim. App. 1989) (first bracket added)). Under those standards as articulated by this Court, Calvert is entitled to a new trial. *See also Dawson*, 503 U.S. at 179; *Chapman*, 386 U.S. at 23.

POINT OF ERROR NO. 17

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EXTENSIVE AND PREJUDICIAL HEARSAY STATEMENTS OF THE VICTIM, JELENA SRIRAMAN

A. Facts.

Calvert's (first) former wife, Deidre Adams, testified that she knew the victim Jelena Sriraman and had spoken with her on the day of her death. RR-129:28-32. During Ms. Adams's testimony, the State elicited extensive testimony regarding hearsay statements made by Ms. Sriraman. For instance, the following exchange transpired:

> Bingham: Okay. Did she [Ms. Sriraman] say what – what she was terrified – I mean, obviously of him coming by the house. Did she mention or had y'all talked about whether she was afraid that he would physically hurt her?
>
> Adams: Yes. Yes.

Calvert: I'm going to object to that, as far as hearsay.

Court: That objection is overruled.

Bingham: Ms. Adams, did y'all talk about – you talked about afraid that he would come by the house anyway. So Jelena, even though she had told him not to come by, was still fearful that he would anyway?

Adams: That's right.

Bingham: Had y'all previously, till October 31, 2012, talked about her fear of the defendant?

Adams: Many, many times. He –

Calvert: I'm going to object, as far as calls for hearsay.

Court: Same ruling by the Court. It's overruled.

Adams: I even brought her to live with me, her and the kids at one point. She was very afraid of him. He threatened her many times, threatened to take the kids, threatened to kill her many times.

Bingham: And she relayed that to you?

Adams: Yes, she did.

Bingham: Did y'all have an agreement should something happen to one of you or her?

Adams: We did.

…

Adams: We knew something would happen eventually to one or the other or both of us, and we had talked about it many times. And if –

Calvert: Objection; hearsay.

Court: The same objection that you're making. Again, it's overruled.

Adams: And if anything were to happen to me that she would make sure justice was seen, that he would be brought to justice because we knew he would be behind it, because he has threatened me many times in the past, as well as my family.

Calvert: Objection to lack of personal knowledge, as far as to the family.

Court: That's overruled.

Bingham: Okay. And so y'all had an agreement should something – she wanted, if something happened to her, for you to let somebody know –

Adams: Right.

Bingham: – all that had transpired, and you had that same agreement with her?

Adams: That's right.

Bingham: This is something that you and Jelena lived with every day?

Adams: Many years, yes.

RR-129:38-40.

Calvert's sister, Debbie Campbell, also was allowed to testify to prejudicial hearsay statements of Ms. Sriraman, again over Calvert's timely objections. For example, the following testimony was elicited:

Bingham: Okay. Let me go back to – just in your relationship with Jelena from the time that you first met her say until her death, did you ever have a break in the relationship with her?

Campbell: No.

Bingham: Was your relationship with her ever bad?

Campbell: No.

Bingham: Were there things she confided –

Calvert: Objection; calls for hearsay.

Bingham: It'll be an 803(3) offer.

Court: Overruled.

Calvert: Renew my objection. Needs to show state of mind. As far as confided is not a –

Court: A what?

Calvert: Confided does not go to state of mind.

Court: No. That's overruled.

Bingham: What I'll ask you – first of all, I want to find out if she ever confided things in you that were – where she expressed to you that she was fearful.

Calvert: Objection; calls for hearsay.

Court: Overruled.

Campbell: Yes.

…

Bingham: Over the time that you had this relationship with Jelena, was that something that was consistent throughout her marriage, or was it during a specific time like the tail end or the last six months – or how long had she expressed this fear to you of James Calvert?

Calvert: Objection; calls for speculation. Also ask to – to go into voir dire, as far as personal knowledge on how this person would know that information.

Court: Overruled.

…

Bingham: I think my question was, during the times that she had expressed this fear of James Calvert, was it through the entire

time you knew her, or did it seem to be during a specific time in her marriage to the defendant?

Calvert: Objection; calls for hearsay.

Court: As to what time? He just asked as to what time. Those objections are overruled.

…

Bingham: Do you recall the statements that she would have made early on when she was pregnant with **YYY** regarding her fear of the defendant?

Calvert: Objection; calls for hearsay.

Court: It's overruled.

Bingham: If you can. If you can't, that's fine.

Campbell: I remember when she was pregnant with **YYY**, and she first told me about this, I remember her saying, what have I got myself into?

Calvert: Objection; hearsay.

Court: Overruled.

Campbell: Now I'm going to be stuck with him for the next 18 years.

…

Bingham: What had Jelena said to you in the last – do you remember some of the statements she's said to you towards the end of her life that caused you to believe her – her fear of the defendant had escalated?

Calvert: Objection; calls for hearsay.

Court: Overruled.

Campbell: I remember on more than one occasion Jelena told me that James –

Calvert: Objection; hearsay.

Court: Overruled.

Calvert: Sorry, ma'am.

…

Campbell: Jelena told me on more than one occasion that James had told her that he would make her death look like an accident, and so to make sure that if she died in an accident, that I had it investigated.

RR-135:97-103. Thereafter, the testimony turned to conversations the witness had with Ms. Sriraman the night before she was killed:

Bingham: Do you remember – you talked for 14 minutes. Do you recall that phone call?

Campbell: I do.

Bingham: Could you tell the jury what that call was in regard to?

…

Campbell: She said that –

Calvert: Objection; hearsay.

Court: Objection's overruled.

…

Campbell: She had – James had texted her the night before –

Calvert: Objection.

Campbell: – but she did not see it until morning.

Calvert: – calls for –

Court: Just a second. Your objection now to this testimony about what the victim alleged in the indictment said to this witness are overruled.

…

Campbell: In addition to telling me what was said and calling and yelling and cussing, she wanted to make sure that I knew. And she was concerned for my safety also. She was concerned about

> her safety, but she was concerned about mine. She asked me to please text her back that day if she texted me because she was concerned about me.
>
> Calvert: Your Honor, all those – obviously, I let that go on, but that's all hearsay and hearsay within hearsay. So those are the objections I'd make.
>
> Court: Those objections are overruled.

RR-135:113-15. Campbell also was allowed to testify over objection about hearsay statements of abuse made by Calvert's first wife, Ms. Adams. *See*, ***e.g.***, RR-136:67-71. In addition, similar hearsay statements of Ms. Sriraman were introduced through Ms. Sriraman's friend Stephanie Whisenhunt, also over Calvert's objections. *See*, ***e.g.***, RR-132:121-32, 144-47, 156, 184.

B. The Trial Court Erred In Admitting The Hearsay Statements Of Ms. Sriraman.

The trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard on appeal. *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). A trial court should not be reversed where the ruling was within the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996) (quotation marks omitted).

The State claimed the hearsay statements of Ms. Sriraman were admissible under TEX. R. EVID. 803(3), which provides:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a

> statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

The hearsay statements introduced through Adams, Campbell and Whisehunt were not reflective of Ms. Sriraman's state of mind but instead were her memories of specific events and were not admissible under Rule 803(3).

In *Dorsey v. State*, 24 S.W.3d 921 (Tex. App. – Beaumont 2000, no pet.), court reversed the defendant's murder conviction where the trial court had admitted hearsay statements of the defendant's deceased wife (the murder victim) concerning abuse by the defendant and her belief that the defendant would be responsible for her death. The court also held inadmissible the deceased's out-of-court statements that the defendant had once held her down on the bed with a knife to her throat, that he held a gun to her head and throat and had put a gun into her mouth, and that he followed her every day to work to make certain she was there. *Id.* at 928-29 (citing *Navarro v. State*, 863 S.W.2d 191 (Tex. App. – Austin 1993), *pet. ref'd*, 891 S.W.2d 648 (Tex. Crim. App. 1994) (deceased's statements to her mother that defendant had put a gun to her head and threatened to kill her are statements of memory to prove the fact remembered and not admissible under Rule 803(3)).

