PD-0160&0161&0162-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/15/2018 11:30 AM
Accepted 2/15/2018 1:45 PM
DEANA WILLIAMSON
CLERK

Case No.: PD-0161-18
TC#F13-24563

FILED
COURT OF CRIMINAL APPEALS
2/15/2018
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

DERRICK SULLIVAN
Appellant

v.

THE STATE OF TEXAS,
Appellee.

Decided in the 282nd Judicial District Court of Dallas County, Texas, the Honorable Amber Givens, Presiding Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621
Appealed to the 5th District Court of Appeals
No. 05-16-01138-CR No.05-16-01139-CR No. 05-16-01140-CR

APPELLANT DERRICK SULLIVAN'S PETITION FOR DISCRETIONARY REVIEW

Derrick Sullivan
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512
Self represented litigant

TABLE OF CONTENTS

TABLE OF CONTENTS ii.

IDENTITY OF PARTIES AND COUNSEL iii.

INDEX OF AUTHORITIES iv.

STATEMENT REGARDING ORAL ARGUMENT 1.

STATEMENT OF THE CASE 1.

STATEMENT OF PROCEDURAL HISTORY 2.

STATEMENT OF JURISDICTION 5.

GROUNDS FOR REVIEW

FIRST ISSUE : 7.
The first issue is whether the appeal court "should have not acted on Mr. Illich's "Motion to Withdraw" before the court examined the record to determine whether counsel and appellant's evaluation of the case was sound."

SECOND ISSUE: 7.
The court of appeals' committed a structural error by denying the appellant his right's of due process. The second issue is whether the appellant has a right to file a pro se appeal brief after the court denies appellant his right to find new appeal counsel, and after the court has allowed the appointed attorney to withdraw from the case.

SUMMARY OF THE ARGUMENT 8.

ARGUMENT 8.

PRAYER 12.

APPENDIX ii. 14.

IDENTITY OF PARTIES AND COUNSEL

The following constitutes a list of all parties to the appellate court's judgment and the names and addresses of all trial and appellate counsel:

Petitioner:	Derrick Sullivan
Petitioner's trial counsel:	Jim Guinan
Petitioner's appellate counsel who was terminated by appellant:	Mr. Niles Illich
Petitioner's Power of Attorney (POA):	Susan Miller
Respondent:	Court of Criminal Appeals
Judges:	Whitehill

INDEX OF AUTHORITIES

Chapman v. United States, 553 F.2d 886, 891 (5th Cir. 1977).....

Faretta, 422 U.S. at 833-34

Johnstone, 808 F.2d at 218

Lombard v. Lynaugh, 868 F.2d 1475, 1484 (5th Cir. 1989).....13,15

McKaskle, 465 U.S. at 178

Myers v. Johnson, 76 F.3d 1330, 1334 (5th Cir. 1996).....13,15

Penson, 109 S.Ct. at 351

Stubbs v. Leonardo, 973 F.2d 167, 169 (2d Cir. 1992).....13,15

STATEMENT OF ORAL ARGUMENT

The petitioner does not believe that oral argument is necessary in this case, as the petitioner's arguments will be set out fully in this petition and brief, should this court grant review. However, should this court determine that oral argument would be helpful in resolving the issues raised in this petition, the petitioner would certainly welcome the opportunity to appear before the Court.

STATEMENT OF THE CASE

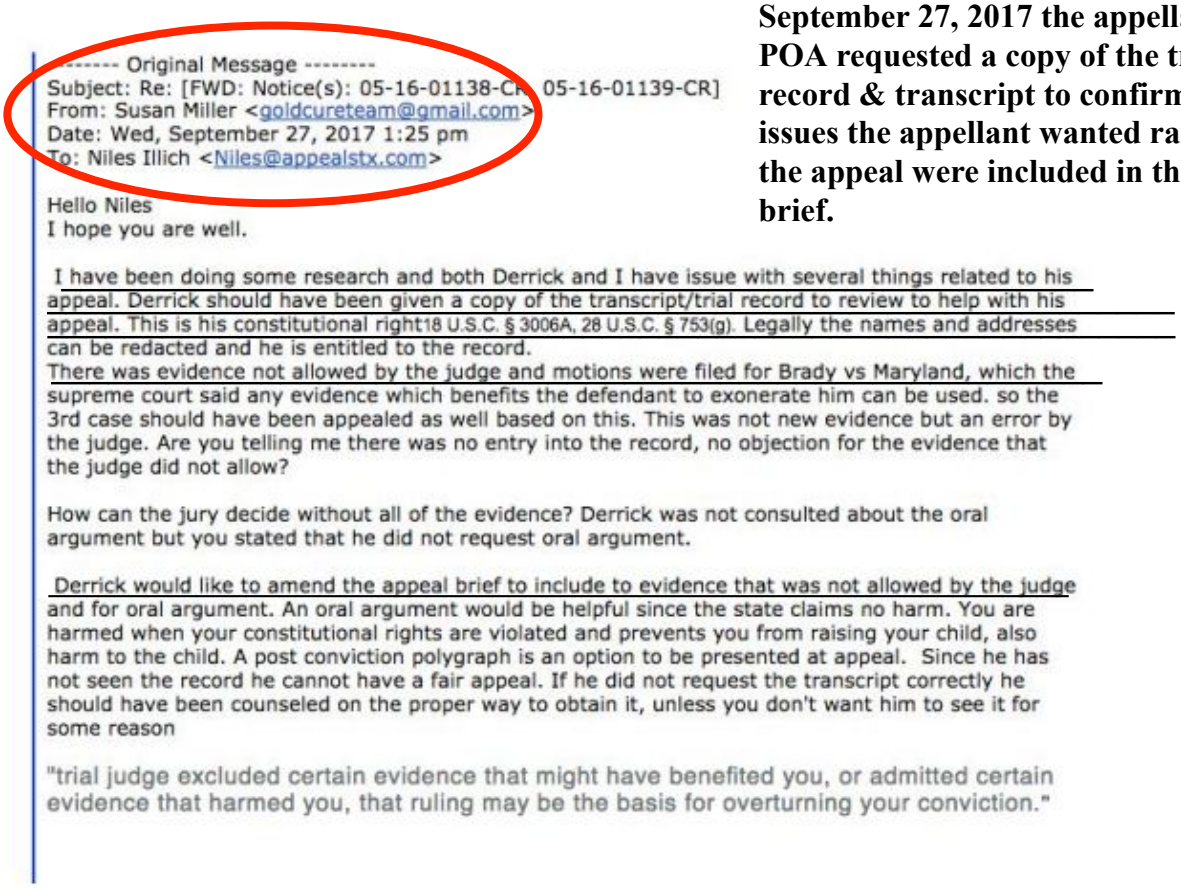
This decision will impact the jurisprudence of the State and all criminal defendants in the state of Texas. This petition is extraordinary due to Justice Whitehill allowing a brief filed by a court appointed appellate attorney after the attorney was terminated by the appellant. The 5th Court of Appeals denied the appellant's right to counsel and denied appellant's pro se brief depriving appellant his right to a fair and just appeal process. The 5th Circuit Appeal Court granted Mr. Illich's "Motion to Withdraw" yet denied the appellant's right to find new counsel and denied appellant's rights to file a pro se appeal brief that included the legal errors and objections preserved in the record. These denials arrived by Justice Whitehill without any analysis, which ultimately ignored the standard

promulgated by the Supreme Court and that has been utilized by this Court. For these reasons this Court should grant a review.

STATEMENT OF PROCEDURAL HISTORY

September 27, 2017, appellant's POA[1] communicated with Mr. Illich, expressing the legal errors the appellant wanted to be included in his appeal brief. These emails prove the discussions took place between Mr. Illich and the appellant's POA.

September 27, 2017 the appellant's POA requested a copy of the trial record & transcript to confirm all issues the appellant wanted raised in the appeal were included in the brief.



-------- Original Message --------
Subject: Re: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
From: Susan Miller <goldcureteam@gmail.com>
Date: Wed, September 27, 2017 1:25 pm
To: Niles Illich <Niles@appealstx.com>

Hello Niles
I hope you are well.

I have been doing some research and both Derrick and I have issue with several things related to his appeal. Derrick should have been given a copy of the transcript/trial record to review to help with his appeal. This is his constitutional right18 U.S.C. § 3006A, 28 U.S.C. § 753(g). Legally the names and addresses can be redacted and he is entitled to the record.
There was evidence not allowed by the judge and motions were filed for Brady vs Maryland, which the supreme court said any evidence which benefits the defendant to exonerate him can be used. so the 3rd case should have been appealed as well based on this. This was not new evidence but an error by the judge. Are you telling me there was no entry into the record, no objection for the evidence that the judge did not allow?

How can the jury decide without all of the evidence? Derrick was not consulted about the oral argument but you stated that he did not request oral argument.

Derrick would like to amend the appeal brief to include to evidence that was not allowed by the judge and for oral argument. An oral argument would be helpful since the state claims no harm. You are harmed when your constitutional rights are violated and prevents you from raising your child, also harm to the child. A post conviction polygraph is an option to be presented at appeal. Since he has not seen the record he cannot have a fair appeal. If he did not request the transcript correctly he should have been counseled on the proper way to obtain it, unless you don't want him to see it for some reason

"trial judge excluded certain evidence that might have benefited you, or admitted certain evidence that harmed you, that ruling may be the basis for overturning your conviction."

[1] POA is Power of Attorney

September 27, 2017, Mr. Illich sent the following email in response to the email sent by appellant's POA.

> On Wed, Sep 27, 2017 at 1:34 PM, Niles Illich <Niles@appealstx.com> wrote:
> Susan:
>
> Thank you for your email. This case is set for oral argument on October 10.
>
> I'm not sure I understand that issue about the transcript. Are you saying that the court or the state had a duty to provide it to him or that I had a duty or that the Court Reporter had the duty or that we all did? I'm not meaning to parse this but I don't understand. I looked up the citations that you sent and they were to federal law that is unrelated to the law that governs this case. This can be a tricky area because some federal law is going to apply and some isn't going to apply. It just depends on what the law is. In my super quick review the two citations that you provided to me do not apply.
>
> If I remember correctly, and I may not off of the top of my head, didn't I send the records to you on dropbox?
>
> Concerning the Brady question, I don't know what you are asking. Perhaps what I mean to say is that I don't remember the nuances of the transcript to answer the question. I can't recall every piece of evidence in this case but we can look.
>
> Niles Illich
> The Law Office of Niles Illich, Ph.D., J.D.
> 701 Commerce
> Suite 400
> Dallas, Texas 75202
> Direct: (972) 802-1788

October 9, 2017, Appellant's POA sent an email to Mr. Illich that terminated him as appellant's appeal attorney. See Appendix Tab 14. **A00109**

October 9, 2017

Appellant terminated Mr. Illich and filed a motion titled, "Motion for Extension of Time to Find New Counsel, File Appellant's Response Brief and Postpone Final Submission of Appeal Brief and Oral Argument". This motion was filed before Mr. Illich's appeal brief was submitted. This motion filed by the appellant stated the following **See A00021**

"Appellant respectfully requests a 60-day extension of time to file an amended brief. Appellant requests this court to remove the current attorney Niles Illich from this appeal. The undersigned attorney, Niles Illich has mislead the appellant about the rules of filing an appeal. Mr. Illich has refused to file an appeal brief that includes all three cases included in appellant's appeal. Mr. Illich has refused to include critical appealable prosecutorial and judicial errors that include a brady disclosures and brady violations in the appeal brief. Mr. Illich has given false representation of law to the appellant since he has been assigned to this case."

October 10, 2017, Mr. Illich was scheduled for oral argument but did not appear. Mr. Illich ignored the fact that he was terminated, and delayed filing his "Motion to Withdraw" until after the final submission of his brief was accepted by the court.

These important dates can be proven by Mr. Illich's "Motion to Withdraw" See Appendix Tab 1, where Mr. Illich stated the following on page one:

> *"Niles Illich files this his Motion to Withdraw. Niles Illich has spoken with Susan Miller and Ms. Miller has a general power of attorney for her son Derrick Sullivan. (Ex. A). Ms. Miller, acting on behalf of her son, has terminated the representation of Niles Illich. (Ex. B). There is a dispute between counsel and client concerning the strategy going forward in this appeal. Counsel does not believe that he can implement the strategy requested by the client, but counsel has no desire to serve as an impediment to the client pursuing that strategy on his own or through another attorney."*

This "Motion to Withdraw" filed by Mr. Illich stated the following on page 2:

> *"Sullivan is in prison and has identified what he believes is a legitimate strategy to reverse his conviction. He and counsel disagree on implementing that strategy and so counsel, whose representation has been terminated by the client, asks this Court to allow him to withdraw and to permit the client to go forward pro-se or with another attorney."*

October 16, 2017, Justice Whitehill granted Mr. Illich's motion to withdraw, and denied the motions filed by the appellant. See Appendix Tab **6 A00066**

October 17, 2017 Appellant filed a written objection to Judge Whitehill, asking for the law and authority used to deny the appellant's right to file his appeal brief. Judge Whitehill ignored the appellant's objection and did not respond. **See A00074**

November 21, 2017, Appellant filed his pro se appeal brief.

December 20, 2017, Justice Whitehill filed an order that incorrectly states the appellant discharged counsel *after* Mr. Illich submitted his appeal brief. *(the record proves appellant discharged counsel BEFORE the final submission of the appeal brief.* **See A00090**

January 2, 2018, appellant timely objected and filed a "MOTION TO RECONSIDER". **See A 00091**

January 5, 2018, The Fifth Court of Appeals denied appellant's "Motion to Reconsider" without a written opinion, striking appellants "pro se brief" from the record. **See A00108**

February 5, 2018, appellant timely filed this petition for discretionary review.

STATEMENT OF JURISDICTION

The structural errors made by the court of appeals, and ignoring precedent without offering any analysis, conflicts with an opinion from the Texas Supreme Court, therefore this court has jurisdiction to grant or deny this petition.

FIRST ISSUE PRESENTED

This issue is not limited to the facts of this case alone but has potential to affect other cases. Appellant filed a motion to terminate his court appointed appeal attorney Niles Illich before final submission of the attorney's appeal brief was accepted. In the same motion appellant requested an extension to file an amended brief, and requested time to find new counsel. Appellant's motions were all denied. The first issue is whether the appeal court "should not have acted on Mr. Illich's motion to withdraw before it made it own examination of the record to determine whether counsel and appellant's evaluation of the case was sound." The court has committed a structural error.

SECOND ISSUE PRESENTED

The court of appeals' committed a structural error by denying the appellant his right's of due process. Justice Whitehill denied appellant's rights to file his appeal brief pro se after denying appellant's right to find new counsel and approving appellant's counsel "Motion to Withdraw. The Texas Supreme Court states all defendants and criminal appellant's have a right to draft their own appeal briefs. The outcome of this petition will have broad impact on the jurisprudence of the State.

SUMMARY OF THE ARGUMENT

REASON FOR REVIEW: The Fifth Court of Appeals decided an important issue in a way that conflicts with an applicable decision of this court and the the State and Federal Constitution. The appeal court "should not have acted on Mr. Illich's motion to withdraw before it made it own examination of the record to determine whether counsel and appellant's evaluation of the case was sound." The Fifth Court of Appeal violated appellant's due process by denying him his rights to find new appeal attorney after the court allowed Mr. Illich to withdraw from the case, and violated the appellants rights to file a pro se appeal brief.

ARGUMENT

Justice Whitehill denied the appellant his right to a fair appeal by denying appellants motion for an extension of time to find new counsel. Appellant notified the 5th Court of Appeals about the issues appellant was experiencing and the reasons appellant terminated his appeal counsel. Whitehill's violation against appellant damaged the appellant by accepting a brief that did not include all the preserved appealable legal issues and evidence of a Brady disclosure appellant wanted to be included in his brief. **A00067**

The due process clause of the Fourteenth Amendment requires that "state action shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." That's the key for the right to counsel: it is a "fundamental principle of liberty and justice" When someone is accused of a crime or is appealing their conviction, they have a right to the assistance of a lawyer in his defense. The Sixth Amendment is obligatory on

state government by virtue of the Fourteenth Amendment. The 5th Court of Appeal did not hold up their obligation and violated the appellants due process.

The proof of appellant's due process being violated is recorded in the actual appeal record. The recorded proof began October 9, 2017, when appellant gave notice to the appeal court regarding the trouble he was having with the appellate counsel. Appellant filed a motion stating reasons for termination of counsel. Appellant requested new counsel, requested an extension to file an amended appeal brief, and requested the courts to postpone oral argument.

On October 10, 2017, the court accepted Mr. Illich's brief knowing the appellant terminated Mr. Illich as counsel. Once the final submission of the brief was accepted into the record, Mr. Illich then filed a "Motion to Withdraw."

On October 12, 2017, appellant timely filed an objection and the court denied the appellant's objection. Appellant then timely filed a motion requesting "Finding of Facts and Laws" but again the court refused to give any facts or law for why the court denied the appellant's motion.

The Supreme Court applies the reasoning of McKaskle and Myers to criminal defendants who clearly and unequivocally asserts his right to present

pro se briefs on the first direct appeal, and must be allowed to "preserve actual control over the case he chooses to present" to the appellate court — i.e., he must be allowed to determine the content of his appellate brief. See *McKaskle*, 465 U.S. at 178. And see *Myers v. Johnson*, 76 F.3d 1330, 1334 (5th Cir. 1996).

Appellant properly preserved his right to file his brief pro se by terminating his court appointed attorney and immediately notifying the court that he terminated his attorney, before the court filed the final submission of the appeal brief.

According to Myers, the appropriate remedy is an opportunity to present an out-of-time pro se appellate brief to the state court of appeals. *See Lombard v.*

Lynaugh, 868 F.2d 1475, 1484 (5th Cir. 1989) (determining that the appropriate remedy for ineffective assistance of counsel on direct appeal was a conditional grant of a writ of habeas corpus unless the state court would grant the petitioner an out-of-time appeal); *see also Stubbs v. Leonardo,* 973 F.2d 167, 169 (2d Cir. 1992) (granting writ unless the state appellate court allows the filing of a pro se brief). This is proven by reviewing *Myers,* where the appeal court ordered the

district court to conditionally grant Myers's petition for writ of habeas corpus unless the Texas Fourteenth Court of Appeals allowed Myers an opportunity to present an out-of-time pro se appellate brief. See *Myers v. Johnson*, 76 F.3d 1330, 1339 (5th Cir. 1996)..

PRAYER FOR RELIEF

WHEREFORE, Therefore since the Fourteenth Court of Appeals allowed an out-of-time pro se appeal brief to be filed, as previously allowed by the Texas Supreme Court this court must follow precedent. This Court should grant review to correct the appeal court's denial of the appellant's right to file his pro se appeal brief. Appellant prays that this petition for discretionary review be granted, and allow the appellant to file his out of date pro se appeal brief.

Respectfully submitted,

/s/ Derrick Sullivan

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 2469 words (excluding the caption, table of contents, table of authorities, signature, proof of service, certification, and certificate of compliance). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

12.

/s/ Derrick Sullivan

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on Feb 5, 2018, a copy of the foregoing petition for discretionary review was sent by mail, through the USPS certified mail was sent by email, through an electronic-filing-service provider, to the following:

The Honorable Amber Givens-Davis
282nd Judicial District Court
Frank Crowley Courts Building
133 N. Riverfront Boulevard
, Lock Box 32 Dallas, TX 75207 *
DELIVERED VIA E-MAIL *

Faith Johnson Dallas County District Attorney
Frank Crowley Courts Building 133 N. Riverfront Blvd., LB19
Dallas, TX 75207-4399 * DELIVERED VIA E-MAIL *

Felicia Pitre Dallas County District Clerk
George Allen Sr. Courts Building
600 Commerce Street, 1st Floor
Dallas, TX 75202 * DELIVERED VIA E-MAIL *

Anne B. Weatherholt Assistant District Attorney
133 N. Riverfront Blvd. Lock Box 19
DALLAS, TX 75207-4399 * DELIVERED VIA E-MAIL *

The Honorable Mary L. Murphy Presiding Judge,
1st Admin. Jud. Region Frank Crowley Courts Bldg.
133 N Industrial Blvd, LB 50
Dallas, TX 75207 * DELIVERED VIA E-MAIL

/s/ Derrick Sullivan

APPENDIX

Table of Contents:

Tab 1.	Oct. 9, 2017 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FIND NEW COUNSEL, FILE APPELLANT'S RESPONSE BRIEF AND POSTPONE FINAL SUBMISSION OF APPEAL BRIEF AND ORAL ARGUMENT	**A00021**
Tab 2.	Oct. 12, 2017 Mr Illich's MOTION TO WITHDRAW	**A00035**
Tab 3	Oct. 12, 2017 EXPEDITED MOTION FOR LEAVE TO SUPPLEMENT THE RECORD	**A00044**
Tab 4.	Oct 13, 2017 ORDER Appellant's Expedited Motion for Leave to supplement the Record is DENIED.	**A00064**
Tab 5.	Oct. 16, 2017 ORDER DENIED by Justice Whitehill	**A00065**
Tab 6.	Oct. 16, 2017, ORDER Motion to Withdraw as Counsel for appellant is GRANTED.	**A00066**
Tab 7.	Oct. 16, 2017 APPELLANT'S RESPONSE TO MOTION TO WITHDRAW AND REQUEST FOR SANCTIONS	**A00067**
Tab 8.	Oct. 17, 2017 "MICKENS" OBJECTION TO JUDGES ORDER 6th Amendment VIOLATION MOTION TO RESPECTFULLY REQUEST THE LAWS THAT CONTROL	**A00074**

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Tab 9.	Oct. 25, 2017 APPELLANT'S NOTICE OF SELF REPRESENTATION and NOTICE OF APPOINTED POWER OF ATTORNEY	**A00081**
Tab 10.	Nov. 14, 2017 APPELLANT'S MANDATORY JUDICIAL NOTICE	**A00086**
Tab 11.	Dec. 20, 2017 ORDER Appellant's post-submission pro se brief is STRICKEN from the record.	**A00090**
Tab 12.	Jan. 2, 2018 APPELLANT"S OBJECTION & MOTION TO RECONSIDER	**A00091**
Tab 13.	Jan. 5, 2018 ORDER DENIED MOTION TO RECONSIDER	**A00108**
Tab 14	Oct. 9, 2017 Email terminating Niles Illich as appeal counsel.	**A00109**
Tab 15.	**June 6, 2017 States Brief**	**A00110**
Tab 16.	**Nov. 21, 2017 Pro Se Appeal Brief Filed by Appellant**	**A00153**
Tab 17.	**Jan 5, 2018 Opinion**	**A00339**

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IN THE COURT OF APPEALS

FOR THE FIFTH DISTRICT

OF TEXAS AT DALLAS

Derrick Sullivan,
Appellant,

Court of Appeals : 05-16-01138-CR
05-16-01139-CR
05-16-01140-CR

Trial Court Case: F- 1324555
F-13-24563
F-13-25621

v.

The State of Texas,
Appellee.

Appellant's Motion for Extension of Time
to Find New Counsel, File Appellant's Response Brief and
Postpone Final Submission of Appeal Brief and Oral Argument

TO THE HONORABLE JUSTICES OF THIS COURT: Now comes, the Appellant, DERRICK SULLIVAN, and moves for an extension of time to file an amended Appellant's brief in this case, postpone final submission and reschedule a oral argument in support thereof shows the following:

This case is on appeal from 282nd Judicial District Court of Dallas County in cause no.

1. Appellant was convicted of 3 counts indecency with a child.
2. Appellant is currently in prison.
3. Appellant's brief was filed on April 4, 2017.
4. Appellant respectfully requests a 60-day extension of time to file an amended brief.
5. Appellant requests this court to remove the current attorney Niles Illich from this appeal.
6. The undersigned attorney, Niles Illich has mislead the appellant about the rules of filing an appeal.
7. Mr. Illich has refused to file an appeal brief that includes all three cases included in appellant's appeal.
8. Mr. Illich has refused to include critical appealable prosecutorial and judicial errors that include a brady disclosures and brady violations in the appeal brief.
9. Mr. Illich has given false representation of law to the appellant since he has been assigned to this case. See exhibits

10. The appellant and appellant's mother have been intentionally mislead about what can be allowed in appeals, if the appeal brief can be amended, and informed that they were not allowed to receive a copy of the transcript. See Exhibits
11. The undersigned attorney Niles Illich canceled the oral argument, against the request of the appellant.
12. Appellant's mother did not received a copy of the transcript until September 29, 2017, after being mislead by Mr. Illich stating only he is allowed to have a copy of the transcript.
13. Appellant's mother has tried to show Mr. Illich where in the record the brady violations and disclosure are, yet Mr. illich refuses to add these errors in the appeal.
14. Mr. Illich released a box to the appellant's mother with all the case documents on Friday Oct 6, 2017.
15. Appellant's mother this past weekend has discovered more critical material that needs to be added in the appeal brief.
16. Mr. Illich refuses to amend the appeal brief and has mislead the appellant to believe amended briefs are not allowed.

17. The emails between Mr. Illich and the appellant's mother that prove Mr. Illich has mislead this appeal are attached.

18. The evidence the appellant's mother discovered this past weekend after sorting through the case documents that were in the case box, Mr. Illich refused to include in the appeal brief are attached.

19. Appellant's mother has attached a sworn affidavit under the penalty of perjury about the facts in reference to one of the brady disclosure. See exhibit

20. Appellant's mother today, received text messages from appellant's trial attorney, stating he had previously spoken to Mr. Illich about there being a brady disclosure.

21. This morning on October 9, 2017, Appellant's mother discovered in the trial transcript the evidence that Mr. Guinan, addressed the brady disclosure during the trial, located in volume 4 page 247, line 20, Mr. Guinan requested a bill of exception in agreement with prosecutor to stipulate specific evidence from the brady material.

22. This proves that there is critical brady material and brady disclosure that must be included in the appellant's appeal brief that Mr. Illich has refused to include.

23. Appellant therefore prays that this Court grant Appellant's motion for new counsel, grant a 60-day extension of time to file an amended appeal brief, and to postpone the final submission of appeal brief and oral argument for 60 days.

24. Appellant is not making this request to intentionally delay the appeal. This approval will ensure that appellant receives a fair chance at his appeal.

Wherefore appellant moves this court to postpone the final submission of the appeal brief scheduled for October 10, 2017, remove Niles Illich from this case, and approve this request to reschedule the final submission of brief and oral argument for 60 days from today.

Respectfully submitted,

/s/ Derrick Sullivan

Certificate of Service

On October 9, 2017, I electronically served a true copy of this motion to the following parties by email using e-file and serve.

Niles Illich
Law Office of Niles Illich, Ph.D, J.D.

701 Commerce St.
Suite 400
Dallas, TX 75202
* DELIVERED VIA E-MAIL *

Anne B. Weatherholt
Assistant District Attorney
133 N. Riverfront Blvd.
Lock Box 19
DALLAS, TX 75207-4399
* DELIVERED VIA E-MAIL *

Between December of 2013 and January of 2014 I received a text from Bill Wirskye, original attorney, for Derrick Sullivan, stating that he had received a document from the DA Shelly Fox following an interview with the girls, the interview was requested by Bill due to suspicion that the girls were being told to say these allegations about Derrick Sullivan. Bill said in the text it was good news. Bill had moved from Harwood office to Bryan Tower. As requested by Bill Wirskye, Derrick and I went in to his new office at Bryan Tower and he presented to us a 1-page document to review the document was an interview by Shelly Fox with the girls, it had lines on it and the printing was written inside of the lines. It stated that the girls were asked if someone is telling them to say these things, the answer was yes, with accusations against Tammy Punt that she was involved and said it was ok.

Later at the pretrial, I asked Jim about putting that document into evidence, the Trial attorney at the time was Jim Guinan, who asked the prosecutor John McMillan about the document. John McMillin produced a typed summary that left out the statement that the girls admitted to being told to say these things. I told Jim that, that was not the correct document, that it was hand written by Shelly Fox. John McMillin then produced the correct document. I read the 1-page document and told Jim that it was the correct one, He saw the statement and approached the bench, asked the judge that it be added into evidence.

In the trial record, Exhibit Index, Defendant's Exhibits No 8, this is not that document. Instead they took three different paragraphs and put in on a blank sheet and entered it in place of the document that Mr. Guinan had requested to be entered. This evidence has been tampered with and the document requested as evidenced was swithched. It was the duty of the prosecutor to ensure that the proper document was entered into evidence per Maryland vs Brady

-------- Original Message --------
Subject: Notice(s): 05-16-01138-CR, 05-16-01139-CR
From: <5thTAMES@5th.txcourts.gov>
Date: Thu, July 27, 2017 6:11 pm
To: <niles@appealstx.com>

You have received notice(s) for the following case(s):

05-16-01138-CR
TC #F-1324555-S
Derrick Brannon Sullivan v. The State of Texas

Files
Submission_FILECOPY.pdf

05-16-01139-CR
TC #F-1324563-S
Derrick Brannon Sullivan v. The State of Texas

Files
Submission_FILECOPY.pdf

Thank you,
Claudia McCoy
Fifth Court of Appeals

Do not reply to this message. If you have questions, please contact the Court at (214) 712-3450.

On Thu, Jul 27, 2017 at 8:56 PM, Niles Illich <Niles@appealstx.com> wrote:

Susan:

I'm sorry it has been so long since we talked, but there has been very little to say. Today the Court issued its order for oral argument. What this means is that the case won't be decided until the date in the letter and could be decided any day after it. Sometimes the decision is quick and sometimes it is slow. I can't predict it. The Court sends these announcements out in batches of two so the third one is set for the same time. They will all be resolved together. I hope that Derrick is well.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

-------- Original Message --------
Subject: Re: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
From: Susan Miller <goldcureteam@gmail.com>
Date: Wed, September 27, 2017 1:25 pm
To: Niles Illich <Niles@appealstx.com>

Hello Niles
I hope you are well.

I have been doing some research and both Derrick and I have issue with several things related to his appeal. Derrick should have been given a copy of the transcript/trial record to review to help with his appeal. This is his constitutional right18 U.S.C. § 3006A, 28 U.S.C. § 753(g). Legally the names and addresses can be redacted and he is entitled to the record.
There was evidence not allowed by the judge and motions were filed for Brady vs Maryland, which the supreme court said any evidence which benefits the defendant to exonerate him can be used. so the 3rd case should have been appealed as well based on this. This was not new evidence but an error by the judge. Are you telling me there was no entry into the record, no objection for the evidence that the judge did not allow?

How can the jury decide without all of the evidence? Derrick was not consulted about the oral argument but you stated that he did not request oral argument.

Derrick would like to amend the appeal brief to include to evidence that was not allowed by the judge and for oral argument. An oral argument would be helpful since the state claims no harm. You are harmed when your constitutional rights are violated and prevents you from raising your child, also harm to the child. A post conviction polygraph is an option to be presented at appeal. Since he has not seen the record he cannot have a fair appeal. If he did not request the transcript correctly he should have been counseled on the proper way to obtain it, unless you don't want him to see it for some reason

"trial judge excluded certain evidence that might have benefited you, or admitted certain evidence that harmed you, that ruling may be the basis for overturning your conviction."

On Wed, Sep 27, 2017 at 1:34 PM, Niles Illich <Niles@appealstx.com> wrote:

Susan:

Thank you for your email. This case is set for oral argument on October 10.

I'm not sure I understand that issue about the transcript. Are you saying that the court or the state had a duty to provide it to him or that I had a duty or that the Court Reporter had the duty or that we all did? I'm not meaning to parse this but I don't understand. I looked up the citations that you sent and they were to federal law that is unrelated to the law that governs this case. This can be a tricky area because some federal law is going to apply and some isn't going to apply. It just depends on what the law is. In my super quick review the two citations that you provided to me do not apply.

If I remember correctly, and I may not off of the top of my head, didn't I send the records to you on dropbox?

Concerning the Brady question, I don't know what you are asking. Perhaps what I mean to say is that I don't remember the nuances of the transcript to answer the question. I can't recall every piece of evidence in this case but we can look.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

-------- Original Message --------
Subject: Re: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
From: Susan Miller <goldcureteam@gmail.com>
Date: Wed, September 27, 2017 2:30 pm
To: Niles Illich <Niles@appealstx.com>

Niles,
Derrick requested the trial record from you, you sent me the administrative record from the clerk. He has not seen the trial record and cannot have a fair appeal without seeing it. I am saying Derrick is entitled by law to see and have a copy of the trial record. you stated in a previous email that you could not share it, due to "victims" info Derrick requested the record after redaction of names and addresses.

Evidence that was not allowed by the judge which would help Derrick were not allowed by the judges as she knew it would help him. Brady vs Maryland motion was filed prior to the trial starting and that evidence should have been allowed. In my research I found that could be used in an appeal.

Thanks

---------- Forwarded message ----------
From: **Niles Illich** <Niles@appealstx.com>
Date: Wed, Sep 27, 2017 at 3:34 PM
Subject: RE: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
To: Susan Miller <goldcureteam@gmail.com>

Susan:

I am happy to provide him with a copy of the redacted version of the transcript minus the jurors names or other identifying information and without the exhibits. I need to go over to the courthouse to get the electronic copies they are not online for me. All I have is my paper copy and I need that. But I disagree that he needed a copy for the appeal. Appeals turn on very fine grained issues, mostly things that people call "technicalities." It is a very rare instance where a client contributes to an appeal. Now in the context of a writ the client has a lot to contribute, but in an appeal there is much less that a client can do to help.

I still don't understand the Brady issue that you are presenting. What was the evidence that you are talking about? I'm assuming it is the evidence of perjury or false testimony.

There is no process to amend an appeal at this point. Many times before we have discussed the issue of a writ. This is probably a writ case. The issues of things like ineffective assistance of counsel are reserved for that. Brady evidence is also probably better raised in a writ. Typically you need some sort of evidence from outside of the record to support these claims. Especially when you are talking about claims of false or perjured testimony. That really makes it a better writ issue. Although not an absolute, bringing an issue in a direct appeal can waive it for the writ--especially if the appellate court addresses the issue substantively in its opinion.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

Left blank

ACCEPTED
05-16-01138-CR
FIFTH COURT OF APPEALS
DALLAS, TEXAS
10/12/2017 9:09 AM
LISA MATZ
CLERK

Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
10/12/2017 9:09:20 AM
LISA MATZ
Clerk

DERRICK BRANNON SULLIVAN
Appellant,

v.

THE STATE OF TEXAS
Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givins, Presiding
Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

MOTION TO WITHDRAW

Niles Illich
SBOT: 24069969
Law Office of Niles Illich, Ph.D., J.D.
701 Commerce Street
Suite 400
Dallas, Texas 75202
Telephone: (972) 802 − 1788
Facsimile: (972) 682 – 7586
Email: Niles@appealstx.com

ATTORNEY FOR APPELLANT

To the Honorable Justices of the Fifth Court of Appeals:

Niles Illich files this his Motion to Withdraw. Niles Illich has spoken with Susan Miller and Ms. Miller has a general power of attorney for her son Derrick Sullivan. (Ex. A). Ms. Miller, acting on behalf of her son, has terminated the representation of Niles Illich. (Ex. B).