Similarly, in *McGee v. State*, 35 S.W.3d 294 (Tex. App. – Texarkana 2001, pet. ref'd), the court ruled that it was error for a police officer to be permitted to testify that the defendant's wife (the murder victim) had told the officer of another

attempt on her life by the defendant. The court ruled the statement was hearsay and inadmissible.

This Court has held that statements of a spouse outside the presence of the accused are inadmissible in the prosecution for the murder of that spouse. *Jones v. State*, 515 S.W.2d 126 (Tex. Crim. App. 1974). This Court reasoned: "If indeed it was evidence of the deceased's state of mind, the testimony is not hearsay at all because it was not offered for its truth but to show that the deceased believed it. However, for the deceased to truly have the state of mind here presented, one could only assume that the accusations were indeed true; why else the state of mind? The effect is that the state of mind cannot be imputed to the deceased without believing the truth of his statements…. It could not have been offered to prove only the state of mind, but had to imply the truth of the matter asserted." *Id*. at 129 (citations omitted).

The trial court abused its discretion in admitting this hearsay testimony, because the statements do not fall within Rule 803(3). Moreover, the admission of hearsay evidence, not otherwise admissible, violated Calvert's Texas and federal constitutional confrontation rights. *See supra*, 161-62.

C. In The Circumstances Of This Case, Given The Extent And Highly Prejudicial Nature Of The Inadmissible Evidence, Calvert Was Harmed And Is Entitled To A New Trial.

Under Tex. R. App. 44.2(b), the judgment of conviction must be reversed if the error had a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *Chapman*, 386 U.S. at 23. In making this determination, the Court must review the record as a whole to determine whether the error had such an influence on the jury's verdict. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

Although there was substantial evidence that Calvert was the person who shot and killed Ms. Sriraman, there was a substantial and legitimate issue at trial whether the State could prove the additional elements necessary for capital murder. The inadmissible evidence at issue here, both on its own and along with other improper evidence in the case, served to distract and inflame the jury and prejudice Calvert. In the circumstances of this case, and particularly given the voluminous and highly prejudicial nature of the inadmissible hearsay at issue here, Calvert was harmed and is entitled to a new trial, under both Texas and federal constitutional standards.

The fact that Calvert chose to represent himself regarding these most serious charges should not be license for the rules of evidence to be suspended. Calvert made proper objections, again and again, and the trial court ruled against him, again

and again. The trial court's responses to some of the objections also show a degree of animosity and/or impatience toward Calvert, whether intended or not. Calvert was cast in a bad light by the number of objections required to protect the record for appeal. The testimony of these witnesses was intended to demonize Calvert and was extremely prejudicial, especially that of his own sister. For all of these reasons, Calvert's conviction should be reversed and the cause remanded to the trial court.

POINT OF ERROR NO. 18

THE TRIAL COURT COMMITTED FURTHER PREJUDICIAL ERROR IN ALLOWING EXTENSIVE ADDITIONAL PREJUDICIAL TESTIMONY BY DEBBIE CALVERT BASED ON AN IMPROPER RULING THAT CALVERT HAD "OPENED THE DOOR" TO SUCH TESTIMONY.

There is additional, and related, prejudicial error arising from testimony allowed by the trial court in connection with the State's examination of Debbie Campbell, Calvert's sister. As set forth above, Campbell testified on direct examination regarding hearsay statements made by Ms. Sriraman and Ms. Adams concerning alleged abuse by Calvert. On cross, Calvert asked Campbell whether the hearsay statements concerned things she had not viewed personally. Campbell responded, "I did not view the physical abuse that you put towards both of them." RR-136:32.

On redirect, Bingham claimed (before the jury) that the State now was entitled to explore "exactly the kind of things that we are prohibited from going into in our

case-in-chief until the defendant opens the door" and that Calvert "just didn't open it; he kicked it wide open." RR-136:62-63; RR-136:62-63 (repeating that "now we want to go into the things that we before would have been prohibited from going into"). First, the State was allowed to ask Campbell about an incident in which Calvert had called her to ask her to come over to his house, and Campbell found Ms. Adams injured, with both police and an ambulance present, and Campbell accompanied Adams to the hospital. RR-136:68-74. This testimony would not have been elicited but for the initial, inadmissible hearsay statements about physical abuse. *See* Point of Error No. 17, *supra*. But then, the State simply asked Campbell about *more* hearsay statements, for which the cross had not "opened the door" by asking that Campbell did not have first-hand knowledge of what actually had occurred. Thus, the State asked whether Ms. Sriraman or Ms. Adams had "*made comments regarding* protective orders" and "*Did Jelena ever talk about* the protective orders that she had had against the defendant with you" (to which Campbell responded, with more hearsay statements). RR-136:90-92, 98-101 (emphasis added). The State also asked "*What did Jelena tell you about* the defendant's threatening her on that trip going to Ohio and when they went through Kentucky – or what state was it," and Campbell then described that "*I was told* his behavior was erratic. And at one point he [Calvert] removed a gun from the glove

box and took off, and Jelena was concerned about what he was going to do." RR-136:93-94 (emphasis added).

The State then asked: "*And did Jelena* or – specifically Jelena *ever talk to you about* a comment the defendant made regarding he was going to slit her throat?" RR-136:94 (emphasis added). Campbell did not recall that, but she recalled and described other threats, *id*.; District Attorney Bingham then commented on the record, before the jury, "Sometimes I get confused on who the statements were said to. 'Slit the throat' must have been to another person." RR-136:94-95. The State then proceeded to ask Campbell a number of other leading questions regarding other hearsay statements of Ms. Sriraman (to which Campbell responded). *See*, *e.g.*, RR-136:96 ("*Did Jelena ever tell you* that living with the defendant was living a life of fear and intimidation?" (emphasis added)); RR-136:97 ("*Had Jelena ever told you* the defendant had referred to her as stupid, worthless, and useless?" (emphasis added)); RR-136:97 ("*Had Deirdre [Adams] ever talked to you about* an incident involving a camera he had placed in the house?" (emphasis added)); RR-136:98 ("*What did Deirdre tell you about that* and the result of that?" (emphasis added)).

All of these questions elicited additional hearsay statements. The testimony was not admissible under Rule 803(3) and violated Calvert's confrontation rights; Calvert's objections again were overruled; and the answers given were prejudicial and harmful error. *See* Point of Error No. 17, *supra*. And most important for the

present Point of Error, Calvert did not open the door to this *additional* hearsay by asking Campbell to confirm that she was not present when the events described in the *prior* hearsay had occurred.

POINT OF ERROR NO. 19

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION, OVER CALVERT'S REPEATED OBJECTIONS, TO ELICIT OPINION TESTIMONY AND COMMENTARY REGARDING CALVERT'S STATEMENT TO THE POLICE.

As set forth at length in Point of Error No. 9, the trial court allowed the State to elicit pages and pages of opinion testimony and commentary from Detective Shine regarding the video statement Calvert gave to the police. *Supra*, 92-96. Appellant will not repeat the testimony again here. The court's rulings were clearly incorrect. *See*, *e.g.*, *Rodriquez*, 903 S.W.2d at 410. Moreover, the pervasiveness and highly prejudicial nature of the testimony deprived Calvert of a fair trial and cannot be deemed to be harmless. *Dawson*, 503 U.S. at 179; *Chapman*, 386 U.S. at 23.

POINT OF ERROR NO. 20

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE OF FIREARMS FOUND IN APPELLANT'S AUTOMOBILE AT THE TIME OF HIS ARREST.

The trial court admitted firearms, consisting of two AR-15 platform rifles, an AK-47, a Winchester shotgun, a 9-millimeter Luger and ammunition (SX267-SX277) over Calvert's objections, which were found in the trunk of Calvert's

automobile when he was arrested in Louisiana. In objecting to the exhibits and testimony, Calvert cited *Alexander v. State*, 88 S.W.3d 772 (Tex. App. - Dallas 2002, pet. ref'd). RR-150:12-13. Calvert also objected pursuant to Texas Rules of Evidence 403 and 404(b). RR-150:120-24. The court overruled the objections. RR-150:120-29.