There is a dispute between counsel and client concerning the strategy going forward in this appeal. Counsel does not believe that he can implement the strategy requested by the client, but counsel has no desire to serve as an impediment to the client pursuing that strategy on his own or through another attorney.

There are no pending deadlines. The briefs have been submitted to this Court.

Derrick Sullivan's current address is:

Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

The email address for Susan Miller, Sullivan's mother and the person whom Sullivan has vested with decision making authority in this case is: goldcureteam@gmail.com.

Sullivan is in prison and has identified what he believes is a legitimate strategy to reverse his conviction. He and counsel disagree on implementing that strategy and so counsel, whose representation has been terminated by the client, asks this Court

to allow him to withdraw and to permit the client to go forward pro-se or with another attorney.

Prayer and Conclusion

Niles Illich has been terminated from this representation and he asks that this Court allow him to withdraw from this case.

Respectfully Submitted,

/s/ Niles Illich
Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce Street
Suite 400
Dallas, Texas 75202-4518
Direct: (972) 802-1788
Fax: (972) 236-0088
Cell: (713) 320-9883
Email: Niles@appealstx.com

Certificate of Compliance

This is to certify that this Motion has been prepared in Times New Roman font, font size 14 and that the motion contains less than 550 words.

/s/ Niles Illich
Niles Illich

Certificate of Service

This is to certify that this motion has been served on those who have access to electronic service through the State's electronic service provider. The motion has been mailed to Derrick Sullivan at the address below.

VIA ELECTONIC SERVICE:
Dallas County District Attorney's Office
Appellate Division
133 N. Riverfront Blvd.
Dallas, Texas 75207
Email: DCDAAppeals@dallascounty.org

Susan Miller: goldcureteam@gmail.com

VIA FIRST CLASS POST:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

/s/ Niles Illich
Niles Illich

Exhibit A

GENERAL POWER OF ATTORNEY

STATE OF TEXAS KNOWN ALL MEN BY THESE PRESENTS:

COUNTY OF MITCHELL

THAT I, Derrick Sullivan, of the county of Mitchell, and State of Texas do hereby constitute and appoint, Susan Collard Miller, of Van Zandt County, Texas to be my duly and lawfully appointed attorney in fact granting unto said attorney in fact full power and authority to do and perform any and all acts or things necessary or requisite to be done in furtherance of my interests, whether said acts involve any type of legal actions, decisions, filing documents, hiring legal representation, signing my name, subpoenas, appearing in court, granting my attorney in fact a universal power of attorney permitting said attorney in fact to act as fully and for all intent and purposes as I might do if I were personally present. I further authorize and empower said attorney to take any legal action as may be necessary under the circumstances. Said attorney in fact is empowered to use their sole discretion in handling matters related to my interests.

This universal power of attorney will supersede my disability to the fullest extent possible for the laws of the Sate of Texas.

Witness my hand this 5th day of October, 2017.

Derrick Sullivan

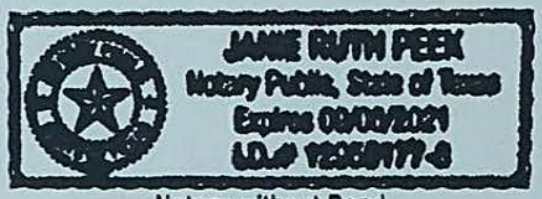
Acknowledgement

STATE OF TEXAS

COUNTY OF MITCHELL

BEFORE ME, the undersigned authority, on this day personally appeared Derrick Sullivan, known to me to be the person whose name is subscribed to the foregoing document and acknowledgeable to me that he executed the same for the purpose and consideration therein expressed.

GIVEN under my hand and seal of office this the 5th day if October, 2017.



Notary without Bond

Janie Ruth Peek

Notary Public in and for Wallace law library office

The State of Texas

Exhibit B

Print | Close Window

Subject: Re: POA Derrick Sullivan
From: Goldcure <goldcureteam@gmail.com>
Date: Wed, Oct 11, 2017 8:11 pm
To: Niles Illich <Niles@appealstx.com>

Niles,
Im not sure I understand your question. Are you saying I have not notified you that Derrick is terminating you as council? I sent you a notice of termination and a copy of POA.

Sent from my iPhone

On Oct 11, 2017, at 12:45 PM, Niles Illich <Niles@appealstx.com> wrote:

[redacted]

A00043

åIN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT
OF TEXAS AT DALLAS

Derrick Sullivan,
Appellant,

Court of Appeals : 05-16-01138-CR
05-16-01139-CR
05-16-01140-CR

v.

Trial Court Case: F- 1324555
F-13-24563
F-13-25621

The State of Tex.

EXPEDITED MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE JUDGES OF SAID COURT: Petitioner herein, Derrick Brannon Sullivan, who's currently represented by Niles Illich. Mr Illich has refused to file this motion, to correct the appeal record and exhibits list. Petitioner makes this Motion to Supplement the Record in Support of Petitioner's Motion to File an Amended Appeal Brief and a 60 Day Extension for the final submission of the appeal brief. The Petitioner files this request on said grounds therefore would show the Court: This cause was heard in the 282nd Judicial District Court of Dallas County, Texas trial court cause numbers F- 1324555, F-13-24563, and F-13-2562 styled "The State of Texas v. Derrick Brannon Sullivan."

The major issue of the trial was whether Derrick Sullivan committed indecency with a minor involving 3 children. These children belong to the Petitioner's ex girlfriend's sister.

Sometime in January of 2014, the state assistant district attorney, Shelly Fox interviewed 2 of the 3 children.

During an interview the children made the statement to Shelly Fox that they told were what to say.

This statement is evidence that supports the petitioner's defense.

Assistant District Attorney Shelly Fox stated this is a Brady disclosure and Ms. Fox followed the rules by handing over this Brady disclosure to the petitioner's trial attorney,

There was no other evidence against Petitioner other than these children statements.

This Brady disclosure was in the form of a handwritten interview. A copy of this note was shown to the petitioner, his mother by petitioner's attorney and then shown to trial attorney by prosecution.

This Brady disclosure is referenced in the record beginning, vol 4, page 247/255

The evidence that is in this trial record is not the same evidence that was to be entered based on a specific statement witnessed during pretrial, handed to petitioner's attorney and filed in this trial record.

The referenced evidence that is now in this record is an altered, typed statement that has left out the Brady disclosure of what the children stated to the assistant district attorney Shelly fox.

During this past 2 weeks, the petitioner and his mother discovered the record does not have the correct evidence that was the original copy of the hand written notes. Petitioner has attached to this motion an affidavit that describes the events and the description of this missing record. See Exhibits

Exhibit B is the affidavit of Susan Miller, who is the power of attorney for the petitioner and who also read the original handwritten notes from the District Attorney Shelly Fox .

The recorded phone conversation attached as Exhibits A allows the Court to learn that petitioners first attorney, Bill Wirskye states that there was a Brady disclosure. The emails attached in Exhibits A,B and C show that the Brady disclosure and that hand written notes do exist.

These emails, texts, and recorded conversations, show there is indisputable evidence contradicting statements from the state's alleged witnesses that prove these girls statements contradict their other statements. See attached pgs. 9 to 18.

These emails, texts, and recorded conversations prove that Petitioner's evidence and case file has been tampered with by the district court.

These emails, texts, and recorded conversations prove appeal council Niles Illich has chosen to ignore these violations.

These 3 cases evidence files has been altered and switched.

This case transcript that has been submitted in this this appeal has been altered to leave out critical evidence that would proves judicial errors and prosecutorial misconduct that took place during the trial.

This is a violation of petitioner's constitutional rights to a fair and just trial by violating his due process and the rights to a fair and just appeal.

Petitioner's motion is made so that, in the interest of justice, this Honorable Court may have the benefit of all the evidence available so that a just and equitable decision can be reached and it is for this reason that the motion is brought.

WHEREFORE, PREMISES CONSIDERED, Appellant, moves this Court to grant this Motion and to allow time to supplement the record with the correct exhibits that prove there is a Brady disclosure the trial court concealed.

If this court refuses to allow the appellant to correct and give time to file a supplemental appeal brief and time to correct the transcript and record, then this court will also violate the petitioner's rights of due process by obstructing justice.

Respectfully submitted,

Derrick Sullivan.

CERTIFICATE OF COMPLIANCE WITH TRAP 9.4

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this reply (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix) is 734.

/s/ Derrick Sullivan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Supplement the Record was served on current council, the trial clerk, the appeal clerk, and the Assistant District Attorney of Dallas County, Texas on the 12th day of October, 2017 electronic service to the following emails:

Niles Illich
Law Office of Niles Illich, Ph.D, J.D.
701 Commerce St.
Suite 400
Dallas, TX 75202
* DELIVERED VIA E-MAIL *

Anne B. Weatherholt
Assistant District Attorney
133 N. Riverfront Blvd.
Lock Box 19
DALLAS, TX 75207-4399
* DELIVERED VIA E-MAIL *

Faith Johnson
Dallas County District Attorney
133 N. Riverfront Blvd.
Lock Box 19
DALLAS, TX 75207-4399
* DELIVERED VIA E-MAIL *

October 7, 2017
Transcript of Phone Call with attorney Bill Wirskey
Discussing the Brady Disclosure

Susan: somehow the document did not end up in the court record. Something else has ended up in its place

Bill: umm mm

Susan: I was wondering if you can verify and state that we came to view this document,. That the document existed

Bill: Im gonna have to look at the file um,I have as hazy memory of a brady disclosure, which I discussed with y'all. That's what it is called, a brady disclosure and notification without knowing what exactly… once the case goes south uh people have different allegiances and ys know i don't know this lawyer yall used or anyone else but I've gotta have a lot more detail before my memory has gotta be refreshed. Does that make sense?

Susan Right

Bill I'm not trying to hedge on you but i do remember early on we had a brady disclosure that they gave us that I liked. Ands it's always good news when you get a brady disclosure and we discussed one. I just can't tell you what that was without my file. Uhh I can't do timing... I don't know what happened after I was off the case so if you're looking for affidavits.. and I don't understand.. and I need to know who is pursuing what and uh... I'm always willing to tell the truth and help people, and different people have different agendas post conviction, and I need to understand what everyone body's agendas is.

Susan:
What they did was there is a DA summary that you signed and it left out that statement what we saw, that talked about how Tammy was included and how Tammy they accused her about knowing about the abuse and they also said that yes Derrick did it but they were told to say that. That was in that document

Bill: Well see record means different things to different people. So what are we talking about? Are we talking about the trial record?

Susan: Yes sir. The trial record.

Bill: Who is the attorney you are working with now?

Susan Niles Illich

Bill: Who I'm sorry?

Susan: Niles Illich

Bill: Okay If you want to have him call me I'd be glad to talk with him but i've gotta know a lot more.

Susan: Well all I'm asking is that we came and looked at the document, I want to be completely on the up and up

Bill: All I remember was a brady disclosure. I remember at some point we would of discussed it in person at the office. I don't have any specific recall about that. I don't really recall the contents of the brady disclosure but ya know uh, so if this lawyer wants to call I'd be happy to talk with him and if you want to be on the call I will tell him the same things. But I have to be careful because I don't know who these people are and I don't want anyone to throw me under the bus.

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IN THE COURT OF APPEALS

Dallas County, TEXAS

APPELLANT

Derrick Sullivan,

Vs.

The State of Texas

AFFIDAVIT

THIS INSTRUMENT HEREBY ACKNOWLEDGES that the undersigned, Susan Miller, ("affiant"), does hereby swear and affirm that the following is true and accurate, to the best of their knowledge, under penalty of perjury:

Between December of 2013 and January of 2014 I received a text from attorney Bill Wirskye, who was the original attorney for Derrick Sullivan, he stated that he had received a document from the District Attorney Shelly Fox. The document received was Shelly Fox's hand written notes that she took during an interview she conducted with the alleged victims. This interview was requested by Mr. Wirskye, due to our suspicion that the girls were being told and coached about what they were to say in reference to the sexual abuse criminal charges filed against Derrick Sullivan.

The actions by, Ryan Hester, Theresa Franks who were court ordered to pay Tammy Punt child support for the girls, caused concern due to the status of my son's broken relationship with Punt, which lead to unjust motives behind the accusers filing sexual abuse criminal charges. Mr. Wirskye sent me a text message that stated, "to meet him at his new office in the Bryan Tower." As requested, Derrick and I drove to Mr. Wirskye's new office. Mr. Wirskye shared with us a piece of paper that was handwritten by DA Shelly Fox. This was a one page copied Form document with black lines on it and Shelly wrote inside the lines. The notes taken by Ms. Fox stated several things from her interview, the girls were asked if someone was telling them to say these things. The answer was "yes" they were

told to say these things." The document also included accusations by the girls against Tammy Punt, stating that she was involved in this and it was ok. Due to unfortunate circumstances Mr. Wirskye was no longer practicing as a criminal defense attorney, and my sons case was taken over by criminal defense attorney Jim Guinan.

Later during the pretrial, As Derrick and I sat in the courtroom, I asked Mr. Guinan to obtain that document from prosecution and add the document into evidence. Mr. Guinan asked the prosecutor John McMillan about the document. John McMillin presented a typed Summary of Shelly Fox's notes, which did not have the same notes that were handwritten by Shelly Fox. The document presented by the District Attorney was a typed document that was missing critical parts of Shelly Fox's notes, and left out the statements about how the girls admitted to Shelly fox that they were told to say these things about my son. I told Jim Guinan that was not the correct document. I explained to Jim while Mr McMillin was there in the courtroom that the correct document is a handwritten statement by Shelly Fox. John McMillin then corrected the issue by offering the correct hand written document to the court. Jim handed me the document Derrick and I both reviewed it and verified that it was the correct document. Jim then approached the bench and presented the evidence to the judge, requesting it to be entered into the record as evidence.

During the actual trial this evidence was not allowed to be entered as evidence and was never presented to the jury. This evidence falls under the category of exculpatory evidence which was withheld from the jury.

After the case was tried and my son was found guilty, he filed for his appeal. The court appointed appellate attorney Niles Illich, My son asked numerous times to review the trial record due to the numerous judicial violations during the trial, Mr. Illich refused to give him a copy of the trial transcript and exhibits for my son's review until one week prior to the 10/10/17 scheduled submission of cause in the Court of Appeals fifth District . We have raised numerous issues of constitutional and judicial violations of which Mr Illich ignores. I believe Mr. Illich has committed fraud and misrepresentation about the law to both myself and my son on numerous occasions. Mr. Illich stated that he did not have an electronic copy of the trial record, only one paper copy and that one copy is for him. I called the court clerk to inquire about how to get a copy of the transcripts and I was informed

that a copy would be around $1500.00. After numerous requests to Mr. Illich and his refusal to consider the issues identified I emailed him the Texas rules of appeal and he then finally agreed to get me a copy at this late date. After brief review the entire record, I discovered that the exhibit of the handwritten notes from the DA Shelly Fox has been altered, and replaced with a false document. The record shows that Vol 8 is not the correct record that was filed into the record by James McMillian. In the appeal record, Defendant's Exhibits No 8, is not that document. Instead they took three different paragraphs from the prosecutor's summary and copied it onto on a blank sheet and entered it in place of the document that Mr. Guinan had requested to be entered. This evidence has been tampered with and the document requested as evidenced was switched. It was the duty of the prosecutor to ensure that the proper document was entered into evidence and presented to the jury. The prosecutor withheld this evidence which caused a Brady violation against my son.

Signed to this Day Month,

10/06/17 Susan Miller

STATE OF TEXAS COUNTY OF Van Zandt In Texas,
on the 6th day of October 2017, before me, a Notary Public in and for the above state and county, personally appeared Susan Miller, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as her free and voluntary act and deed.