The general rule in Texas is that the State is entitled to show circumstances surrounding an arrest unless such evidence is inherently prejudicial and has no relevance to any issue in the case. *Maddox v. State*, 682 S.W.2d 563, 564 (Tex. Crim. App. 1985). The firearms and ammunition found in Appellant's automobile trunk were not relevant to the issue in the case. None of these firearms was alleged by the State to have been involved in the killing of Ms. Sriraman, and Calvert's possession of the firearms was not otherwise unlawful. In *Alexander*, the reviewing court found that a .357 revolver found in the house where the defendant was arrested was not relevant.

Even if the evidence of the weapons and ammunition was relevant, it should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice to Calvert. Tex. R. Evid. 403. A Rule 403 balancing test includes the several factors. *Wyatt v. State*, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000). The contents of the automobile trunk did not serve to make a fact of consequence more or less probable, and did not even show an extraneous offense.

The State did not contend that possession of the firearms and ammunition was illegal. However, the admission of weapons and ammunition had a great potential to impress the jury in an irrational and indelible way. The State had no need for presenting evidence of the firearms and ammunition to prove any fact of consequence.

Because the trial court abused its discretion in admitting this inadmissible, prejudicial evidence, Calvert's conviction should be reversed and the matter remanded for a new trial.

DIRECTED VERDICT / JURY INSTRUCTION ISSUES

POINT OF ERROR NO. 21

THE EVIDENCE WAS INSUFFICIENT TO FIND APPELLANT GUILTY OF MURDER IN THE COURSE OF KIDNAPPING OR ATTEMPTED KIDNAPPING.

After the State rested, defense counsel moved for a directed verdict on the charge of capital murder that Calvert had intentionally committed murder in course of committing or attempting to commit kidnapping. RR-161:4-5. In support of the motion, counsel cited *Herrin v. State*, 125 S.W.3d 436 (Tex. Crim. App. 2002). RR-161:5. The trial court denied the motion. RR-161:14.

The motion for a directed verdict should have been granted. In *Herrin*, this Court held that to violate Tex. Penal Code § 19.03(a)(2), an individual must have

been in the course of kidnapping or attempting to kidnap the victim at the time that the murder occurred. 125 S.W.3d at 440. "The critical question is whether the murder was committed in the course of the kidnapping or attempted kidnapping, not the other way around." *Id*. The Court in *Herrin* also underscored that proof beyond a reasonable doubt "carries considerable weight; it means proof to a high degree of certainty." *Id*. at 441. The Court in *Herrin* also explained that the same principles apply with regard to the offense of murder in the course of a robbery: "[f]or a murder involving a theft to constitute a capital murder committed in the course of a robbery, *the intent to rob must be formulated before or at the time of the murder*," *id*. (emphasis supplied); "[p]roof that the robbery was committed as an afterthought and unrelated to the murder is not sufficient," *id*.

In the instant case, there was insufficient evidence that Calvert killed Ms. Sriraman in order to kidnap **XXX**. Although Calvert took **XXX** with him when he left Ms. Sriraman's home, at that time **XXX** was only four years old. There is no evidence that Calvert killed Ms. Sriraman in order to take **XXX**, as opposed to simply taking **XXX** so that he would not be left alone in the home after Ms. Sriraman was killed. Indeed, the State conceded, "I don't dispute that there's evidence in the record that they had had an agreement that day to − or the day before that he would pick the children up." RR-161:32. On these facts, although the evidence was sufficient to prove that Calvert intended to kill Ms. Sriraman, the evidence was

insufficient to prove that he did so in order to kidnap **XXX** – as distinct from taking **XXX** from the home "as an afterthought," *Herrin*, 125 S.W.3d at 441, so that **XXX** was not left alone in the home.[16]

In *Herrin*, there was evidence that the defendant had moved the victim after the shooting. Even more significant, there was evidence that the defendant killed the victim because the victim "[had] it coming"; the victim owed money to the defendant's family; and the victim's wallet was missing after the murder. 125 S.W.3d at 441. Yet despite these facts, this Court held that the State had not presented sufficient evidence for the jury to find beyond a reasonable doubt that the murder was committed in the course of either a kidnapping or a robbery. Similarly here, the evidence was insufficient for the jury to find beyond a reasonable doubt that Calvert had formed an intent to kidnap **XXX** before or at the time that he killed Ms. Sriraman.

[16] Indeed, there is authority that legal custody of **XXX** may have vested in Calvert at the time of Ms. Sriraman's death – even if, of course, that legal custody may have been subject to termination as a result of Calvert's involvement in her death. *See*, *e.g.*, *Widner v. Pixley*, 439 S.W.2d 403, 406 (Tex. App. Beaumont 1969, no writ) (upon death of an infant's father, to whom custody had been awarded in a divorce decree, mother's right to custody was revived, and from the moment of death of father was legally entitled to physical possession of the child). The more important point under *Herrin*, however, is that there was insufficient evidence in this case that an intent to kidnap was formulated before or at the time of the murder.

POINT OF ERROR NO. 22

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY REGARDING THE STATUTORY AFFIRMATIVE DEFENSE TO KIDNAPPING.

The trial court also erred in refusing to instruct the jury regarding the affirmative defense to kidnapping set forth at Tex. Penal Code § 20.03(b). Defense counsel requested the charge and argued for it at length. RR-161:25-36. The trial court denied it. RR-161:36-37.

The underlying offense of kidnapping under Tex. Penal Code § 20.03 has a statutory affirmative defense, defined as follows:

> (b) It is an affirmative defense to prosecution under this section that:
>
> (1) the abduction was not coupled with intent to use or to threaten to use deadly force;
>
> (2) the actor was a relative of the person abducted;
>
> (3) the actor's sole intent was to assume lawful control of the victim.

Tex. Penal Code § 20.03(b). The trial court refused to instruct the jury regarding this affirmative defense because it found there to be no evidence to support the first element, that "the abduction was not coupled with intent to use or to threaten to use deadly force." RR-161:37.

The issue here is similar to that discussed in Point of Error No. 21, regarding this Court's decision in *Herrin*. There is no dispute that "deadly force" *existed* in

this case; the question, however, is whether the abduction of **XXX** was "coupled" with the "intent to use" that deadly force. As in *Herrin*, to the extent the jury could have found that Calvert took **XXX** with him "as an afterthought," *Herrin*, 125 S.W.3d at 441, so that **XXX** was not left alone in the home, then the jury could have found that the "abduction" was not "coupled" with the intent to use deadly force. Rather, there was deadly force, and then **XXX** was taken so he would not be left alone. And of course, the issue here is simply whether the jury should have been *charged* regarding the matter; in *Herrin*, this Court went further and resolved the issue as a matter of law. The evidence in this case provided an adequate basis for the jury to find all three elements of the affirmative defense in § 20.03(b), and the court erred in failing to give the charge.

The error also cannot be found to be harmless. The "abduction" of **XXX** was a major focus of the State throughout the trial. The jury readily could have found Calvert guilty of murder, but not capital murder. There also was evidence to defeat the underlying offense of burglary, *see supra*, 32, and the jury may not have found Calvert guilty of either underlying offense. In these circumstances, the conviction for murder may be affirmed, but the conviction for capital murder should be reversed. *Herrin*, *supra*.

POINT OF ERROR NO. 23

CALVERT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT, IN VIOLATION OF BOTH THE TEXAS AND U.S. CONSTITUTION, WHEN THE TRIAL COURT REFUSED TO USE A SPECIAL VERDICT FORM AS REQUESTED BY DEFENSE COUNSEL, THEREBY ALLOWING THE JURORS TO FAIL TO AGREE UNANIMOUSLY ON THE UNDERLYING OFFENSE NEEDED TO ESTABLISH CAPITAL MURDER.