Type of ID Produced: DL

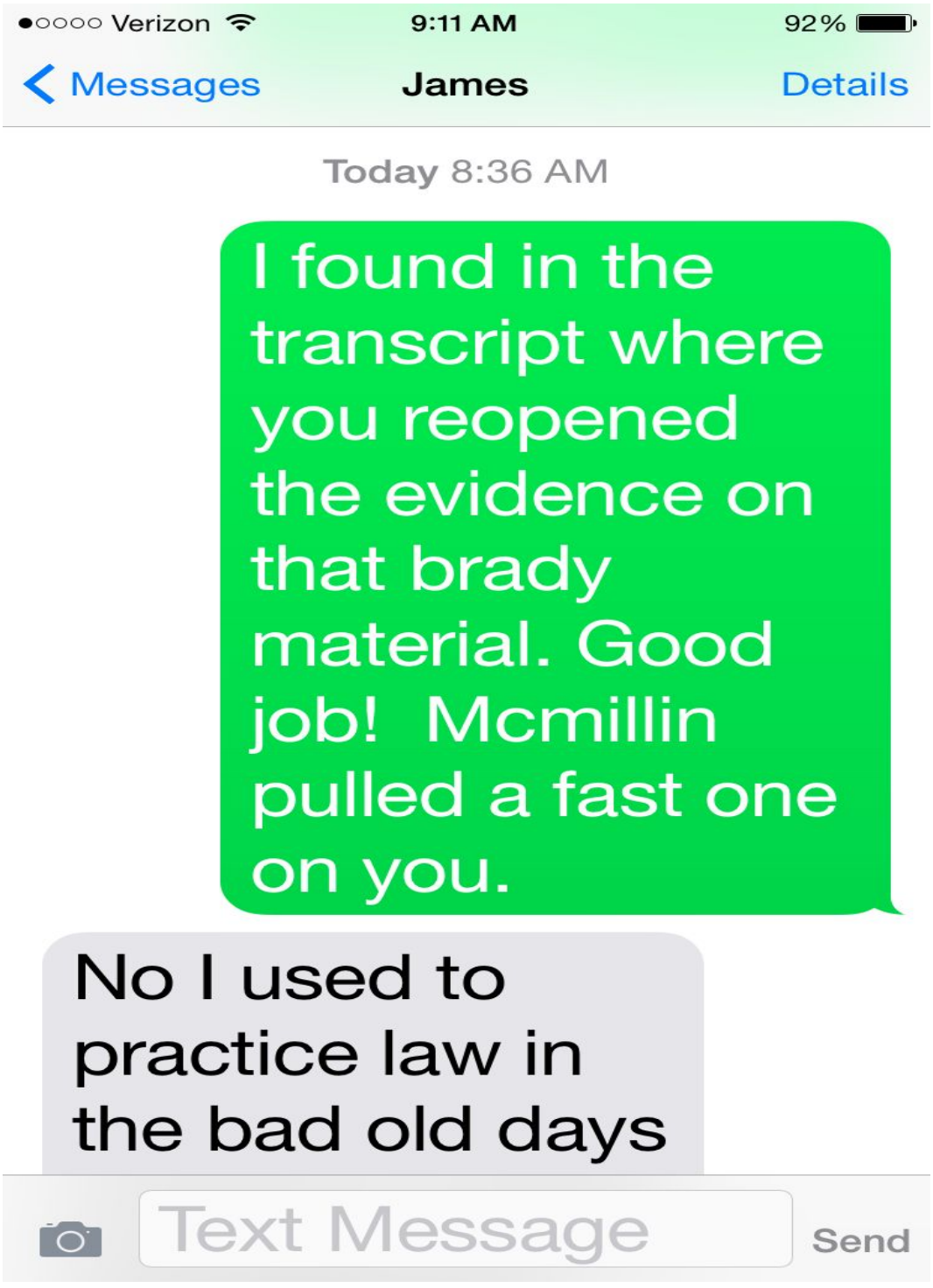
Affiant is not personally known to me

Christy B Martinez

NOTARY PUBLIC

CHRISTY B. MARTINEZ
Notary Public, State of Texas
My Commission Expires
SEPTEMBER 10, 2019

My Commission Expires: September 10, 2019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9:11 AM
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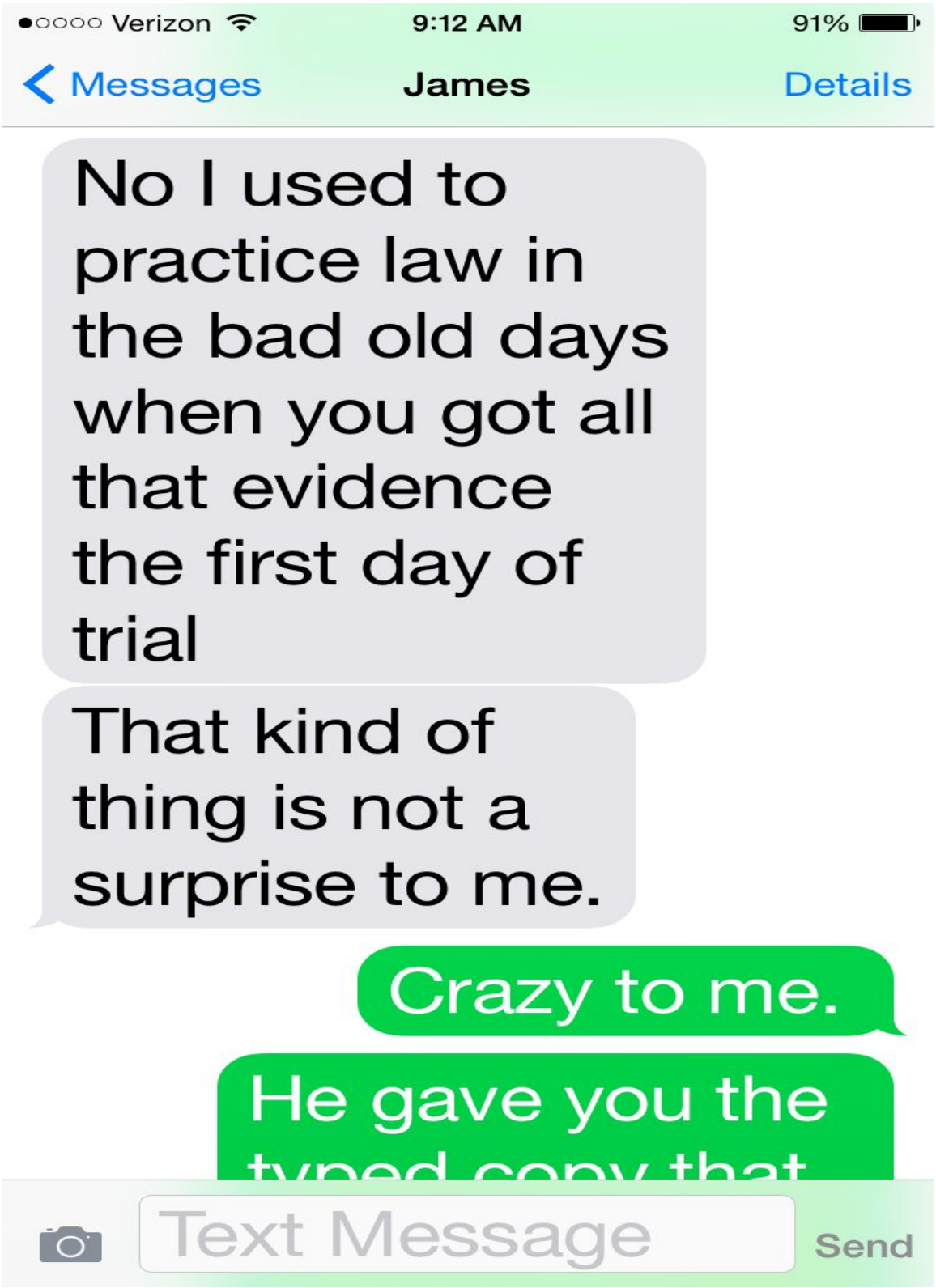
Messages
James
Details
Today 8:36 AM
I found in the transcript where you reopened the evidence on that brady material. Good job! Mcmillin pulled a fast one on you.
No I used to practice law in the bad old days
Text Message
Send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Messages
James
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No I used to practice law in the bad old days when you got all that evidence the first day of trial
That kind of thing is not a surprise to me.
Crazy to me.
He gave you the
Text Message
Send

GENERAL POWER OF ATTORNEY

STATE OF TEXAS KNOWN ALL MEN BY THESE PRESENTS:

COUNTY OF MITCHELL

THAT I, Derrick Sullivan, of the county of Mitchell, and State of Texas do hereby constitute and appoint, Susan Collard Miller, of Van Zandt County, Texas to be my duly and lawfully appointed attorney in fact granting unto said attorney in fact full power and authority to do and perform any and all acts or things necessary or requisite to be done in furtherance of my interests, whether said acts involve any type of legal actions, decisions, filing documents, hiring legal representation, signing my name, subpoenas, appearing in court, granting my attorney in fact a universal power of attorney permitting said attorney in fact to act as fully and for all intent and purposes as I might do if I were personally present. I further authorize and empower said attorney to take any legal action as may be necessary under the circumstances. Said attorney in fact is empowered to use their sole discretion in handling matters related to my interests.

This universal power of attorney will supersede my disability to the fullest extent possible for the laws of the Sate of Texas.

Witness my hand this 5th day of October, 2017.

Derrick Sullivan

Acknowledgement

STATE OF TEXAS

COUNTY OF MITCHELL

BEFORE ME, the undersigned authority, on this day personally appeared Derrick Sullivan, known to me to be the person whose name is subscribed to the foregoing document and acknowledgeable to me that he executed the same for the purpose and consideration therein expressed.

GIVEN under my hand and seal of office this the 5th day if October, 2017.

Notary without Bond

Janie Ruth Peek

Notary Public in and for Wallace law library office

The State of Texas

Fwd: Brady material Inbox x

Susan Miller Oct 9 (3 days ago)

to me

response from Niles
--------- Forwarded message ---------
From: **Niles Illich** <Niles@appealstx.com>
Date: Mon, Oct 9, 2017 at 2:04 PM
Subject: RE: Brady material
To: Goldcure <goldcureteam@gmail.com>

I think we would all benefit from another attorney giving you their opinion on this case. I recognize that we won't agree on this point. But as I see it, Jim used this information during trial to impeach the witnesses and then admitted part of it to the record. I did not think that this constituted a Brady violation when I wrote the brief and after review I do not think that it constitutes a Brady violation now. I admire your passion for your son, but I disagree with you on this.

I do not think that the Court will appoint another attorney to represent Derrick at this point especially on the ground that we disagree about legal strategy. I am happy to file a motion to withdraw from this case with the Court of Appeals. They can deny the motion, but if that helps I will do it.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

-------- Original Message --------
Subject: Brady material
From: Goldcure <goldcureteam@gmail.com>
Date: Mon, October 09, 2017 12:55 pm
To: Niles Illich <Niles@appealstx.com>

This morning at 8:30 I found in the trial record where Jim asks for brady information to be reopened. That he had an agreement with McMillin. Starts Vol 4 page 247 line 20. Due to this finding and the fact that you are not willing to address the bray issues, Derrick has requested new alternative council for his appeal, As we cannot depend on you to uphold derricks rights guaranteed under the constitution

Thank you
Susan Miller

Sent from my iPhone

CAUSE NO. F13-24555, F13-24563, F15-25621

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	282nd JUDICIAL DISTRICT
	§	
DERRICK BRANNON SULLIVAN	§	
Defendant	§	DALLAS COUNTY, TEXAS

MOTION FOR EXAMINATION AND INSPECTION OF EXCULPATORY MATERIAL PURSUANT TO BRADY VS. MARYLAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, requests production of any evidence in the possession of the state or its agents which would tend to exculpate the defendant under Brady v. Maryland, 373 U.S. 83 (1963), or which would impeach the state witnesses under Giglio v. United States, 405 U.S. 150 (1972). See also United States v. Martinez-Mercado, 888 F.2d 1484 (5th Cir. 1989).

FILED
2016 FEB 26 AM 10: 52
FELICIA PITRE
DISTRICT CLERK
DALLAS COUNTY, TEXAS
DEPUTY

REQUESTED MATERIALS

1) This request specifically includes, but is not limited to:

(a) any witness who is favorable to the defense;

(b) any psychiatric or psychological reports which evidence defendant's legal insanity;

(c) any prior contrary statements of any state witness;

(d) any witness statements or other evidence that suggest that defendant did not knowingly and/or wilfully violate the statute that is the subject of this given case;

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Order entered October 13, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause No's F-1324555-S, F-13-24563-CR, 05-16-01140-CR

ORDER

Appellant's Expedited Motion for Leave to supplement the Record is **DENIED.**

/s/ BILL WHITEHILL
JUSTICE

Order entered October 16, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1324555-S

ORDER

Niles Illich's Motion to Withdraw as Counsel for appellant is **GRANTED.** The clerk is directed to update the court's records to reflect that Niles Illich is no longer appellant's counsel of record and all future orders and notices are forwarded to appellant, pro se at: TDCJ No. 02092943, Wallace Unit, 1675 South FM 3525, Colorado City, TX 79512.

Appellant's Motion for Sanctions is **DENIED**.

/s/ BILL WHITEHILL
JUSTICE

Order entered October 16, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1324555-S

ORDER

Niles Illich's Motion to Withdraw as Counsel for appellant is **GRANTED.** The clerk is directed to update the court's records to reflect that Niles Illich is no longer appellant's counsel of record and all future orders and notices are forwarded to appellant, pro se at: TDCJ No. 02092943, Wallace Unit, 1675 South FM 3525, Colorado City, TX 79512.

Appellant's Motion for Sanctions is **DENIED**.

/s/ BILL WHITEHILL
JUSTICE

Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

DERRICK BRANNON SULLIVAN

Appellant,

v.

THE STATE OF TEXAS

Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givens, Presiding
Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

RESPONSE TO MOTION TO WITHDRAW AND REQUEST FOR SANCTIONS

To the Honorable Justices of the Fifth Court of Appeals:

1. Derrick Sullivan files this Response to Mr. Illich's Motion to Withdraw.
2. Mr. Illich has claimed the reason for this dispute between appellant and Mr. Illich is due to a dispute concerning the strategy going forward in this appeal.
3. This is not the truth. Mr. Illich has intentionally given false information regarding the appeal process and ignored the prosecutorial errors and judicial errors that are found within the case file and transcript.

4. Mr. Illich intentionally restricted the appellant from having a copy of his transcript by giving appellant false appeal laws, which violated appellant's rights to due process.
5. The appellant did not receive a copy of the transcript until the week before the final submission to file the brief was due.
6. Mr. Illich and the court have a duty to ensure the appellant has access to justice and to uphold the rights of Due Process.
7. Mr Illich claimed to this court he does not believe he can implement the strategy requested by the appellant.
8. Mr. Illich has a duty to ensure that the appeal has properly addressed all the violations made by the lower court.
9. The attached exhibits prove that this is exactly what has transpired since Mr. Illich took this appeal case. Mr. Illich has intentionally impeded appellants appeal. Mr. Illich has a duty to ensure that appellants appeal includes all errors that preserved errors that took place.
10. Mr. Illich has stated he does not want to serve as counsel and Mr. Illich has no desire to serve as an impediment to the appellant
11. The attached emails will prove that Mr. Illich has caused serious injury to the appellant by violating the rules of criminal appeals, rules of evidence

and has impeded the appellants appeal by giving false rules about the appeal process, restricting the appellant from having a copy of his transcript until less than a week before the final submission was due, and has intentionally misguided the appellant about the rules of criminal appeal procedure.

12. On October 10, 2017, after Mr. Illich learned that appellants Power of attorney, Susan Miller, on behalf of appellant asked for oral argument, Mr. Illich canceled the scheduled oral argument against the appellants wishes.
13. When asked about the scheduled Oct. 10, 2017, oral argument, Mr. Illich lied and stated that October 10, 2017 hearing was just a final submission of the appeal brief.
14. There are pending deadlines that the appellant has missed due to Mr. Illich's actions.
15. The brief that was submitted to this court on October 10, 2017, has falsified exhibits that replaced the real exhibits.
16. The transcript has been altered, and the brief and does not address the errors by the judge or the prosecutor, nor does the brief filed by Mr. Illich include the brady disclosures and brady violations.
17. Sullivan is in prison and has identified a legitimate strategy to reverse his conviction.

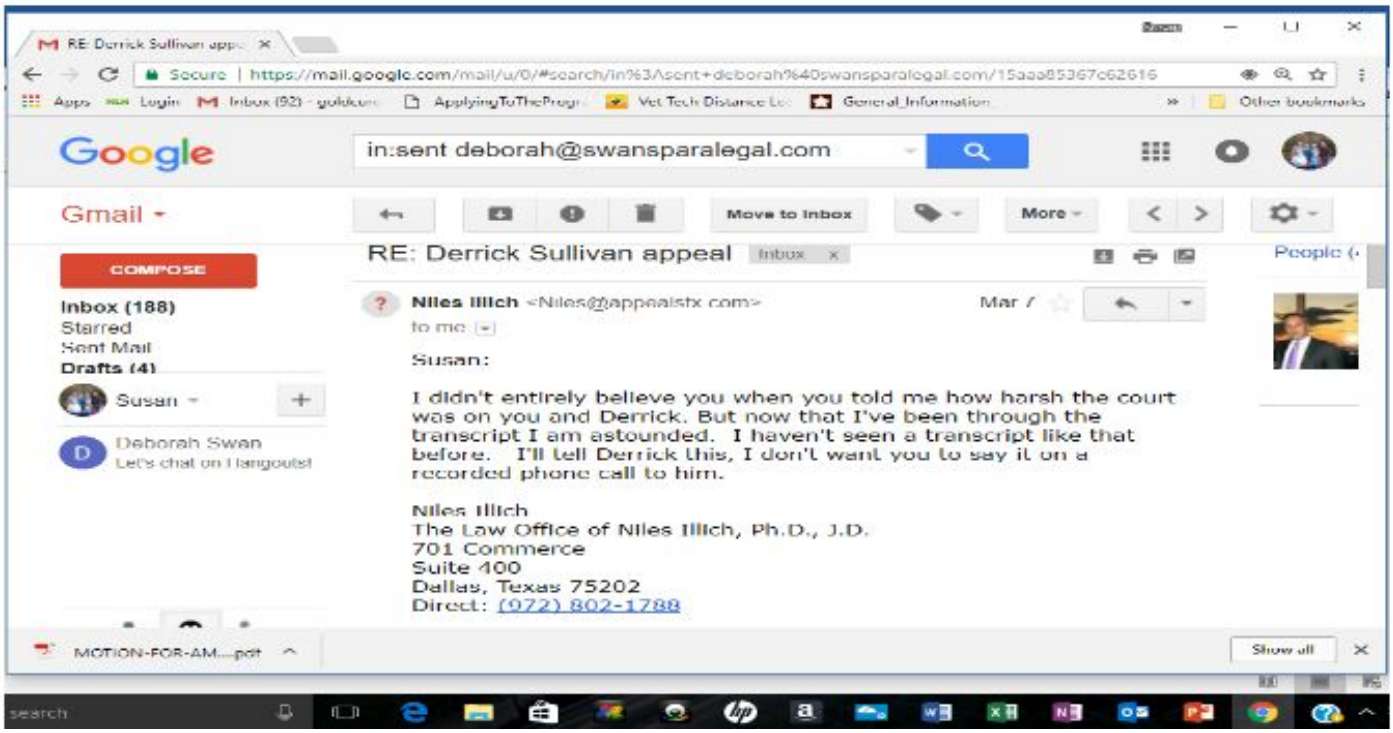
18. There is proof of Brady disclosures and violations all throughout the case.