Calvert was indicted on three capital murder charges: (1) murder in the course of kidnapping; (2) murder in the course of burglary; and (3) murder in the course of robbery. CR-1:1. After it rested, the State agreed to dismiss the charge of murder in the course of robbery, RR-161:10, and the jury was instructed only on murder in the course of kidnapping, and murder in the course of burglary. During the charge conference, defense counsel argued: "[G]iven the unique set of facts in this situation and that we're dealing with the alleged abduction of Mr. Calvert's child and/or motion for directed verdict as to kidnapping, we think it's imperative to have that specific jury form so that if Mr. Calvert is convicted of capital murder, the appellate court can review whether there was harm in the jury charge and a lack of a unanimous verdict for that reason, Your Honor." RR-161:42. The trial court denied the request. RR-161:45.

Calvert's right to a unanimous verdict was violated because the charge allowed the jury to convict him of capital murder, even if the jurors did not unanimously agree on which of the two underlying offenses − kidnapping or

burglary − Calvert had committed. And there were substantial defenses to both charges. As set forth above, there were substantial grounds to question whether Calvert was guilty of kidnapping when he took his own son from Ms. Sriraman's home, rather than leaving **XXX** there alone. And there was a significant question whether Calvert was guilty of burglary, particular given **XXX**'s statement that, before his mother was shot, there was a knock on the door. RR-128:59.

This Court recently rejected a similar argument in *Petetan v. State*, No. AP-77,038, __ S.W.3d __, 2017 WL 2839870 at *44 (Tex. Crim. App. Mar. 8, 2017), but a petition for rehearing remains pending in that case.

Calvert's request for a specific verdict form was well founded and should have been granted. As Justice Scalia explained in *Ring v. Arizona*, 536 U.S. 584 (2002), "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives" − whether called an element of the offense or a sentencing factor − "must be found by a jury beyond a reasonable doubt." *Id*. at 610 (Scalia, J., concurring). And this Court has made clear in numerous cases that the "underlying offense" in Calvert's capital murder indictment − whether kidnapping or burglary − is an "element" of capital murder, necessary before the State may impose a sentence of death. *See*, *e.g.*, *Rodriguez v. State*, 146 S.W.3d 674, 677 (Tex. Crim. App. 2004); *Herrin v. State*, 125 S.W.3d 436, 444 (Tex. Crim. App. 2002); *Santellan v. State*,

939 S.W.2d 155, 170 (Tex. Crim. App. 1997); *Whitaker v. State*, 977 S.W.2d 595, 598 (Tex. Crim. App. 1998); *Boyd v. State*, 811 S.W.2d 105, 114 (Tex. Crim. App. 1991).

As an "element" of the offense of capital murder, the *same* underlying offense must be found unanimously and beyond a reasonable doubt, both under the due course of law provision of the Texas Constitution and the due process clause of the United States Constitution. *See*, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Johnson v. Louisiana*, 406 U.S. 356, 363-65 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 406 n.1 (1972); *see also Williams v. Florida*, 399 U.S. 78, 103 (1970); *Schad v. Arizona*, 501 U.S. 624, 633 (1991); *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005).

PENALTY PHASE ISSUES

POINT OF ERROR NO. 24

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY INFLAMMATORY EVIDENCE CONCERNING A VIOLENT ATTACK THAT SEVERELY INJURED A WITNESS, A STATE CORRECTION OFFICER, WHEN CALVERT HAD NO INVOLVEMENT IN THE INCIDENT.

The trial court erred when it admitted testimony by a former Corrections Officer concerning injuries he suffered when a prisoner stabbed him in the eye with a pencil. The Court also erred when it admitted an x-ray of the resulting injury

showing the pencil embedded four inches in the witness's brain. The court erred for three reasons. First, Calvert's timely objection to this evidence under Rules 401 and 402 of the Texas Rules of Evidence should have been sustained because the evidence was completely irrelevant to the issues in the penalty phase of the proceeding. Second, even if the evidence was somehow relevant in the proceeding, given Calvert's timely objection, it should have been excluded under Rule 403 because its probative value was outweighed by the danger of unfair prejudice, confusing the issues and misleading the jury. Finally, given Appellant's timely objection, the evidence should have been excluded because it violated Appellant's right under the Eighth Amendment of the U.S. Constitution to avoid suffering a cruel and unusual punishment because Calvert's death sentence may have resulted from the jury's consideration of a random, unrelated act of violence committed on a random, unrelated but very sympathetic Corrections Officer by a random, unrelated prisoner.

A. Factual Background

During the penalty phase of the trial, David Logan testified concerning his "perspective on violence within the penitentiary" at Stiles, Texas. Logan was a veteran who served during Operation Desert Storm in the U.S. Navy, before becoming a Corrections Officer in his home town of Beaumont, Texas. RR-164:9-10. He served over ten years as a Corrections Officer before he was the victim of a "particularly brutal" incident, an unprovoked attack with a pencil by David Barrera,

an inmate at the penitentiary. RR-164:12. The inmate put the pencil in Logan's eye and pushed it four inches into his brain where it came to rest against the artery of his brain. RR-164:10-12, 18-22. As a result of the incident, Logan is completely blind in the eye where he was stabbed. RR-164:18. Calvert had no connection with the prisoner who committed this crime, the victim of the crime, or the penitentiary where the crime was committed.

Logan was the victim of a horrible violent crime. The State had no reasonable justification for seeking to have the jury consider this unrelated crime when deciding whether Calvert should be sentenced to death.

The State also offered SX368 in evidence. This was an x-ray photograph showing the pencil embedded four inches into Logan's brain. RR-164:18.[17]

---

[17] Apart from the principal purpose for which the State called him, the prosecutor also elicited testimony – actually, the District Attorney testified himself – about another, highly prejudicial and entirely unrelated prison incident that had nothing to do with Calvert:

> Bingham: Is that the same thing that the man at the Telford Unit – was it Telford Unit – that was beat to death, the guard?
>
> Logan: That's exactly the same thing.
>
> Bingham: Okay. That was about three months ago. They beat the guard to death.
>
> [defense counsel]: Again, Your Honor, same objection.
>
> Court: Same ruling by the Court.

Defense counsel objected to SX368 and "to this entire testimony," RR-164:19-20, on the grounds that (1) the evidence was irrelevant ("what this particular prison guard went through at one time has no relevance to an ultimate finding of fact that this jury has to make"); (2) "any relevance is outweighed by the prejudicial effect"; and (3) the evidence "is violative of the Eighth Amendment requirement, individualized sentencing." RR-164:19-20. The State asserted the evidence was relevant to show "an inmate's opportunity for violence within the penitentiary." RR-164:20. The District Attorney went so far as to contend, "Because of what happened to him [Logan], he [Calvert] should get the death penalty." RR-164:19. The court overruled the objections. RR-164:20-22.

During the state's final summation during the punishment phase, the State compounded the prejudice to Calvert by referring to Logan being stabbed in the brain with a pencil. RR-171:128.

> Bingham: That was a 47-year-old man, what, had been there three months. The guard got that bean tool taken from him, beat him to death, and threw him off the second tier. I don't know if you know all that.
>
> Logan: Yeah. I know just a little bit about it. But that's the bean tool. It's a statewide issued tool.

RR-164:27.

B. The Trial Court Committed Reversible Error When It Admitted Irrelevant And Highly Prejudicial Evidence Concerning A Crime That Calvert Did Not Commit.

The State is required to prove beyond a reasonable doubt that if Calvert was not sentenced to death, there is a probability he would commit criminal acts of violence that would constitute a continuing threat to society. Charge of the Court on Punishment, Special Issue No. 1; Tex. Code Crim. Proc., art. 37.071, § 2(b)(1). The "future dangerousness" special issue asks "whether a defendant would be a continuing threat 'whether in or out of prison' without regard to how long the defendant would actually spend in prison if sentenced to life." *Martinez v. State*, 327 S.W.3d 727, 735 (Tex. Crim. App. 2010).

This Court generally will review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996); *see also Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). However, "a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Consequently, it is necessary for juries to focus on a defendant's *individual* character for violence and the probability

he would commit acts of violence in whatever society in which he found himself. *Coble v. State*, 330 S.W.3d 253, 269 (Tex. Crim. App. 2010).[18]

Logan's testimony and SX368 were inadmissible for each of the reasons asserted by defense counsel.

First, the evidence simply was irrelevant under Rule 401. While this Court has found that testimony regarding the violent nature of Texas prisons is relevant to future dangerousness of a defendant, *see*, *e.g.*, *Lucero v. State*, 246 S.W.3d 86, 97 (Tex. Crim. App. 2008), the testimony the State offered at Calvert's trial stands distinct. It is undisputed that inmate David Barrera put a pencil in David Logan's eye, and the pencil became embedded four inches into his brain. Calvert had nothing to do with the commission of this specific criminal act, and the commission of this crime is irrelevant to the question of whether the State should impose the death penalty on him. In *Bell v. State*, 938 S.W.2d 35, 49 (Tex. Crim. App. 1996), this Court held that a prison guard's generalized testimony that he had seen other death row inmates suddenly snap and become unexpectedly violent after long periods of good behavior was "at least marginally relevant" to the issue of future dangerousness, because it tended to show that the defendant could be violent again even after a lengthy period of peaceful behavior. There is no such "marginal

[18] In *Coble*, the trial court had granted defense counsel's motion in *limine* to avoid mention of any specific instances of misconduct by other inmates. 330 S.W.3d at 287.

relevance" to the specific, graphic incident presented here. Logan's testimony concerning a violent attack against his person by a random, unrelated inmate is not relevant as to Calvert's future dangerousness. There is a complete disconnect between the evidence concerning Logan and the injuries he suffered, and the issue of Calvert's future dangerousness.

Second, any "marginal" relevance was clearly outweighed by the graphic and highly prejudicial nature of the evidence and the extreme sympathy it evoked for Logan. "Rule 403 allows for the exclusion of otherwise relevant evidence when its probative value 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.'" *Shuffield*, 189 S.W.3d at 787 (quoting Tex. R. Evid. 403). "[A] Rule 403 analysis should include, but is not limited to, the following factors: (1) how probative the evidence is; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Id*.

"Unfair prejudice" refers to a "tendency to suggest that a decision be made on an improper basis, commonly[, though not necessarily,] an emotional one." *Karnes v. State*, 127 S.W.3d 184, 191 (Tex. App. – Fort Worth 2003, pet. ref'd); *accord Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993). "The danger of unfair

prejudice exists only when the evidence has the 'potential to impress the jury in an irrational way.'" *Martinez*, 327 S.W.3d at 737 (citation omitted). In this case, the trial court did not adequately conduct the required prejudice-versus-probative-value balancing analysis. *See* RR-164:20-22. But in any event, any relevance of Logan's testimony and SX368 was outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury. As discussed above, the probative value of the evidence was weak. Yet the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way, was striking. Logan's injuries were graphic and clearly evoked sympathy for Logan. The jury could feel anger against all inmates, or conclude it safer simply to execute them all rather than risk an injury like Logan suffered. On its face, the evidence was both inflammatory and confusing to the jury, which asked to deal with a gruesome, life-changing injury committed by a unrelated, random prisoner. The detailed and violent extent of injuries suffered by Logan are a step too far. This is evident from the State's own introductory presentation of SX368: "I'm going to put this up here. That's a scan of your brain. And this shows the pencil that was shoved into your eye and then ultimately into your brain." RR-164:21. The State had no need for this evidence; it was not used as rebuttal nor tailored to prove anything about Calvert.

This Court in *Cole v. State*, No. AP-76,703, 2014 WL 2807710 (Tex. Crim. App. June 18, 2014) (not designated for publication), acknowledged the appropriate

course a trial court should take when confronted with testimony concerning the prison system, which was not followed in this case:

> The trial court did not permit the state to question Aubuchon regarding specific incidents of conduct by other inmates, nor did it allow the state to suggest that appellant was responsible for any of the incidents reflected in the EAC report. *Cf. Ex parte Lane,* 303 S.W.3d 702, 712 (Tex.Crim.App.2009) (criticizing the prosecution for attempting to persuade the jury to convict the applicant based on an uncharged offense for which he was not on trial). Rather, the court limited the state to questioning Aubuchon about raw data concerning broad categories of offenses committed inside TDCJ and the frequency with which they occurred, in response to Aubuchon's assertion that TDCJ was a fairly secure or safe place.

Id. at *31.[19]

Third, as defense counsel argued, the nature and extent of Logan's testimony and SX368 violated Calvert's Eighth Amendment right to individualized consideration of the appropriateness of the death penalty. Sentencing in a death penalty case requires a greater degree of accuracy and reliability than is required in a noncapital case. *See*, *e.g.*, *Gilmore v. Taylor*, 508 U.S. 333 (1993). The Eighth Amendment requires a process that "allow[s] the particularized consideration of relevant aspects of the character and record of [the] convicted defendant before the

[19] Admission of evidence of this kind, which is "so unduly prejudicial that it renders the trial fundamentally unfair," also violates the Due Process Clause. *Kansas v. Carr*, 136 S. Ct. 633, 644-45 (2016) ("The test prescribed by *Romano* for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of "due process."'"); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The Supreme Court has declared impermissible any process that "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304.

The entire purpose of Logan's testimony was to suggest that *all* persons convicted of capital murder should be executed, because *all* such inmates sentenced to life in prison are capable of causing a horrible, gut-wrenching injury like Logan suffered. In the punishment phase of the trial, the jury was required to decide whether there was a probability that *Calvert* would commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc., art. 37.071, § 2(b)(1). Logan's testimony and SX368 concerning "an inmate's opportunity for violence within the penitentiary," RR-164:20, deprived Calvert of individualized consideration of that issues. By admitting this evidence, the court violated Calvert's Eighth Amendment right to individualized sentencing.

This issue was raised but not decided in *Lucero*, 246 S.W.3d at 98. In that case, a state official familiar with Texas state prisons "provided fact testimony about Texas prison conditions in general and opinion testimony that violence can occur within the Texas prison system." *Id*. at 96. Lucero claimed that admission of this testimony violated his Eighth Amendment right to individualized sentencing. But

Lucero had not presented this Eighth Amendment claim to the trial court, and this Court ruled he failed to preserve the issue for appellate review. *Id*. at 98. In this case, defense counsel made a timely objection, and the issue is ripe for decision.

Finally, it is clear that the admission of Logan's testimony and SX368 cannot be deemed to be harmless error. *Dawson*, 503 U.S. at 179; *Chapman*, 386 U.S. at 23. As set forth *infra*, there was minimal – and legally insufficient – evidence that Calvert himself presented a threat of future dangerousness, apart from being a mentally ill, frequently annoying *pro se* litigant and jailhouse inmate. Calvert had a minimal prior record, all of which was related to domestic incidents, and he had no record of assaultive or violent conduct as an inmate. Testimony like Logan's, however, unfairly suggested that *all* inmates with life sentences should be executed, because any one of them could commit a horrific crime in prison like Logan had suffered. Moreover, the State specifically referenced Logan's testimony near the end of its closing summation, which underscored and inflated its supposed significance to the jury. RR-171:128.

POINT OF ERROR NO. 25

THE TRIAL COURT ERRED IN ALLOWING IMPROPER OPINION TESTIMONY AND OTHER IMPROPER EVIDENCE AT THE PENALTY PHASE HEARING.

As summarized in the statement of facts above, the prosecution elicited other irrelevant and improper evidence in the penalty phase hearing.