19. On the attached exhibit, you will see the discussion between Mr. Illich and the appellant's mother, Susan Sullivan about the Brady disclosure.

20. On the exhibit below, Mr. Illich claims to appellant how shocked he was when he read the transcript at how bad the court handled this case.

21. The email below was sent from Mr. Illich to Susan Miller, appellants power of attorney, and Mr. Illich states:

"I didn't entirely believe you when you told me how harsh the court was on you and Derrick. But now I've been through the transcript and I'm astounded. I haven't seen a transcript like that before. I'll tell Derick this. I don't want you to say it on a recorded phone call to him." - Niles Illich



Conclusion

Due to the violations and "obstruction of justice" that has taken place by Mr. Illich, appellant moves this Court to allow appellant time to draft a corrected appeal brief, reschedule a final due date for submission, and allow the appellant to have an oral argument pro-se or with attorney.

Appellant terminated Mr. Illich from this representation and requests this court to file sanctions for the harm and violations Mr. Illich's actions has intentionally impeded against this appellant's rights to his appeal.

Filed on the 16th day of October, 2017.

Respectfully Submitted,
/s/ Derrick Sullivan

Derrick Sullivan's current address is:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

The email address for Susan Miller, Sullivan's mother and the person whom Sullivan has vested with decision making authority in this case is: goldcureteam@gmail.com.

Certificate of Compliance

This is to certify that this Motion has been prepared in Times New Roman font, fontsize 14 and that the motion contains less than 647 words.

Certificate of Service

This is to certify that this motion has been served on those who have access to electronic service through the State's electronic service provider.

VIA ELECTRONIC SERVICE:
Dallas County District Attorney's Office
Appellate Division
133 N. Riverfront Blvd.
Dallas, Texas 75207
Email: DCDAAppeals@dallascounty.org

Susan Miller: goldcureteam@gmail.com

Please return a filed stamped copy to the appellant located at:
VIA FIRST CLASS POST:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

/s/ Derrick Sullivan

Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

DERRICK BRANNON SULLIVAN

Appellant,

v.

THE STATE OF TEXAS

Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givens, Presiding
Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

"MICKENS" OBJECTION TO JUDGES ORDER
6th Amendment VIOLATION
MOTION TO RESPECTFULLY REQUEST THE LAWS THAT CONTROL

To the Honorable Justice Bill Whitehill,

1.

Appellant files this Objection to Justice Bill Whitehill's following orders he denied, and respectfully requests the laws that control this court to deny and reject appellant's constitutional rights to a fair and just appeal.

2.

The appellant following motions were denied without the law that controls why

each motion was denied:

a. Appellant's “Motion to for an Extension of Time to File Final Submission of Appeal Brief” DENIED.
b. Appellant's “Motion for Leave to Supplement the Record.” DENIED
c. Appellant's “Motion to Correct the Exhibits in the Appeal Brief” DENIED.
d. Appellant's “Motion for an Extension of 60 days to File an Amended Appeal Brief” DENIED.
e. Appellants “Motion Requesting to Reschedule Oral Argument” DENIED

3.

Appellant has previously given notice to this court of the appeal council's performance by filing the listed motions. Council's performance caused the appeal brief to be submitted without the brady disclosure evidence, and without the prosecutorial and judicial errors that took place during the trial, and without the correct exhibits included in the brief.

4.

Pursuant to *Mickens v. Taylor* "an actual conflict of interest" meant precisely a conflict *that affected counsel's performance* — as opposed to a mere theoretical division of loyalties. It was shorthand for the statement in *Sullivan* that "a

defendant who shows that a conflict of interest ” *Mickens v. Taylor*, 535 U.S. 162, 171 (U.S. 2002)

5.

“The question presented in this case is what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.” *Mickens v. Taylor*, 535 U.S. 162, 164 (U.S. 2002)

6.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), we held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, *id.*, at 687, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective standard of reasonableness,"

7.

Appellant's motions that have been filed in this appeal court, prove and demonstrate the appellant's counsel Niles Illich’s performance falls under a conflict of interest, and falls below an objective standard of reasonableness.

8.

Pursuant to Roe v. Flores-Ortega,[34] the Supreme Court held that "when [appellate] counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." [35] *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (U.S. 2000)

9.

6th Amendment Violation

According to the controlling authority cited in this objection, all an appellant need show, then, to establish prejudice for purposes of a Sixth Amendment claim of ineffectiveness of appellate counsel that wholly deprived him of an appeal, is that he would indeed have pursued that appeal. He need not also show "some likelihood of success on appeal." [36] and respectively requests the law that controls this court to deny and reject appellant's constitutional rights to a fair and just appeal.

10.

The appellant filed this objection and the listed previous motions before a final ruling and order has made on this appeal.

11.

Wherefore appellant respectfully request Justice Bill Whitehall the laws that control this court to deny and reject appellant's constitutional rights to a fair and just appeal.

12.

The appellant swears under the penalty of perjury that every point made in this motion is true and this motion is not being filed to cause intentional delay.

13.

Filed on October 17, 2017, by appellants power of attorney Susan Miller.

/s/ Derrick Sullivan
/s/ Susan Miller
Pro se Power of Attorney

Certificate of Compliance

This is to certify that this Motion has been prepared in Times New Roman font, fontsize 14 and that the motion contains 476 words.

Certificate of Service

This is to certify that this motion has been served on those who have access to electronic service through the State’s electronic service provider.

VIA ELECTRONIC SERVICE:
Dallas County District Attorney's Office
Appellate Division
133 N. Riverfront Blvd.
Dallas, Texas 75207
Email: DCDAAppeals@dallascounty.org

Susan Miller: goldcureteam@gmail.com

Please return a filed stamped copy to the appellant located at:

VIA FIRST CLASS POST:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

/s/ Derrick Sullivan
/s/ Susan Miller

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Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

DERRICK BRANNON SULLIVAN

Appellant,

v.

THE STATE OF TEXAS

Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givens, Presiding
Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

APPELLANT'S NOTICE OF SELF REPRESENTATION and NOTICE OF APPOINTED POWER OF ATTORNEY

To the Honorable Justices of the Fifth Court of Appeals:

COME NOW, appellant, Derrick Sullivan, and respectfully gives notice to this court that Susan Miller is appellant's legal power of attorney of record, and has been given power to act in place of Derrick Sullivan. A copy of the Power of Attorney is attached.

This decision is made knowingly, and intelligently. "To be constitutionally effective, such a decision must be made competently, voluntarily, knowingly, and intelligently. *Godinez v. Moran,* 509 U.S. 389, 400, 113 S.Ct. 2680, 2687, 125 L.Ed.2d 321 (1993); *Faretta,* 422 U.S. at 835–36, 95 S.Ct. at 2541;*Collier v. State,* 959 S.W.2d 621, 625 (Tex.Crim.App.1997)" *In Re C.L.S.*, 403 S.W.3d 15, 19 (Tex. App. 2013)

This court has already accepted appellant's pro se filings with Susan Miller acting on the appellant's behalf. This court has accepted 6 motions filed by the appellant and has ruled on them all except the most recent objection filed by the appellant.

This notice is not for purpose of delay but so that justice may be done and at the instruction of this court.

WHEREFORE, PREMISE CONSIDERED, appellant requests Susan Miller to continue to act in place of Derrick Sullivan as appellant's power of attorney of record. Appellant grants full authority and permission to act in place of Derrick Sullivan for this case and all future post conviction actions connected to this case.

Respectfully Submitted,
/s/ Derrick Sullivan

Derrick Sullivan's current address is:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

The email address for Susan Miller, Sullivan's mother and the person whom Sullivan has vested with decision making authority in this case is: goldcureteam@gmail.com.

Certificate of Compliance

This is to certify that this Motion has been prepared in Times New Roman font, fontsize 14 and that the motion contains less than 300 words.

Certificate of Service

This is to certify that this motion has been served on those who have access to electronic service through the State's electronic service provider.

VIA ELECTRONIC SERVICE:
Dallas County District Attorney's Office
Appellate Division
133 N. Riverfront Blvd.
Dallas, Texas 75207
Email: DCDAAppeals@dallascounty.org

Susan Miller: goldcureteam@gmail.com

Please return a filed stamped copy to the appellant located at:
VIA FIRST CLASS POST:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

/s/ Derrick Sullivan

GENERAL POWER OF ATTORNEY

STATE OF TEXAS KNOWN ALL MEN BY THESE PRESENTS:

COUNTY OF MITCHELL

THAT I, Derrick Sullivan, of the county of Mitchell, and State of Texas do hereby constitute and appoint, Susan Collard Miller, of Van Zandt County, Texas to be my duly and lawfully appointed attorney in fact granting unto said attorney in fact full power and authority to do and perform any and all acts or things necessary or requisite to be done in furtherance of my interests, whether said acts involve any type of legal actions, decisions, filing documents, hiring legal representation, signing my name, subpoenas, appearing in court, granting my attorney in fact a universal power of attorney permitting said attorney in fact to act as fully and for all intent and purposes as I might do if I were personally present. I further authorize and empower said attorney to take any legal action as may be necessary under the circumstances. Said attorney in fact is empowered to use their sole discretion in handling matters related to my interests.

This universal power of attorney will supersede my disability to the fullest extent possible for the laws of the Sate of Texas.

Witness my hand this 5th day of October, 2017.

Derrick Sullivan

Acknowledgement

STATE OF TEXAS

COUNTY OF MITCHELL

BEFORE ME, the undersigned authority, on this day personally appeared Derrick Sullivan, known to me to be the person whose name is subscribed to the foregoing document and acknowledgeable to me that he executed the same for the purpose and consideration therein expressed.

GIVEN under my hand and seal of office this the 5th day if October, 2017.

Notary without Bond

Jamie Ruth Peek

Notary Public in and for Wallace law library office

The State of Texas

IN THE COURT OF APPEALS FOR THE

FIFTH DISTRICT OF TEXAS

DERRICK BRANNON SULLIVAN appellant

Appellant,

v.

THE STATE OF TEXAS

Appellee.

Appealed from the 282nd Judicial District Court of

Dallas, County, Texas, the Honorable Amber Givens, Presiding

Court Cause Numbers: F-1324555, F-1324563, F-1325621

APPELLANT'S MANDATORY

JUDICIAL NOTICE

All officers of the court for the COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS are hereby placed on notice under authority of the supremacy and equal protection clauses of the United States Constitution and the common law authorities of Haines v Kerner, 404 U.S. 519, Platsky v. C.I.A. 953 F.2d. 25, and Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) relying on

Willy v. Coastal Corp. 503 U.S. 131, 135 (1992), "United States v. International Business Machines Corp., 517 U.S. 843, 856 (1996), quoting Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring). Trinsey v. Pagliaro, D.C. Pa. 1964, 229 F. Supp. 647, American Red Cross v. Community Blood Center of the Ozarks, 257 F.3d 859 (8th Cir. 07/25/2001).

In re Haines: pro se litigants *(Appellant is a pro se litigant)* are held to less stringent pleading standards than BAR registered attorneys. Regardless of the deficiencies in their answers, appearances, appeals, briefs, pleadings, motions, objections, oral arguments, pro se litigants are entitled to the opportunity to be allowed and fair chance to be heard, submit evidence, appear, in support of their defenses and claims. In re Platsky: court errors if court dismisses the pro se litigant (Appellant is a pro se litigant) without instruction of how appeals, briefs, pleadings, motions, objections, notices, are deficient and how to repair pleadings. All litigants have a constitutional right to have their claims adjudicated according the rule of precedent. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). Statements of counsel, in their appeals, briefs, motions, or arguments are

not sufficient for a motion to object, default, dismiss or for summary judgment, Trinsey v. Pagliaro, D.C. Pa. 1964, 229 F. Supp. 647.

Dated Nov. 14, 2017

Respectfully Submitted,

/s/ Derrick Sullivan

self represented litigant

Certificate of Service

This is to certify that this motion has been served on those who have access to electronic service through the State's electronic service provider.

VIA ELECTRONIC SERVICE:
Dallas County District Attorney's Office
Appellate Division
133 N. Riverfront Blvd.
Dallas, Texas 75207
Email: DCDAAppeals@dallascounty.org

Susan Miller: goldcureteam@gmail.com

Please return a filed stamped copy to the appellant located at:
VIA FIRST CLASS POST:
Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

/s/ Derrick Sullivan

Order entered December 20, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F13-24555-S, F13-24563-S, F13-25621-S

ORDER

Appellant's counsel timely filed appellant's brief in this matter, and the case was submitted on October 10, 2017. After the case was submitted, appellant discharged counsel and we granted counsel's motion to withdraw. Thereafter, on November 21, 2017, appellant filed a pro se brief. Appellant's post-submission pro se brief is **STRICKEN** from the record.

/s/ BILL WHITEHILL
JUSTICE

TAB 12

Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The Court of Appeals

FIFTH DISTRICT OF TEXAS

DERRICK BRANNON SULLIVAN
Appellant,

v.

THE STATE OF TEXAS
Appellee.

Appealed from the 282nd Judicial District Court of Dallas County, Texas, the Honorable Amber Givins, Presiding Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

OBJECTION
MOTION TO RECONSIDER

1.

To the Honorable Justices of the Fifth Court of Appeals:

Appellant Derrick Sullivan files this **Objection** to Judge's order to strike the appellants pro se brief.

2.

A. The facts alleged in the Judge's order are incorrect.

B. The Judge's order falsely claims appellant discharged counsel after the attorney's appeal brief was submitted.

C. This is false.

D. The appeal record proves the appellant discharged counsel on October 9, 2017, which was BEFORE the attorney's appeal brief was submitted. (See Exhibit A.)

E. The record proves on October 9, 2017, the Appellant filed a pro se Motion, terminating Mr. Illich as counsel. (See Exhibit B)

F. The Motion filed by the appellant stated the following:

> "Appellant respectfully requests a 60-day extension of time to file an amended brief. 5. Appellant requests this court to remove the current attorney Niles Illich from this appeal. 6. The undersigned attorney, Niles Illich has mislead the appellant about the rules of filing an appeal. 7. Mr. Illich has refused to file an appeal brief that includes all three cases included in appellant's appeal. 8. Mr. Illich has refused to include critical appealable prosecutorial and judicial errors that include a brady disclosures and brady violations in the appeal brief. 9. Mr. Illich has given false representation of law to the appellant since he has been assigned to this case."

G. On October 12, 2017, Mr. Illich filed a Motion to withdraw himself from the case due to the Appellant terminating Niles Illich on October 9, 2017.

H. Niles Illich's Motion to Withdraw, filed on Oct. 12, 2017, stated the following on page 1:

> "Niles Illich files this his Motion to Withdraw. Niles Illich has spoken with Susan Miller and Ms. Miller has a general power of attorney for her son Derrick Sullivan. (Ex. A). Ms. Miller, acting on behalf of her son, has terminated the representation of Niles Illich. (Ex. B). There is a dispute between counsel and client concerning the strategy going forward in this appeal. Counsel does not believe that he can implement the strategy requested by the client, but counsel has no desire to serve as an impediment to the client pursuing that strategy on his own or through another attorney."

I. The Motion to Withdraw filed by appellant's counsel Niles Illich also stated the following on page 2 :

> "Sullivan is in prison and has identified what he believes is a legitimate strategy to reverse his conviction. He and counsel disagree on implementing that strategy and so counsel, whose representation has been terminated by the client, asks this Court to allow him to withdraw and to permit the client to go forward pro-se or with another attorney."

J. Justice Whitehill granted counsel's motion to withdraw, yet denied all the appellant's motions.

K. Appellant filed a written objection to Judge Whitehill orders he denied, demanding the judge to show under what law and authority was he denying the appellant his rights to file a pro se brief.

M. Judge Whitehill did not respond to the appellants objections, nor has Judge Whitehill given the facts and law to show what authority he applied to deny the appellant the right to file a pro se brief.

3.

The Supreme Court applies the reasoning of *McKaskle* to an appellate situation and the state of Texas holds that criminal defendant who clearly and unequivocally asserts his right to present pro se briefs on the first direct appeal must be allowed to "preserve actual control over the case he chooses to present" to the appellate court — i.e., he must be allowed to determine the content of his appellate brief. *See McKaskle,* 465 U.S. at 178. ***Myers v. Johnson*, 76 F.3d 1330, 1334 (5th Cir. 1996)**

4.

Prior to the Supreme Court's decision in *McKaskle,* this court had also recognized that "the nature of the right to defend pro se renders the traditional harmless error doctrine peculiarly inapposite." *Chapman v. United States,* 553 F.2d 886, 891 (5th Cir. 1977). In *Chapman,* we recognized that the defendant's right to represent himself is protected not "out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour

of trial and to embrace the consequences of that course of action." *Id. Myers v. Johnson*, 76 F.3d 1330, 1337 (5th Cir. 1996)

5.

The right to present pro se briefs on direct appeal, as the right to self-representation at trial, arises from the fundamental belief that a criminal defendant should not have counsel forced upon him. *See Myers,* 8 F.3d at 252. Constitutional protection of the right to represent oneself on direct appeal preserves the values of individual autonomy and freedom of choice. *See Faretta,* 422 U.S. at 833-34 ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."); *Chapman,* 553 F.2d at 891 ("[E]ach person is ultimately responsible for choosing his own fate, including his position before the law."). Violation of the right to present pro se briefs sacrifices these values regardless of the effect of the violation on the outcome of the appeal. *See Johnstone,* 808 F.2d at 218. The violation of the constitutional right to self-representation on direct appeal, limited to the right to present pro se briefs and motions, is not amenable to harmless error analysis. See *Myers v. Johnson*, 76 F.3d 1330, 1338-39 (5th Cir. 1996)

6.