For example, the District Attorney asked Captain Ralph Caraway of the Smith County Sheriff's Office: "Do you think it's probable – probable means more likely than not – that if the defendant went to the penitentiary, that he would be a violent individual?" RR-162:151. Defense counsel objected, "The witness has absolutely no personal knowledge, has no credentials to even answer that question…. He is not an expert, and that's invading the province of the jury." RR-162:151-152. The court overruled the objection. RR-162:152. The District Attorney then repeated the "question" as a three-paragraph speech:

> I mean, you have been the captain over at the jail and been responsible for ultimately the defendant's well-being, his supervision.
>
> You have expressly – even looking at that list, observed him to be non-compliant. You believe him to be dangerous. He has secreted weapons. He's extremely manipulative. He's not a rule follower. He does not respect authority. He displays anger. He's very controlling. And he orders jailers.
>
> In your opinion, if he went to the penitentiary – strictly your opinion, if you feel comfortable giving it – with nothing to lose – I mean, he's in there with life without parole – do you believe there's a probability that he could commit criminal acts of violence that would constitute a threat to that society within the penitentiary?

RR-162:152. Defense counsel again objected, and the court again overruled the objection. *Id*. The question (and speech) was clearly improper. Caraway was not

an expert, and the inquiry invaded the province of the jury. *See*, *e.g.*, *Sandoval v. State*, 409 S.W.3d 259, 292-293 (Tex. App. Austin 2013, no pet.).[20]

Apart from the improper opinion testimony set forth above (for which again there are numerous other examples), the prosecution improperly invaded the province of the jury in its examination of its two experts at the sentencing phase, Dr. Gripon and Dr. Arambula. Thus, District Attorney Bingham asked Dr. Gripon: "But I mean, as far as when the jury is looking at these diagnoses *and does that mitigate the defendant's actions in shooting his wife* or – " RR-167:210 (emphasis added). Defense counsel objected, "That's outside the doctor's area of expertise," but the trial court allowed the testimony. *Id*.[21] Again, these questions invaded the province of the jury and were improper. *Sandoval v. State*, 409 S.W.3d at 292-93.

Finally, the State elicited improper victim impact testimony, over objection. *See* RR-167:76; RR-167:159.

---

[20] In addition, the question was one of many asked by State to establish that *any* person sentenced to life in prison without parole had "nothing to lose" and therefore would probably commit acts of violence. *See*, *e.g.*, RR-163:36-40; RR-163:91 (question by District Attorney: "He's never getting out. What are you going to do? Never ever, right? He's kind of got immunity, true?"); RR-163:148-149; RR-164:56-57. This constant theme deprived Calvert his right to an individualized sentencing hearing as mandated by the Eighth Amendment. *See supra*, 198-99.

[21] The prosecution asked other ultimate questions of Dr. Arambula. *See*, *e.g.*, RR-138:42-56, 100-104.

POINT OF ERROR NO. 26

THE TEXAS CAPITAL SENTENCING STATUTE'S DEFINITION OF "MITIGATING EVIDENCE" IS UNCONSTITUTIONAL BECAUSE IT LIMITS THE EIGHTH AMENDMENT CONCEPT OF "MITIGATION" TO FACTORS THAT RENDER A CAPITAL DEFENDANT LESS MORALLY "BLAMEWORTHY" FOR COMMISSION OF THE CAPITAL MURDER.

(together with) POINT OF ERROR NO. 27

THE TEXAS CAPITAL SENTENCING STATUTE'S DEFINITION OF "MITIGATING EVIDENCE" IS UNCONSTITUTIONAL, AS APPLIED TO APPELLANT, BECAUSE IT LIMITS THE EIGHTH AMENDMENT CONCEPT OF "MITIGATION" TO FACTORS THAT RENDER A CAPITAL DEFENDANT LESS MORALLY "BLAMEWORTHY" FOR COMMISSION OF THE CAPITAL MURDER.

Appellant is aware that this Court has, on several occasions, rejected claims that Tex. Code Crim. Proc. art. 37.0711, § 3(f)(3), defining "mitigating evidence" as evidence that a juror might regard as reducing the defendant's moral blameworthiness, is unconstitutional. The cases rejecting the attacks on the constitutionality of the Texas definition of mitigating evidence find their genesis in *pre-Tennard* litigation.[22]

This Court has relied upon *Penry v. Johnson*, 532 U.S. 782, 803 (2001), a pre-*Tennard* case, to reject claims of unconstitutionality of the mitigation definition.[23]

---

[22] *Tennard v. Dretke*, 542 U.S. 274 (2004).

[23] *See Cargill v. State*, No. AP-76,819, 2014 Tex. Crim. App. Unpub. LEXIS 1044 (Tex. Crim. App. Nov. 19, 2014) (not designated for publication).

However, that case only speaks favorably of the "brevity and clarity" of the current "mitigation issue."[24] The *Penry v. Johnson* court does not consider or speak to the Texas Legislature's attempt to confine mitigating evidence to only that evidence which reduces the defendant's moral blameworthiness for the offense. The potential effect of the Texas limiting definition of mitigation was not a consideration for the *Penry v. Johnson* court and should not be used as authority for the constitutionality of limiting mitigation evidence to that which reduces a defendant's moral blameworthiness for the commission of the offense.

Even pre-*Tennard*, the Supreme Court had made it clear that a sentencer must be allowed to give full consideration and full effect to mitigating circumstances. *Woodson*, 428 U.S. at 304.

This Court also has cited *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010) as a justification for finding that the Art. 37.0711 § 3(f)(3) definition is constitutional. There the defendant's claims were denied on the basis of *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007). The *Coble* court went on to

[24] Tex. Code Crim. Proc. art. 37.071 § 2(e)(1), "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."

say that it saw no "nexus" requirement in the statutory definition and went on to hold that the statutory definition would be in violation of *Tennard v. Dretke*, 542 U.S. 274 (2004), "only if the jury would be reasonably likely to infer a nexus requirement from the statutory words." *Coble v. State*, 330 S.W.3d at 296.[25]

In *Roberts*, relied upon by *Coble*, the defendant contended that the statutory definition unconstitutionally narrowed the definition of mitigation to that evidence that reduced the defendant's moral blameworthiness and constituted an unconstitutional screening test in violation of *Tennard v. Dretke.* The Court addressed these issues by saying it had already addressed these issues in *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004).

In *Perry*, the defendant complained that the statutory definition instructed the "jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness." *Id.* (quotation marks omitted). The Court held that the issue had already been decided against the defendant in *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App. 1997).

In *Cantu*, the defendant contended the definition of mitigating evidence rendered the death penalty statute unconstitutional because it limited mitigation to

[25] The Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence. A State cannot preclude the sentencer from considering any relevant evidence that the defendant proffers in support of a sentence less than death.

evidence that a juror might regard as reducing the defendant's moral blameworthiness. The Court held: "Because the considering and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not *unconstitutionally* narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." *Id.* at 649 (emphasis added).[26] This holding had the effect of dodging the issue since it gave no indication how the jury was to know their determination was "open-ended" in light of the restrictive definition given to them by the trial court.

This is where the train slipped off the track. *Cantu* was decided before *Tennard*, yet all the holdings of this Court on this issue come back to *Cantu.* After *Tennard*, we learn that the Eighth Amendment prohibits the narrowing of a jury's discretion to include only that evidence that would tend to lessen a defendant's moral blameworthiness for the offense. Appellant respectfully asks the Court to recognize that fact.

In *Tennard*, the Supreme Court rejected the "nexus" test the Fifth Circuit and the Texas Court of Criminal Appeals had been using as a restriction upon

[26] The *Cantu* Court relied upon *Colella v. State*, 915 S.W.2d 834 (Tex. Crim. App. 1995), which was a sufficiency of the mitigating evidence case that did not involve the *Tennard*-type issues at all.

independent mitigation evidence in Texas state courts. In the context of deciding that the Texas capital defendant was entitled to a certificate of appealability the Court found that the relevance standard applicable to mitigating evidence in capital cases is simply whether the evidence is of such character that it might serve as a basis for a sentence less than death, regardless of whether the defendant is able to establish a nexus between the evidence and the commission of the crime.

The Texas statutory definition of mitigating evidence is unconstitutional as it was applied to Appellant in this case. Rather than acknowledge the lessons of *Tennard*, the prosecutors took full advantage of a *pro se* defendant by reverting to the old "nexus" requirement during voir dire and teaching it to individual jurors, without objection.