We may assume then that the constitutional right to self-representation on direct appeal, as the complement to the constitutional right to counsel on direct appeal, is derived from the Fourteenth Amendment Due Process guarantee. Therefore, while the right to self-representation at trial is a Sixth Amendment right; the right to present pro se briefs on direct appeal is a Due Process right. *Myers v. Johnson*, 76 F.3d 1330, 1339 n.7 (5th Cir. 1996)

7.

Prayer and Conclusion

According to Myers, the appropriate remedy is an opportunity to present an out-of-time pro se appellate brief to the state court of appeals. *See Lombard v. Lynaugh,* 868 F.2d 1475, 1484 (5th Cir. 1989) (determining that the appropriate remedy for ineffective assistance of counsel on direct appeal was a conditional grant of a writ of habeas corpus unless the state court would grant the petitioner an out-of-time appeal); *see also Stubbs v. Leonardo,* 973 F.2d 167, 169 (2d Cir. 1992) (granting writ unless the state appellate court allows the filing of a pro se brief). This is proven by reviewing *Myers,* where the appeal court ordered the district court to conditionally grant Myers's petition for writ of habeas corpus unless the

Texas Fourteenth Court of Appeals allowed Myers an opportunity to present an out-of-time pro se appellate brief. *Myers v. Johnson*, 76 F.3d 1330, 1339 (5th Cir. 1996)

Therefore since the Fourteenth Court of Appeals has allowed an out-of-time pro se appeal brief to be filed in Myers as their remedy, this court should apply the same remedy and do the same.

The facts found within the record, prove that Niles Illich was terminated from this representation on October 9, 2017, before the final submission of the brief was filed. Appellant asks that this Court allow appellant to file his pro se brief and not strike it from the record. Appellant moves this court to review the events that have transpired with this entire appeal process, and uphold the appellants due process which guarantees his right of self representation on his appeal.

Certificate of Compliance

This is to certify this Motion has been prepared in Times New Roman font, font size 14 and that the motion contains 1270 words.

/s/Derrick Sullivan

Certificate of Service

I, Derrick Sullivan, certify that I electronically filed this Objection with a Motion to Reconsider, using the Tyler Tech Odyssey "e-file and serve" system to the following parties:

Anne B. Weatherholt
Assistant District Attorney
133 N. Riverfront Blvd. Lock Box 19
DALLAS, TX 75207-4399 *
DELIVERED VIA E-MAIL *

Faith Johnson
Dallas County District Attorney
Frank Crowley Courts Building
133 N. Riverfront Blvd., LB19
Dallas, TX 75207-4399 *
DELIVERED VIA E-MAIL *

EXHIBIT A

IN THE COURT OF APPEALS

FOR THE FIFTH DISTRICT

OF TEXAS AT DALLAS

Derrick Sullivan,
Appellant,

Court of Appeals : 05-16-01138-CR
05-16-01139-CR
05-16-01140-CR

Trial Court Case: F- 1324555
F-13-24563
F-13-25621

v.

The State of Texas,
Appellee.

Appellant's Motion for Extension of Time
to Find New Counsel, File Appellant's Response Brief and
Postpone Final Submission of Appeal Brief and Oral Argument

TO THE HONORABLE JUSTICES OF THIS COURT: Now comes, the Appellant, DERRICK SULLIVAN, and moves for an extension of time to file an amended Appellant's brief in this case, postpone final submission and reschedule a oral argument in support thereof shows the following:

This case is on appeal from 282nd Judicial District Court of Dallas County in cause no.

1. Appellant was convicted of 3 counts indecency with a child.
2. Appellant is currently in prison.
3. Appellant's brief was filed on April 4, 2017.
4. Appellant respectfully requests a 60-day extension of time to file an amended brief.
5. Appellant requests this court to remove the current attorney Niles Illich from this appeal.
6. The undersigned attorney, Niles Illich has mislead the appellant about the rules of filing an appeal.
7. Mr. Illich has refused to file an appeal brief that includes all three cases included in appellant's appeal.
8. Mr. Illich has refused to include critical appealable prosecutorial and judicial errors that include a brady disclosures and brady violations in the appeal brief.
9. Mr. Illich has given false representation of law to the appellant since he has been assigned to this case. See exhibits

10. The appellant and appellant's mother have been intentionally mislead about what can be allowed in appeals, if the appeal brief can be amended, and informed that they were not allowed to receive a copy of the transcript. See Exhibits

11. The undersigned attorney Niles Illich canceled the oral argument, against the request of the appellant.

12. Appellant's mother did not received a copy of the transcript until September 29, 2017, after being mislead by Mr. Illich stating only he is allowed to have a copy of the transcript.

13. Appellant's mother has tried to show Mr. Illich where in the record the brady violations and disclosure are, yet Mr. illich refuses to add these errors in the appeal.

14. Mr. Illich released a box to the appellant's mother with all the case documents on Friday Oct 6, 2017.

15. Appellant's mother this past weekend has discovered more critical material that needs to be added in the appeal brief.

16. Mr. Illich refuses to amend the appeal brief and has mislead the appellant to believe amended briefs are not allowed.

17. The emails between Mr. Illich and the appellant's mother that prove Mr. Illich has mislead this appeal are attached.

18. The evidence the appellant's mother discovered this past weekend after sorting through the case documents that were in the case box, Mr. Illich refused to include in the appeal brief are attached.

19. Appellant's mother has attached a sworn affidavit under the penalty of perjury about the facts in reference to one of the brady disclosure. See exhibit

20. Appellant's mother today, received text messages from appellant's trial attorney, stating he had previously spoken to Mr. Illich about there being a brady disclosure.

21. This morning on October 9, 2017, Appellant's mother discovered in the trial transcript the evidence that Mr. Guinan, addressed the brady disclosure during the trial, located in volume 4 page 247, line 20, Mr. Guinan requested a bill of exception in agreement with prosecutor to stipulate specific evidence from the brady material.

22. This proves that there is critical brady material and brady disclosure that must be included in the appellant's appeal brief that Mr. Illich has refused to include.

23. Appellant therefore prays that this Court grant Appellant's motion for new counsel, grant a 60-day extension of time to file an amended appeal brief, and to postpone the final submission of appeal brief and oral argument for 60 days.

24. Appellant is not making this request to intentionally delay the appeal. This approval will ensure that appellant receives a fair chance at his appeal.

Wherefore appellant moves this court to postpone the final submission of the appeal brief scheduled for October 10, 2017, remove Niles Illich from this case, and approve this request to reschedule the final submission of brief and oral argument for 60 days from today.

Respectfully submitted,

/s/ Derrick Sullivan

Certificate of Service

On October 9, 2017, I electronically served a true copy of this motion to the following parties by email using e-file and serve.

Niles Illich
Law Office of Niles Illich, Ph.D, J.D.

EXHIBIT B

Nos: 05-16-01138-CR/05-16-01139-CR/05-16-01140-CR

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

DERRICK BRANNON SULLIVAN
Appellant,

v.

THE STATE OF TEXAS
Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givins, Presiding
Trial Court Cause Numbers: F-1324555, F-1324563, F-1325621

MOTION TO WITHDRAW

Niles Illich
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ATTORNEY FOR APPELLANT

To the Honorable Justices of the Fifth Court of Appeals:

Niles Illich files this his Motion to Withdraw. Niles Illich has spoken with Susan Miller and Ms. Miller has a general power of attorney for her son Derrick Sullivan. (Ex. A). Ms. Miller, acting on behalf of her son, has terminated the representation of Niles Illich. (Ex. B).

There is a dispute between counsel and client concerning the strategy going forward in this appeal. Counsel does not believe that he can implement the strategy requested by the client, but counsel has no desire to serve as an impediment to the client pursuing that strategy on his own or through another attorney.

There are no pending deadlines. The briefs have been submitted to this Court.

Derrick Sullivan's current address is:

Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512

The email address for Susan Miller, Sullivan's mother and the person whom Sullivan has vested with decision making authority in this case is: goldcureteam@gmail.com.

Sullivan is in prison and has identified what he believes is a legitimate strategy to reverse his conviction. He and counsel disagree on implementing that strategy and so counsel, whose representation has been terminated by the client, asks this Court

another attorney.

Prayer and Conclusion

Niles Illich has been terminated from this representation and he asks that this Court allow him to withdraw from this case.

Respectfully Submitted,

/s/ Niles Illich
Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
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Email: Niles@appealstx.com

Certificate of Compliance

This is to certify that this Motion has been prepared in Times New Roman font, font size 14 and that the motion contains less than 550 words.

/s/ Niles Illich
Niles Illich

LEFT BLANK

Order entered January 5, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F13-24555, F13-24563, F13-25621

ORDER

Appellant's objection and motion to reconsider the order striking his post-submission supplemental brief is **DENIED.**

/s/ BILL WHITEHILL
JUSTICE

Deborah Swan <deborah@swansparalegal.com>

Fwd: Brady material

2 messages

Susan Miller <goldcureteam@gmail.com> Thu, Feb 1, 2018 at 7:58 AM
To: Deborah Swan <deborah@swansparalegal.com>

After verbal termination, I sent this email on the 9th which you can include in PDR
---------- Forwarded message ----------
From: **Goldcure** <goldcureteam@gmail.com>
Date: Mon, Oct 9, 2017 at 12:55 PM
Subject: Brady material
To: Niles Illich <Niles@appealstx.com>

This morning at 8:30 I found in the trial record where Jim asks for brady information to be reopened. That he had an agreement with McMillin. Starts Vol 4 page 247 line 20. Due to this finding and the fact that you are not willing to address the bray issues, Derrick has requested new alternative council for his appeal, As we cannot depend on you to uphold derricks rights guaranteed under the constitution

Thank you
Susan Miller

Sent from my iPhone

--

Susan Miller

(903) 920-1532

Susan Miller <goldcureteam@gmail.com> Mon, Feb 5, 2018 at 8:34 AM
To: Deborah Swan <deborah@swansparalegal.com>

[Quoted text hidden]

Tab 15

Nos. 05-16-01138-CR
05-16-01139-CR
05-16-01140-CR

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

==========

DERRICK BRANNON SULLIVAN,
Appellant

v.

STATE OF TEXAS,
Appellee

==========

On appeal from the 282nd Judicial District Court
Dallas County, Texas
Cause Numbers F13-24555-S, F13-24563-S, F13-25621-S

==========

STATE'S BRIEF

==========

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ATTORNEYS FOR THE STATE OF TEXAS

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

SUMMARY OF STATE'S ARGUMENT 9

ARGUMENTS 10

I. and II. (Response to Issues 1 and 2) 10

APPELLANT DID NOT SUFFER ACTUAL HARM FROM THE TRIAL COURT'S INSTRUCTIONS IN THESE TWO CASES. THE INSTRUCTIOS TRACKED THE INDICTMENTS AND ALLEGED "ON OR ABOUT" A DATE IN EACH CASE.

III. (Response to Issue 3) 28

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN "STACKING" APPELLANT'S SENTENCES.

PRAYER 32

CERTIFICATE OF SERVICE AND CERTIFICATE OF WORD COMPLIANCE 32

INDEX OF AUTHORITIES

Cases

Almanza v. State,
686 S.W.2d 157 (Tex. Crim. App. 1985) 15

Arrington v. State,
451 S.W.3d 834 (Tex. Crim. App. 2015) 16, 23, 24, 27

Bonilla v. State,
452 S.W.3d 811 (Tex. Crim. App. 2014) 30

Carr v State,
477 S.W.3d 335 (Tex. App.—Houston [14th Dist.] 2015, no pet.) 16

Cosio v. State,
353 S.W.3d 766 (Tex. Crim. App. 2011) 13, 14, 15, 16, 23, 24, 25

Edwards v. State,
No. 05-09-01496-CR, 2011 Tex. App. LEXIS 6908
(Tex. App.—Dallas, Aug. 29, 2011, no pet) 24

Flores v. State,
513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) 25

Francis v. State,
36 S.W.3d 121 (Tex. Crim. App. 2000) 11, 12

Hill v. State,
No. 05-15-00989-CR, 2017 Tex. App. LEXIS 378
(Tex. App.—Dallas Jan. 18, 2007, pet. ref'd) 31

Pizzo v. State,
235 S.W.3d 711 (Tex. Crim. App. 2007) 11

Rodriguez v. State,
446 S.W.3d 520 (Tex. App.—San Antonio 2014, no pet.) 26

Rubalcado v. State,
424 S.W.3d 560 (Tex. Crim. App. 2014) 23

Ruiz v. State,
272 S.W.3d 819 (Tex. App.—Austin 2008, no pet.) 26

Sanders v. State,
255 S.W.3d 754 (Tex. App.—Fort Worth 2008, pet. ref'd) 31

Smith v. State,
No. 14-15-00563-CR, 2017 Tex. App. LEXIS 545
(Tex. App.—Houston [14th Dist.] Jan. 24, 2017, pet. ref'd)..... 25, 26

State v. Mechler,
153 S.W.3d 435, 444 (Tex. Crim. App. 2005)..... 31

Constitutions

Tex. Const. art. V, § 13..... 11

Statutes

Tex. Code Crim. Proc. Ann. art. 12.01(1)(E) 17

Tex. Code Crim. Proc. Ann. art. 21.24..... 13

Tex. Code Crim. Proc. Ann. art. 36.29(a) 11

Tex. Code Crim. Proc. Ann. art. 38.37..... 15

Tex. Penal Code Ann. § 3.03..... 30

TO THE HONORABLE COURT OF APPEALS:

The State of Texas submits this brief in reply to the brief of appellant, Derrick Brannon Sullivan.

STATEMENT OF THE CASE

Appellant pled not guilty, and a jury convicted him in these three cases of indecency with a child by contact. The jury set punishment at confinement for three years in each case. The court ordered the sentences to run consecutively. (CR1: 106, CR2: 146, CR3: 68).[1]

STATEMENT OF FACTS

Tammy Punt was appellant's longtime girlfriend. They had a son together and lived in Garland, Texas at the time of the offenses. (RR3: 58-60). The child complainants, B.H., K.H., and M.H. were her nieces. (RR3: 61). B.H. and M.H had the same father; M.H. had a different father. (RR3: 63). The girls' mother, Regina Punt, was her sister. (RR3: 61, 63).

During the weekdays in 2012, B.H. and K.H. lived with their father Ryan H.[2] and his mother Terry Franks in Van Zandt County. The girls stayed with

[1] The State will refer to cause number 05-16-01138-CR/ F13-24555-S as CR1, to cause number 05-16-01139-CR/F13-24563-S as CR2, and to cause number 05-16-01140-CR/F13-25621-S as CR3.

[2] After these allegations were made, Ryan H. was in a car accident. At the time of trial, he was in a nursing home because he suffered brainstem and right frontal lobe brain injury. He was paralyzed and could hardly talk. (RR3: 225-226).

Tammy every other weekend. Tammy had joint custody with Ryan H. since 2009. M.H. lived with her own father, Justin Greene, and his side of the family. (RR3: 63-67, 103). Because Tammy worked and appellant did not, he was in charge of B.H. and K.H. when she was not there. (RR3: 70-71).

On October 12, 2012, B.H.'s and K.H.'s father, Ryan, told Tammy that the girls had made allegations of child abuse against appellant. (RR3: 71-73, 104). Tammy said she asked appellant about it, and he denied it. (RR3: 74-75). At that time, Tammy believed appellant. (RR3: 74-76).

For many years, Tammy, B.H. and K.H. did not have contact with M.H. In 2013, M.H. went with Tammy, appellant, B.H. and M.H. on a camping trip. (RR3: 82, 116). M.H. subsequently made the same type of allegation of sexual contact against appellant. (RR3: 76). Tammy concluded that since M.H. had had no contact with B.H. and K.H., nor had M.H. had contact with their father Ryan or their grandmother Terry Franks previously, what B.H. and K.H. told her in 2012 had to be true. (RR3: 83). Tammy confronted appellant about it, and he admitted it was true. He said he helped M.H. go to the restroom, and his finger slipped. M.H. was five years-old and did not need any help. (RR3: 84). When Tammy asked about B.H. and K.H., he admitted that he touched them on the outside of their clothes. (RR3: 85). Tammy kicked appellant out of the house and called the police. (RR3: 86, 116).

B.H. testified that she and her sister K.H. went to her aunt Tammy's house on weekends; they would play with young male cousins Christian and Caden. (RR3: 120). Appellant was there. (RR3: 121). Their sister M.H. was not there. (RR3: 121). B.H. did not like appellant because "he touched her in the wrong place." (RR3: 121). He touched her "three or four times" that she "didn't like." (RR3: 122).

B.H. did not remember the first time he touched her like that. (RR3: 122). She remembered the last time he did it. She and appellant were in the living room. She was sitting on the couch. Appellant was on the other couch. He came over to her and, with his hand, touched her "middle" private part on the outside of her clothes for a couple of seconds. This private part was where she pees. (RR3: 122-124). She demonstrated on the table what appellant did with his hand. (RR3: 125). She was scared to tell anyone because he told her that if she told, he would hurt someone. (RR3: 125).

Another time, she was playing on the computer. (RR3: 125). Appellant was in the kitchen, and he told her to come there. She did not want to go, but if she did not do so, he would force her, so she went. He was on his knees. He touched her with his hand for a couple of seconds over her clothes on the same middle part. (RR3: 126-127).

A different time, he told her to come to the bathroom, and when she did so,

he locked the door. He touched her middle part over her clothes with his hand. (RR3: 128-129). Every time, he told her not to tell anyone, and she was scared. (RR3: 129).