Juror number one, Karen Crowell, was told that "moral culpability" in the mitigation issue "means the personal responsibility of the defendant for the crime he or she chose to commit, okay? How responsible are they for what happened?" RR-77:55. This plainly equates moral responsibility to personal responsibility "for the crime he chose to commit." The prosecutor went on to say:

> Again, I have come to realize through the years that's a good thing … because it can be a lot of different things. It's defined as anything that lessens a juror – I'll read exactly what it is to you. Evidence that a juror may regard as reducing the defendant's moral blameworthiness, okay?
>
> Now, so what reduces a defendant's moral blameworthiness? I don't know. Lots of things, nothing, some things. To me, again, it's a scale.

> You might look at all the evidence and go: You know what? There's no one thing that reduces her moral blameworthiness. *You know, she did it. She did exactly what she wanted to do.* I've considered all the evidence. Huh-uh, not one thing that's even mitigating, much less sufficient.

RR-77:56 (emphasis added). The prosecutor is suggesting there is a nexus requirement between mitigation and culpability for the offense, with the logical conclusion being that there can be no real mitigation if the accused is guilty of the offense.

The prosecutor instructed juror number two, Gregory Duncan as follows:

> It's evidence that a juror may regard – okay – mitigation they define as evidence that a juror may regard as reducing the defendant's moral blameworthiness, okay? *It's some piece of evidence that reduces his moral blameworthiness in the commission of this offense.*

RR-78:110-11 (emphasis added).

The prosecutor instructed juror number three, Linda Setzkorn, as follows:

> So what it says is: Consider the defendant's character and background – if you have that information, you might have it from our witnesses – and the personal moral culpability of the defendant – *that's how responsible is the defendant for what she did, which you've already found her, at that point, guilty of doing* – and ask yourself this: Is there a sufficient mitigating circumstance or circumstances?.... Look at everything that is out there, consider all of the evidence, look at the crime, the facts and circumstances of the offense, look at the crime she chose to commit, look at her background, look at her character, *look at how personally responsible she is for what happened* and ask yourself: Is there one thing that rises to the level of being sufficiently mitigating to warrant life over death?

RR-80:110-11 (emphasis added).

The prosecutor instructed juror number four, Jessica Hudson, that mitigation is something that lessens a defendant's moral blameworthiness for what happened. RR-82:210.

The following exchange between the prosecutor and prospective juror, who became juror number six, Larry Carson, transpired:

> Sikes: And it says, "Evidence that a juror may regard as reducing the Defendant's moral blameworthiness." And you know what that blame is, you know, the *fault for what happened.*
>
> Carson: Yes.
>
> Sikes: So does it reduce the Defendant's moral blameworthiness? Again, there's no list. To me, it's a spectrum. You may look at all the things they tell you to look at and go, "You know what? *There's not one thing that reduces her moral blameworthiness for this crime. She chose to do it. She did it. Nothing reduces it.*"

RR-87:165 (emphasis added).

The prosecutor advised juror number 10, Glenda Towery, that blameworthiness, in the context of the mitigation issue, "is defined as being at fault, deserving the blame, you know." RR-102:86.

Juror number twelve, Shannon Hays, was also given the speech by the prosecutor equating moral blameworthiness with being at fault. RR-110:92.

This Court has instructed, in *Coble*, that the statutory definition of mitigation would be in violation of *Tennard*, and therefore a violation of the Eighth and

Fourteenth Amendments to the United States Constitution, "if the jury would be reasonably likely *to infer* a nexus requirement from the statutory words." 330 S.W.3d at 296 (emphasis added) Here, the jury did not have to infer, they were told to their face there was such a requirement.

Appellant's cousin, Jason Calvert, testified about growing up with him and about their respective families. He testified that he and Appellant continued a close relationship into their adult lives. RR-169:10-15. Jason Calvert described Appellant as a "great father" to his children. RR-169:16, 18. He said that he was a good, attentive father, coaching them, teaching them. RR-169:18. The witness acknowledged that Appellant took photos and videos at almost all family gatherings and some of those videos were admitted and viewed by the jury, showing Appellant with his children, **YYY** and **XXX**. RR-169:19-22.

Since each individual juror must have the opportunity to give full consideration and full effect to mitigating circumstances so she can express her individual reasoned moral judgment in rendering a verdict, how can it be known, beyond a reasonable doubt, that this constitutional error did not contribute to the punishment in this case?[27] Every member of the jury took an oath to follow the law given to them in the court's charge. The trial court instructed the jury in the

[27] *See Penry v. Lynaugh*, 492 U.S. 302, 318-19 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

definition of mitigating evidence, which they were bound by their oaths to follow. It is generally presumed that jurors follow their instructions. *See*, *e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), cited in *Penry v. Johnson*, 532 U.S at 799-800. The only mitigating evidence proffered by Appellant was evidence made admissible by *Tennard* but rendered moot by the unconstitutional definition of mitigating evidence and the misleading and unlawful *voir dire* by the prosecution.

Appellant's punishment judgment should be reversed and the cause remanded to the trial court for a new punishment hearing.

OTHER ISSUES

POINT OF ERROR NO. 28

THE TRIAL COURT ERRED IN REFUSING TO STRIKE VENIREPERSONS BRESSMAN, MALONE, AND WELCH.

A. Calvert Was Entitled To A Jury Free From Bias And Prejudice.

Trial by jury is fundamental to American criminal jurisprudence. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). Both Texas and federal law requires a juror to be struck where the juror's "views would prevent or substantially impair the performance of [the juror's] duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (quotation marks omitted). Indeed, "a single partial juror will vitiate a conviction." *Delrio v. State*, 840 S.W.2d 443, 445 (Tex. Crim. App. 1992).

Texas law requires that a potential juror be disqualified if he or she "has a bias or prejudice in favor of or against a party in the case." TEX. GOV'T CODE ANN. § 62.105(4). In order to disqualify a potential juror for bias, "it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality"; prejudice is a subset of bias and "is more easily defined[,] for it means prejudgment, and consequently embraces bias." *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963). "[V]eniremembers may be disqualified even if they say they can be 'fair and impartial,' so long as the rest of the record shows they cannot." *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005).

If a prospective juror's bias or prejudice for or against a party in a lawsuit is established as a matter of law, the trial court must disqualify that person from service. TEX. GOV'T CODE ANN. § 62.105(4); *Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998). Although a venireperson may be subject to "rehabilitation," such rehabilitation must be limited to instances where there is "an expression of a bias that is subject to more than one interpretation or is uncertain." *Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284, 294-95 (Tex. App. – Beaumont 2005, pet. denied).

B. The Trial Court Abused Its Discretion In Failing To Excuse Venirepersons Bressman Malone, And Welch For Cause.

1. Venireperson Bressman.

Venireperson Bressman's statements showed that she was biased and prejudiced against the defendant. She was prejudiced because both of her parents worked for the TDC; her father worked for the criminal justice system for 40 years. The State used an example of "spitting on a guard in TDC" as an example of future violent conduct, and referred to guards in the penitentiary as potential victims of a "hypothetical" capital murderer's future criminal act of violence. In addition, Bressman had seen information about the case on television, and affirmatively wanted to join the jury. RR-98:145, 148-49, 152-53, 193-194, 215.

Bressman's statements showed a clear bias to convict and to impose the death penalty, both at the beginning of her *voir dire* and at the end. She said: "I support the death penalty. I believe that, you know, if you take a life and you've – vicious enough to do that, then you really shouldn't have the right to live; but that's just how I feel about that." RR-98:147. She agreed, at the conclusion of her *voir dire*, that her "core beliefs" "absolutely" leaned towards the death penalty. RR-98:213. She stated: "I do feel like if someone has taken the life of someone very brutally and for no good, apparent reason, I definitely – and the evidence is there – I do think the death penalty is an appropriate penalty for that person." RR-98:204.