K.H., nine years-old at the time of trial, testified to the same relationships and living conditions as her older sister, B.H. (RR3: 154-156). She testified that appellant touched her on more than one occasion in the kitchen at Aunt Tammy's house. (RR3: 157). Appellant called her into the kitchen from the living room. He was on his knees, leaning. He touched her private part outside her clothes with his hand. (RR3: 159-161, 163). A drawing of a girl in which she circled the private part where appellant touched her was admitted as State's Exhibit 19. (RR3: 160-162). The private part appellant touched was where she peed when she went to the restroom. (RR3: 162). Appellant told her not to tell anyone; she did not tell because she was scared. (RR3: 162-163). He touched her the same way on other occasions. (RR3: 162). She eventually told her grandmother what happened and went to the Advocacy Center. (RR3: 164-165).

M.H., who was eight years-old at time of trial, lived with her mother. (RR3: 172-173). She used to go to Aunt Tammy's house on weekends, where she would see cousins Christian and Caden and appellant. (RR3: 173-175). Sisters B.H. and K.H. lived with their father. (RR3: 174). Appellant had one knee on the floor and one knee bending when he touched the front part of M.H.'s body one time. (RR3:

176-177). She was at Aunt Tammy's house. Appellant called for her to go to the kitchen from the living room. When she got there, he touched the front part of her body with his hand. He touched the part of her body that she uses to pee. He did this underneath her clothes and moved his hand. (RR3: 176-179). He said that if she told anyone, he would hurt her. (RR3: 179-180). She subsequently told her mother when they were driving on the highway. They went to the Children's Advocacy Center. (RR3: 180, 185).

Patti Flowers worked at the Children's Advocacy Center in Van Zandt County in Canton, Texas, as a forensic interviewer. (RR3: 186). B.H. and K.H. were living in Van Zandt County at that time. (RR3: 188). She interviewed B.H. and K.H. on October 17, 2012, upon referral by a Van Zandt County constable. (RR3: 187-188). This was a couple of days after they told their (paternal) grandmother what happened. (RR3: 208). Flowers interviewed K.H. first. K.H. made outcry to her. (RR3: 190). K.H. said appellant touched them on her private part with his hand outside her clothing. (RR3: 190-192). K.H. circled her vaginal area on a drawing. (RR3: 191). She said it happened more than one time in the kitchen. (RR3: 193).

Flowers next interviewed B.H. (RR3: 193). B.H. made an outcry to her. (RR3: 194). B.H. said she overheard K.H. telling their grandmother that appellant touched her, and she told their grandmother that appellant did the same thing to

her. (RR3: 195). She said appellant touched her on more than one occasion on her private area in the kitchen. (RR3: 196). She also made a drawing for Flowers. (RR3: 196). Flowers identified State's Exhibits 20 and 21 as anatomical drawings made on October 17, 2012; they were admitted into evidence. (RR3: 197-200). Flowers did not see any indicators of the girls being "coached." (RR3: 209).

The girls' mother, Regina Punt, testified that when B.H. was seven years-old, and K.H. was six years-old they lived with their father (Ryan), who had joint custody with her sister Tammy. (RR3: 220). M.H. lived with Regina and her father, Justin Greene. (RR3: 220-221). M.H. did not see B.H. and K.H. during this period. (RR3: 221). In October 2012, B.H. and K.H. made an allegation of sexual abuse against appellant, whom Regina did not know very well. (RR3: 222). She did not know what to believe about that. (RR3: 233). At that time, she thought B.H.'s and K.H.'s paternal grandmother, Terry Franks, was lying in order to get custody of the girls. (RR3: 233). Regina had never gotten child support from Ryan. (RR3: 231). On November 10, 2013, M.H. made a general allegation of sexual abuse by appellant as they were driving to Tammy's house. Regina called Tammy immediately. (RR3: 224). She did not take M.H. to Tammy's house. (RR3: 224).

Theresa (Terry) Franks was Ryan H.'s mother and B.H.'s and K.H.'s paternal grandmother. (RR4: 11). Franks and Ryan lived in Grand Saline in Van

Zandt County. (RR4: 14). From January 2012 until October 2012 when the girls made the allegations against appellant, Ryan had primary custody of the girls, and he shared custody with Tammy and Regina Punt. (RR4: 12). Ryan did not pay child support to the women when he had primary custody and they only had the girls on weekends. (RR4: 12-13, 20).

In October 2012, grandmother Terry picked up the girls from Tammy's house. K.H. made an allegation of sexual abuse against appellant, and B.H. did also. (RR4: 14). Terry immediately called Ryan, and they filed a police report the next day. The constable took them to the Children's Advocacy Center in Van Zandt County. That information was given to the Garland Police, where Tammy lived and the girls said the offenses occurred. (RR4: 14). Terry acknowledged that she had her "differences" with Regina and Tammy Punt. (RR4: 15). Terry acknowledged that after Ryan signed over guardianship and she filed for custody, the Texas Attorney General acted on Ryan's behalf to try to get child support from Regina, but she never paid anything. (RR4: 20-21). Any obligation Ryan had to pay child support was released because he was in a nursing home. (RR4: 26-27).

M.H. was five years-old when she made an outcry to forensic interviewer Patricia Guardiola at the Dallas Children's Advocacy Center on November 15, 2013. (RR4: 28, 38-39). She said it was her uncle, Aunt Tammy's husband (appellant), who abused her. (RR4: 39). Her uncle asked her to go into the

bathroom, and she did so. In the bathroom, he lowered her pants and touched her "area" (her vagina) with his hand over her panties. (RR4: 39). On the drawing of a girl, she circled the vagina. (RR4: 40). This drawing was admitted into evidence as State's Exhibit 24. (RR4: 40-41).

Detective Robert Golladay investigated the allegation of sexual abuse against appellant along with Detective McNear after Tammy reported the offense involving M.H. to police. (RR4: 61-64). After investigation of the allegation, he obtained an arrest warrant for appellant. (RR4: 67). He and other officers drove their marked Garland Police cars on November 13, 2013, to where appellant worked in Dallas. They parked while they waited for appellant to return to work. When appellant drove into the parking lot, he made a loop and exited the lot. (RR4: 67-69). The officers then made a traffic stop of appellant and arrested him. (RR4: 70-71). Detective Golladay used the "on or about date of May 18, 2013" after talking to Tammy and Regina and because M.H. described that it was "hot outside." (RR4: 74).

Katherine Dumond, a therapist at the Dallas Children's Advocacy Center, did not participate in this case. She explained the basic dynamics of child sexual abuse, including delayed outcry. (RR4: 79). On cross-examination, she explained that "inclucation" is when something is repeated to a person over and over to get

someone to learn new material. A person can be inculcated to a false fact by repetition. (RR4: 91).

The court took judicial notice of the return date of the indictments. In indictment, F13-25621-S, the return date was January 27, 2014; in indictment, F13-24563-S, the return date was July 17, 2013; indictment, F13-24555-S, the return date was August 12, 2013. (RR4: 92).

After the State rested its case, appellant called several character witnesses. (RR4: 139-195). He also testified in his own behalf. He denied the allegations and claimed he could not have been alone with B.H. and K.H. during the time period previously discussed. (RR4: 208-209, 233). He claimed B.H. and K.H. lied. (RR4: 233-234, 238). He testified that Tammy was manipulative. (RR4: 211). He also testified that Terry Franks would do anything to get the children for herself. (RR4: 213). He denied touching M.H. at a later date. He said M.H. told Tammy that nothing happened during the short time that M.H. was at the house with appellant. (RR4: 221-226). He denied admitting to Tammy in November 2013 that everything was true. (RR4: 241).

SUMMARY OF STATE'S ARGUMENT

Issues 1 and 2: The trial court's jury instructions tracked the two indictments, which alleged that appellant committed indecency with child B.H. "on or about" a specified date and with child K.H. "on or about" a specified date.

The girls testified that appellant also touched them other times. Although appellant claims that the court's instructions denied him his right to a unanimous verdict on one specific offense for each child, no reversals are required in these two cases because, based on the facts, he did not suffer actual harm.

Issue 3: The State filed a motion to cumulate sentences upon appellant's convictions of indecency by contact with young children. The trial court understood it had discretion under Texas statutes to impose cumulative sentences, and the court exercised its discretion to "stack" appellant's three sentences of three years so that they ran consecutively for a total of nine years.

ARGUMENT

I. and II.

(Response to Issue 1 and 2)

(As to F13-24555-S/05-16-01138-CR and F13-24563-S/05-16-01139-CR only)

APPELLANT DID NOT SUFFER ACTUAL HARM FROM THE TRIAL COURT'S INSTRUCTIONS IN THESE TWO CASES. THE INSTRUCTIOS TRACKED THE INDICTMENTS AND ALLEGED "ON OR ABOUT" A DATE IN EACH CASE.

In two related issues, appellant alleges that the trial court committed egregious error in two cases when it gave a jury charge that did not require a unanimous verdict. Issue 1 relates to complainant B.H., and Issue 2 relates to

complainant K.H.[3] The trial court's jury charges as to children B.H. and K.H., which alleged an "on or about" date for each offense tracked the indictments. The girls testified that appellant also touched them on other occasions. Appellant did not object to the court's charge or request an election. No reversal is required because appellant did not suffer actual harm.

Law

Separate instances of indecency with a child by contact are separate offenses. *See Pizzo v. State,* 235 S.W.3d 711, 719 (Tex. Crim. App. 2007) (holding the offense of indecency with a child by contact is a conduct-oriented offense and analyzing it in the same way as the offense of sexual assault). Jury unanimity is mandated in all criminal cases, requiring jurors to agree unanimously about the specific crime committed. Tex. Const. art. V, § 13; Tex. Code Crim. Proc. Ann. art. 36.29(a).

In *Francis v. State,* 36 S.W.3d 121 (Tex. Crim. App. 2000), the defendant was charged with a single count of indecency with a child in a single paragraph. The State introduced evidence of four acts of indecency in its case-in-chief, occurring on different dates and time—two acts involving touching of the child's breasts and two acts involving touching of the child's genitals. *Francis,* 36

[3] These two issues do not involve complainant M.H.; she is not involved in these unanimity issues.

S.W.3d at 122. The State elected to proceed on two of those acts—one involving the child's breasts and one involving the child's genitals. *Francis,* 36 S.W.3d at 122. Francis asked the trial court to require the State to elect between those two counts, but the trial court denied the requests. The charge allowed conviction if the defendant touched the child's breast or genitals. He was convicted of one count of indecency with a child. *Francis,* 36 S.W.3d at 122. On appeal the defendant complained that some of the jurors could have believed he touched the child's breast and some could have believed he touched the child's genitals. The Court of Criminal Appeals concluded:

> The breast-touching and the genital-touching were two different offenses, and therefore, should not have been charged in the disjunctive. By doing so, it is possible that six members of the jury convicted appellant on the breast-touching offense (while the other six believed he was innocent of the breast-touching) and six members convicted appellant on the genital-touching offense (while the other six believed he was innocent of the genital-touching). Appellant was entitled to an unanimous jury verdict. *See Brown v. State,* 508 S.W.2d 91 (Tex. Crim. App. 1974). Hence, the trial court erred by charging appellant in the disjunctive.

Francis, 36 S.W.3d at 125. Thus, the Court held that the charge submitted to the jury allowed a conviction on less than a unanimous verdict.[4] *Francis,* 36 S.W.3d at 125.

[4] The Court noted that the Texas requirements for a unanimous verdict are not identical to the requirements under federal law. *Francis,* 36 S.W.3d at 125, n.1.

In *Cosio v. State,* 353 S.W.3d 766 (Tex. Crim. App. 2011), the indictment included several counts, some with alternative paragraphs, alleging sexual abuse of a child. *See* Tex. Code Crim. Proc. Ann. art. 21.24 (joinder of certain offenses). Appellant requested that the State elect which counts it would proceed upon, and the State made some elections. The Court summarized what the State had to prove after the State elected. It had to prove: on or about July 31, 2004, Cosio caused his sexual organ to penetrate the child's mouth; on or about July 31, 2004, Cosio caused his sexual organ to penetrate the child's sexual organ; on or about July 31, 2007, Cosio touched the child's genitals; on or about July 31, 2007, but on a different occasion, Cosio touched the child's genitals. *Cosio,* 353 S.W.3d at 770. The court instructed the jury at the end of each charge that its verdicts must be unanimous. Cosio did not object that the jury charge allowed for non-unanimous verdicts. *Cosio,* 353 S.W.3d at 770. The jury found him guilty on all counts.

The Court of Criminal Appeals concluded:

> The jury could have relied on separate incidents of criminal conduct, which constituted different offenses or separate units of prosecution, [footnote omitted] committed by Cosio to find him guilty in the three remaining counts upheld by the court of appeals. [Footnote omitted]. Further, as in *Ngo*, the standard, perfunctory unanimity instruction at the end of each charge did not rectify the error. The jury may have believed that it had to be unanimous about the offenses, not the criminal conduct constituting the offenses.

Cosio, 353 S.W.3d at 774.

The Court in *Cosio* also discussed and analyzed forfeiture and harm. The Court decided that a request for an election is not a prerequisite of Texas' requirement of jury unanimity. *Cosio,* 353 S.W.3d at 775. The Court recognized there were strategic reasons the defense might not request an election. *Cosio,* 353 S.W.3d at 775. The Court also recognized that guaranteeing unanimity is ultimately the responsibility of the trial judge, who is obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict. *Cosio,* 353 S.W.3d at 776. The Court stated:

> A defendant's decision to elect or not elect is a strategic choice made after weighing the above considerations. And while an election may ensure jury unanimity, guaranteeing unanimity is ultimately the responsibility of the trial judge because the judge must instruct the jury on the law applicable to the case. [Footnote omitted]. The trial judge is therefore obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict. To guarantee unanimity in this context, we have stated that the jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt. [Footnote omitted]. Such an instruction should not refer to any specific evidence in the case and should permit the jury to return a general verdict. For double jeopardy purposes, the trial judge's charge will not alter the effect on a defendant who chose not to elect. *Because it will be impossible to determine which particular incident of criminal conduct that the jury was unanimous about, the State will be jeopardy-barred from later prosecuting a defendant for any of the offenses presented at trial.*

Cosio, 353 S.W.3d at 776 (emphasis added).[5] The Court held that because appellant had not objected in the trial court that the jury charge failed to require a unanimous verdict, he would be entitled to reversal only if there was egregious harm under the standard of *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). *Cosio,* 353 S.W.3d at 776-777. In applying *Almanza,* the Court concluded that no actual harm was shown, so Cosio was not denied his right to a fair and impartial trial. *Cosio,* 353 S.W.3d at 777-778.

In the instant case, B.H. testified to the last incident of appellant touching her vagina over her clothes, and she testified to two other instances of the same conduct; they all occurred at different locations in the home. K.H. testified to appellant committing the same conduct of touching her vagina over her clothes on more than one occasion in the kitchen of the home. Such testimony of other instances of sexual abuse of a child was admissible under Tex. Code Crim. Proc. Ann. art. 38.37. Nevertheless, under *Francis* and *Cosio,* each of these acts of touching was a separate offense, and therefore, the trial court's instruction denied

[5] Appellant cites several cases for the proposition that Texas law requires jury unanimity; they follow the holding in *Francis* regarding unanimity and apply a harm analysis.

appellant his right to a unanimous verdict.[6] No reversal is required, however, unless appellant suffered actual harm.

Harm analysis

To determine harm, the factors of *Almanza* must be examined. An egregious harm determination must be based on a finding of actual rather than theoretical harm. *Cosio*, 353 S.W.3d at 777. To establish actual harm, the charge error must have affected "the very basis of the case," "deprive[d] the defendant of a valuable right," or "vitally affect[ed] a defensive theory." *Cosio*, 353 S.W.3d at 777. When assessing harm based on the particular facts of the case, the reviewing court considers: (1) the entire jury charge; (2) "the state of the evidence[,] including contested issues and the weight of the probative evidence"; (3) the parties' arguments; and (4) all other relevant information in the record. *Arrington v. State,* 451 S.W.3d 834, 840 (Tex. Crim. App. 2015).

The Entire Jury Charge

The court instructed the jury that "on or about" allowed proof of an alleged

[6] As a matter of verdict clarity, the State could have filed three indecency with a child indictments for B.H., each charging a different "on or about" date, and two indictments for K.H. each charging a different "on or about date" to avoid a unanimity problem like the one that appears in sexual abuse cases. Since each act of indecent conduct was by touch, assuming the jury believed the children, appellant could have been found guilty on all five indictments, and the jury could have set punishment on each of three cases involving B.H. and each of two cases involving K.H. *See Carr v State*, 477 S.W.3d 335, 337, 342 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (defendant was charged in two indictments with sexual assault of a child, the cases were consolidated for trial, and the jury found defendant guilty as charged in both cases).

offense any time prior to the presentment of the indictment and within the statute of limitations. The court also told the jury that there is no statute of limitations for the crime of indecency with a child. (CR1: 122, CR2: 166, CR3: 82; RR5: 12). *See* Tex. Code Crim. Proc. Ann. art. 12.01(1)(E). The court instructed the jury that they could only consider the unindicted instances for limited purposes. (CR1: 122, CR2: 166, RR5: 12-13). The court told the jury several times that their verdict had to be unanimous. (CR1: 125, 126, CR2: 169, 170, CR3: 85, 86; RR5: 18-19). At the charge conference, the defense had no objection to "on or about" language as to all three complainants. (RR5: 4-5). Nor did he have any objection to reading one charge an adding only the different paragraphs separately. (RR5: 7, 9). He did not ask for the State to make an election.

Although the charge did not apprise the jury of the proper unanimity requirement, it did limit the jury's consideration of the unindicted acts to state of mind, relationship, motive, intent, scheme or design, or the character of the defendant. Thus, based on the entirety of the charge, while this factor weighs in favor of egregious harm, it bears minimal weight as to egregious harm, as in *Cosio* and *Arrington*.