Bressman's prejudice and bias was inflamed by outrageous conduct by the State during her *voir dire*. First, the Assistant District Attorney injected her personal beliefs and irrelevant prejudicial remarks into the matter, stating that "I'm a very eye-for-an-eye-type person" and "by way of example, I had a capital murder where a little 92-year-old woman was beaten, stabbed, strangled, raped, her two cats killed in front of her, and set on fire. To me, I don't know why the very same thing couldn't happen to the person that chose to commit it…. Because they choose the conduct for the victim, so why isn't it good enough for them?" RR-98:148.

But the State then got even more salacious and revolting, and directly sought to prejudice Calvert with regard to a potential defense of insanity that had been noticed (but had not been established as one the defense actually would present at trial):

> Sikes: I use Jeffrey Dahmer as an example. Because I spent a lot of time talking to one of his psychiatrists. Jeffrey Dahmer, no doubt, had a serious mental disease or defect. I mean, for goodness sake, he ate people, like a cannibal. I mean, pretty easy, right?
>
> Bressman: Right.
>
> Sikes: But even he knew his conduct was wrong. You know, this doctor said he would slice the bicep and fry it up with onions and potatoes. Now, he didn't go, "Hey, I want all y'all to come on over to my house. I've killed a couple of new people. We're going to have some bicep and fried potatoes." So he knew it was wrong.
>
> Bressman: Right.

> Sikes: For most people, they say, "Man. That's pretty much a stretch." In this particular case, you know Mr. Calvert's filed notice of insanity to plead insanity. Maybe he can prove to you that he had a serious mental disease or defect that caused him not to know it was wrong to shoot his wife … to commit kidnapping, robbery, or burglary. We have to prove one of those to you. Maybe he can. Maybe he can't. It's much like everything else we've talked about. To be a qualifying juror, just say, "Hey, April, I don't know. Maybe he can. Maybe he can't." For a lot of people that's a stretch.

RR-98:179-80. These are but examples of the State inflaming the *voir dire* with the most extreme examples of criminal conduct warranting retribution. *See also*, ***e.g.***, RR-98:185 ("I had a 14-month-old baby that was raped."); RR-98:188 ("I've had four-year-olds testify about their dad raping them.").

Calvert challenged Bressman for cause, the trial court denied the motion, and Calvert was forced to use a peremptory strike. RR-98:219-21. The court's ruling was error.

2. Venireperson Malone.

Venireperson Malone's statements showed she had an inevitable bias and should have been excused for cause. Malone knew and liked the victim, Ms. Sriraman, who was a customer of hers at the bank where she worked. RR-100:124-25, 213-14. Malone knew the victim well enough "to know her by her first name"; Malone acknowledged that Ms. Sriraman "was always nice to me" and that she liked her. RR-100:213-14. Malone had seen news about the case, and "whenever I heard

about the case and everything and heard the name, saw the picture, I knew immediately that is her; that is my customer." RR-100:213. Moreover, Malone had seen news accounts of Calvert's behavior in court and wanted to serve on the jury. RR-100:205, 216. In addition, when asked "you're open to the fact that we may not convict him of anything," her response was "No, sir." RR-100:191.

In the course of the *voir dire*, Venireperson Malone also made clear: "I'm a believer [in the death penalty] and I believe in an eye for an eye, a tooth for a tooth." RR-100:126-27. The District Attorney immediately jumped in with his personal opinion, stating: "And there are other people, like yourself, like I am too, that tend to be very upset. And when you look at someone taking the life of another person, you know, I tend to be like: Well, if you're man enough to take it, you ought to be man enough to step up. And I understand the eye-for-an-eye deal…. I'll give you an instance. I'm like you. I'm very much an eye-for-an-eye person because it's just – a person is living their life, and I don't think anyone has a right to come in and take that other person's life, the one – the only one they're going to have for an eternity, anyway, and then come in here and somehow say: Don't take mine. That just infuriates me." RR-100:127-28. *See also* RR-100:134-35 (other statements by District Attorney to Malone: "I hate to admit it. I don't buy insanity. I just do not.").

Calvert challenged Malone for cause, the trial court denied the motion, and Calvert was forced to use a peremptory strike. RR-100:218-22. The court's ruling was error.

3. Venireperson Welch.

Similar error occurred with regard to Venireperson Welch. *See* RR-79:109-111, 125; RR-80:154.

C. Calvert Was Prejudiced And Is Entitled To A New Trial.

Calvert exhausted his peremptory strikes, and his motion for additional strikes was denied. *See* RR-110:106-08, 170-72. Calvert was presumptively harmed by the trial court's abuse of discretion in failing to excuse Bressman, Malone, and Welch. "[H]arm occurs when the party uses all of his peremptory challenges and is thus prevented from striking other objectionable jurors from the list because he has no additional peremptory challenges." *Cortez*, 159 S.W.3d at 91 (internal quotation marks omitted). In order to show harm, a party must (1) strike the veniremembers peremptorily, (2) exhaust peremptory strikes, (3) request additional strikes, and, if refused (4) identify objectionable juror remaining on venire. *Id*. Calvert has made that showing here.

POINT OF ERROR NO. 29

THE TRIAL COURT DEPRIVED CALVERT OF HIS RIGHT TO BE PRESENT AT ALL ESSENTIAL PROCEEDINGS IN HIS CASE WHEN THE COURT EXCUSED SEVERAL PROSPECTIVE JURORS AT A TIME WHEN CALVERT WAS NOT PRESENT.

The trial court summoned 1,000 persons as potential jurors for Calvert's trial. *See* CR-11:2862. Although Calvert withdrew his previously-filed motion for a *special* venire panel, *see id*., the *general* panel was called solely for Calvert's case. *See id*. (noting that, although previous order had directed that 850 individuals be summoned to appear for jury duty, "after consultation with Lisa Bennet, Deputy District Clerk Jury Coordinator, in order to more accurately obtain the number of people that the Court feels necessary to select a jury *in this case*, the Court is amending its previous order signed March 12, 2015, and hereby Orders the District Clerk's Office to summon a central jury panel of 1000 individuals to appear for jury duty in the Central Jury Room at the Smith County Courthouse…."). Thus, the entire general panel in this case essentially was assigned to a specific court and case, triggering the commencement of formal *voir dire* proceedings – and the duty to record all proceedings with the defendant present – with regard to all interactions with the panel. *See Chambers v. State*, 903 S.W.2d 21, 30-31 (Tex. Crim. App. 1995) (holding that defendant need not be present for examination of prospective

jurors summoned to a general assembly at a time when the jurors "have not been assigned to any particular case").

In the instant case, Calvert was denied his right to be present when at least four of these prospective jurors called for potential service *in his case* were excused, at a time when Calvert was not present. *See* CR-14:3703-3713; RR-75:18-20. This violated Calvert's right to be present for all material portions of his trial under Tex. Crim. Proc. Art. 33.03 ("Presence of defendant").

PRAYER FOR RELIEF

Appellant Calvert respectfully requests that the judgment of the trial court be reversed and the case remanded for a new trial. In the alternative, under particular Points of Error as explained above, Appellant requests that the case be remanded for entry of conviction of the offense of murder, or remanded solely for a new penalty phase hearing.

Respectfully submitted,

/s/ David W. DeBruin
DAVID W. DEBRUIN
Admitted *Pro Hac Vice*
Jenner & Block, LLP
1099 New York Avenue, N.W.
Washington, D.C. 20001
(202) 639-6015

/s/ Douglas H. Parks
DOUGLAS H. PARKS
State Bar No. 15520000
321 Calm Water Lane
Holly Lake Ranch, Texas 75755
(214) 521-2670
(903) 769-3465 (fax)

CERTIFICATE OF COMPLIANCE

This pleading complies with TEX. R. APP. P. 9.4. According to the word count function of the computer program used to prepare the document, the brief contains 53,261 words excluding the items not to be included within the word count limit.

/s/ Douglas H. Parks
DOUGLAS H. PARKS

CERTITICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was served on Mike West, Assistant District Attorney of Smith County, Texas, by email on the 16th day of October, 2017.

/s/ Douglas H. Parks
DOUGLAS H. PARKS