The State of the Evidence

K.H. was the first to outcry. She told her paternal grandmother Terry, who told her father Ryan, who told Tammy Punt. Her sister, B.H., also made outcry.

Upon their outcry, charges were filed in July and August 2012. Appellant denied the accusations to Tammy Punt at that time, and she believed appellant.

M.H. made outcry to her mother, Regina Punt, about a year later in 2013, saying it occurred when the weather was hot. M.H. lived with her mother Regina; she had no contact with Terry or Ryan, who were not blood relations. She had little or no contact with K.H., B.H., Tammy Punt, or appellant, and saw appellant in 2013.

Once M.H. made outcry, Tammy asked appellant about this accusation, and Tammy testified that appellant admitted it, so Tammy believed that appellant had also committed the acts against B.H. and K.H. Appellant tried to suggest that grandmother Terry and father Ryan had a motive to "inculcate" B.H. and K.H. to accuse appellant because they wanted child support from Tammy, but Tammy and Terry denied the child support theory and appellant had no relationship to B.H. and K.H. that would legally require him to pay child support. Moreover, there was no motive for anyone to "inculcate" M.H. Her testimony, therefore, was totally believable. If the jury believed that M.H. was not making up her accusation that appellant touched her vagina over her clothes, which appellant admitted to Tammy, then the jury would have reasonably concluded that B.H. and K.H. were also not making up their accusations that appellant committed the offenses against them in exactly the same manner—he was on his knees and he touched their

vaginas over their clothes. Finally, testimony showed that police in marked patrol cars came to where appellant worked. As he arrived at his place of employment, he drove into the parking lot, made a loop, and then drove away. This action was evidence of his consciousness of guilt. Nothing about the evidence would lead some jurors to believe that appellant only committed some of the touching, not all of it. This factor weights against a finding of egregious harm.

The Parties' Arguments

Appellant notes that in jury argument, the prosecutor reminded the jury that people who touch children inappropriately touch "child after child, after child" (RR5: 28). Although he claims that this is evidence that the prosecutor was reminding the jury of other offenses committed against one child, the State believes the jury would interpret the prosecutor to be referring to one indicted criminal act against each of three children. Appellant touched child B.H., then child K.H., and then M.H., thus, based on the evidence, he touched child after child, after child. These three little girls each described how appellant touched "them over, and over, and over—he touched each of them sequentially, child, after child, after child." (RR5: 29). Thus, although the prosecutor mentioned "again, and again, and again," the reasonable interpretation was that appellant did it separately to each of the three children.

Defense counsel told the jury that the girls had given the forensic

interviewer inconsistent statements. (RR5: 44-48). The issue raised by the defense was that some family members had a motive to "inculcate" the children into unknowingly falsely accusing appellant of indecency.

The prosecutor responded that the children, ages seven, six, and four at the time, were honestly telling what appellant did. He argued that the inconsistencies were because the children were unable to articulate some things since they were not as sophisticated as an adult would be. (RR5: 69-74). With respect to the inconsistencies argued by defense counsel, the prosecutor argued that the children's testimony that appellant touched their private parts never changed. (RR5: 72). In that context, he argued,

> These girls have had to be interviewed through multiple DAs. They had to be interviewed the initial time. But remember what I said in opening argument, *what hasn't changed*? What has *not changed* one bit? The only allegation that we have to prove beyond a reasonable doubt. I don't have to prove -- this isn't a game of Clue. I don't have to prove it was with a candlestick in the library. I *have to prove* that he touched those girls *on their genitals with the intent to gratify his sexual desire*.
>
> And that's what's been *consistent* the entire time with all three of these children. Derrick touched me on my private part. I think it was [K.H.] had to draw on the anatomical drawing because she was too embarrassed to say it aloud in court.

(RR5: 72). He continued by arguing that the main point that the State had to prove, that appellant touched the girls, "stayed the same." (RR5: 73-74). All three girls testified that appellant was on his knees when he touched their vaginas over

their clothes. No one argued that the jury's verdict could be anything other than unanimous. This factor weighs against a finding of egregious harm.

Other Relevant Information in the Record

The jury sent out notes for exhibits and the forensic interviews. (RR5: 75-78). The jury sent several more notes, some of which were in an improper form and had to be resubmitted in proper form, asking for the rereading of testimony. (RR5: 80-83, 84-87). One note concerned the what Tammy Punt said during the camping trip with M.H. and who was at that camping trip. (RR5: 86-87). Another note concerned Regina Punt's testimony about the circumstances surrounding M.H.'s outcry to her. (RR6: 4-6). Those portions of testimony were read to the jury. (RR5: 86-87, RR6: 5-6).

Later, the jury sent out a note that it could not come to a unanimous agreement; it had "a disagreement on the two counts of three." (RR6: 10). The judge gave the jury an Allen Charge. (RR6: 10-13). In the charge, the court explained to the jury that with regard to the first sentence of their note regarding counts, these were three separate cases, "independent of each other" and there would be "three separate verdicts." (RR6: 12). The jury subsequently returned verdicts that they unanimously found appellant guilty on each of the three cases. (RR6: 14-15). The jury was polled and each juror stated that this was their verdict. (RR6: 15-16). The judge found that the verdicts were unanimous verdicts

of all the members of the jury. (RR6: 16). Nothing about the Allen charge or the events that followed indicates that the jury rendered a non-unamious verdict. This factor does not weigh in favor of a finding of egregious harm.

Consideration of the Four Factors

Due to their young ages, neither B.H. nor K.H. could explain exactly when other incidents of touching their vaginas over their clothes occurred. In testimony to the jury, appellant denied any touchings occurred. The jury would have believed appellant *either touched B.H. three times or he never touched her at all.* Likewise, the jury would have believed appellant *either touched K.H. two times, or he never touched her at all.*

Because four year-old M.H. lived elsewhere in 2012 when B.H. and K.H. said they were sexually abused by appellant, and she had no interaction with appellant, Ryan, or his mother Terry at that time, M.H. had no motive to lie. Whether M.H. was "inculcated" by others was possibly an issue when the jury asked to have Tammy and Regina Punt's testimony reread concerning M.H. After the jury had Punts' testimony on this issue reread, it indicated that it was unanimous on one of the "counts." Later, after an Allen charge, the jurors unanimously found appellant guilty in all three cases. They affirmed their verdicts upon individual polling.

As the Court recognized in *Cosio*, whether to request an election is a

strategic choice by the defense. *Cosio,* 353 S.W.3d at 776. When there is no election, the State will be jeopardy barred from later prosecuting a defendant for any of the offenses presented at trial. *Cosio,* 353 S.W.3d at 776. Because neither B.H. or K.H. could be specific about when other touchings occurred, the "on or about" language in the indictments meant that prosecution would be *jeopardy barred* as to *any* other incidents of indecency by contact that occurred prior to the presentment of the indictments. *See Rubalcado v. State,* 424 S.W.3d 560, 571 (Tex. Crim. App. 2014) (stating that, "[t]o the extent that multiple incidents conform to the charges, however, they are subsumed by the charges for double-jeopardy purposes until and unless the State timely elects what specific offense is being charged. [Footnotes omitted].)"

In similar cases involving indecency with a child or aggravated sexual assault of a child, appellant courts have found no actual harm. In *Arrington,* the child described numerous sexual acts which occurred on four different occasions, resulting in six counts of aggravated sexual assault of a child and one count of indecency with a child. Although the court instructed generally that the jury's verdict had to be unanimous, it did not specifically inform the jurors that they had to be unanimous as to which separate criminal act they believed constituted each count. *Arrington,* 451 S.W.3d at 837-838. Although the court of appeals found egregious harm and reversed, the Court of Criminal Appeals, in applying the four

factors, concluded that the defendant did not suffer actual harm. The Court determined that only the first factor, the jury charge, favored finding egregious harm, but the Court gave it no more weight than it gave in *Cosio*. *Arrington,* 451 S.W.3d at 837-838. In *Cosio,* the Court stated:

> Next, we observe that neither of the parties nor the trial judge added to the charge errors by telling the jury that it did not have to be unanimous about the specific instance of criminal conduct in rendering its verdicts. [Footnote omitted]. This factor therefore does not weigh in favor of finding egregious harm.

Cosio, 353 S.W.3d at777. *See also Edwards v. State,* No. 05-09-01496-CR, 2011 Tex. App. LEXIS 6908, at *8 (Tex. App.—Dallas, Aug. 29, 2011, no pet) (not designated for publication) (where the jurors were charged disjunctively with two offenses, there was no egregious harm).

As in *Cosio* and *Arrington*, appellant's defense was that he did not commit *any* of the offenses. *Cosio,* 353 S.W.3d at 777-778 and *Arrington,* 451 S.W.3d at 842. The Court stated in *Cosio*:

> Cosio's defense was that he did not commit any of the offenses and that there was reasonable doubt as to each of the four incidents because the C.P. was not credible and the practical circumstances surrounding the incidents of criminal conduct did not corroborate C.P.'s testimony. His defense was essentially of the same character and strength across the board. The jury was not persuaded that he did not commit the offenses or that there was any reasonable doubt. Had the jury believed otherwise, they would have acquitted Cosio on all counts. On this record, therefore, it is logical to suppose that the jury unanimously agreed that Cosio committed all of the separate instances of criminal conduct during each of the four incidents.

> [Footnote omitted]. It is thus highly likely that the jury's verdicts (on the three remaining counts not set aside on sufficiency grounds) were, in fact, unanimous. Accordingly, actual harm has not been shown, and we cannot say that Cosio was denied a fair and impartial trial.

Cosio, 353 S.W.3d at 777-778.

Flores v. State, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd), involved a single count—aggravated sexual assault of a child. *Flores,* 513 S.W.3d at 154. The complainant testified to being sexually abused on at least two occasions. The State reinforced during closing argument that more than one offense occurred. *Flores,* 513 S.W.3d at 156. The court believed that it was "very unlikely that any member of the jury believed that the second incident took place but that the first did not." *Flores,* 513 S.W.3d at 160. After weighing the four factors and comparing them to what occurred in *Arrington* and *Cosio,* the court concluded that although the jury charge erroneously permitted a non-unanimous verdict, the defendant did not suffer actual harm. *Flores,* 513 S.W.3d at 161.

In *Smith v. State,* No. 14-15-00563-CR, 2017 Tex. App. LEXIS 545 (Tex. App.—Houston [14th Dist.] Jan. 24, 2017, pet. ref'd) (not yet published), the defendant was indicted in separate indictments for indecency with a child by contact (touching the child's genitals) and super-aggravated sexual assault of a child under the age of six (causing the mouth of the child to contact defendant's sexual organ). *Smith,* 2017 Tex. App. LEXIS 545, at *4. Both offenses were

alleged to have occurred "on or about" the same date. *Smith,* 2017 Tex. App. LEXIS 545, at *4. There was testimony that the offenses happened several times. The jury charge did not specifically inform the jury that they had to be unanimous as to which specific incident of super-aggravated sexual assault and which specific incident of indecency with a child supported each charged offense. *Smith,* 2017 Tex. App. LEXIS at *9-10. The court concluded:

> None of the differences between [the child's] testimony and that of the outcry witnesses contain detail sufficient to differentiate between separate instances of abuse on different dates. [Footnote omitted]. Moreover, [the child's] testimony gave no indication as to the timing or frequency of particular instances of abuse, and she provided no other information from which the jury could differentiate the multiple incidents of each charged offense. Given the evidence presented, it is highly unlikely that the jury could have found appellant guilty of different instances of each offense occurring at different times. *See Jourdan v. State,* 428 S.W.3d 86, 98 (Tex. Crim. App. 2014) (stating that a relevant consideration in an egregious-harm analysis is "the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of the particular case").

Smith, 2017 Tex. App. LEXIS 545, at *15; *see also Rodriguez v. State,* 446 S.W.3d 520, 532 (Tex. App.—San Antonio 2014, no pet.) (holding no egregious harm shown when complainant testified about specific, detailed incidents and said defendant's sexual contact with her happened "a lot," noting the defense was not that defendant did not commit certain alleged acts, but was instead that he committed no acts); *Ruiz v. State,* 272 S.W.3d 819, 826-827 (Tex. App.—Austin 2008, no pet.) (holding that the state of the evidence weighed against finding

egregious harm when defendant did not argue that he was guilty of only some of the complainant's allegations of abuse, but instead argued that he had not committed any of the alleged conduct, leaving the jury with an "all-or-nothing" decision).

In *Arrington,* the concluded that based on the facts of the case, a mistrial on one of the counts "fails to suggest actual harm." *Arrington,* 451 S.W.3d at 844 The State maintains that based on the facts of the instant case, the Allen charge failed to suggest actual harm. After finding appellant guilty as charged in all three indictments, the jury was polled and each juror said that that was their verdict.

As in *Cosio* and *Arrington,* appellant denied committing any of the offenses. The jury thoroughly considered all the evidence in this case. Based on that evidence, it would have either found appellant committed all the touching acts against B.H. and all of the touching acts K.H. or none of these acts. By finding him guilty, it concluded unanimously that he committed all of the acts. As in *Arrington* and *Cosio,* the "only factor that weighs in favor of finding egregious harm is the consideration of the jury instructions." *Arrington,* 451 S.W.3d at 845. Just as in those cases, the erroneous jury instructions did not cause appellant egregious harm. Therefore, appellant did not suffer actual harm, and he is not entitled to a reversal of his convictions involving B.H. and K.H. This issue should be overruled.

III.

(Response to Issue 3)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN "STACKING" APPELLANT'S SENTENCES.

Appellant alleges that the trial court abused its discretion in granting the State's motion to cumulate the sentences in appellant's three cases. The State filed a motion to cumulate sentences upon appellant's convictions of indecency by contact with young children. The trial court understood it had discretion under Texas statutes to impose cumulative sentences, and the court exercised its discretion to "stack" appellant's three sentences of three years so that they ran consecutively for a total of nine years.

Facts

The State and appellant both called family members as witnesses in the punishment stage. Several of appellant's witnesses asked for the minimum sentence. (RR7: 7-55, 60-65). Appellant testified about his life experiences and his character. He asked the jury for a minimum sentence. He denied committing the offenses. (RR7: 70-85).

The offense of indecency with a child by contact is a second degree felony. The punishment range for this offense is a minimum of two years and a maximum of twenty years, with a possible fine of up to $10,000. (RR7: 92). *See* Tex. Penal

Code Ann. §21.11(a)(1) & (d), and Tex. Penal Code Ann. §12.33. The jury returned its unanimous verdicts of confinement in the penitentiary for three years in each case. (RR7: 110-111). The judge recognized the motion to accumulate sentences previously filed by the State, and asked if the State would like to be heard. (RR7: 111). The prosecutor told the court that Penal Code section 3.03 "specifically *contemplates an exception* to a general rule that allows cause numbers to run concurrently." (RR7: 112) (emphasis added). He also told the court that Penal Code section 21.11, the statute under which appellant was convicted, "allows an exception for these three cases to be run consecutive." (RR7: 112). He added that considering all the evidence presented in this case, "I believe it's appropriate for the Judge - - for Your Honor to cumulate these sentences. We'd ask you to do so." (RR7: 112). Defense counsel responded that he thought the court should follow the jury's wishes of three years, not a cumulated sentence of nine years. (RR7: 112). The court decided:

> THE COURT: The statute does contemplate under these circumstances, that being of the same criminal transaction that the *Court has the discretion* to cumulate the sentences.
>
> Based on the fact that these are the same criminal episode as defined under 3.03 and the fact that the defendant was convicted under Penal Code Section 21.11, the Court is cumulating these sentences and so ordered.

(RR7: 112-113) (emphasis added). The court then signed the State's motion to

cumulate the sentences and informed appellant that his sentences would be served consecutively.

Law and analysis

Texas Penal Code Ann. § 3.03 states:

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.
> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences *may* run concurrently or consecutively if each sentence is for a conviction of:
>
> * * * *
>
> (2) an offense:
>
> (A) [ ] under Section [ ] 21.11 [ ] committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section . . . .

Tex. Penal Code Ann. § 3.03 (emphasis added). *See Bonilla v. State,* 452 S.W.3d 811, 815 (Tex. Crim. App. 2014) (noting that the trial judge has discretion to stack sentences under Section 3.03(b)(2)(A) if there is "some evidence" that the offenses occurred after September 1, 1997).

In the instant case, the State filed a motion to cumulate the sentences. The judge knew she had the discretion to cumulate the sentences because she said so. She had heard all the witnesses at both the guilt/innocence stage and the punishment stage. She had seen all the evidence. She did not have to put her

reasons for choosing to cumulate the sentences on the record. *See State v. Mechler,* 153 S.W.3d 435, 444 (Tex. Crim. App. 2005) (Cochran, J., concurring) (stating, in a somewhat analogous situation, that the trial judge is not required to articulate his Rule 403 balancing-test reasoning on the record); *Sanders v. State,* 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd) (Rule 403 does not require the balancing analysis be performed on the record); see also *Hill v. State*, No. 05-15-00989-CR, 2017 Tex. App. LEXIS 378, *at 11-12 (Tex. App.—Dallas Jan. 18, 2007, pet. ref'd) (mem. op., not designated for publication) (same).

Thus, the trial judge understood that she had the discretion under the law to cumulate appellant's sentences. She understood that the prosecutor asked her to cumulate appellant's sentences. Based on the facts of this case, she chose to exercise her discretion and cumulate appellant's sentences. She did not abuse her discretion in granting the State's motion. This issue should be overruled.

PRAYER

The State prays this Honorable Court will affirm the judgment of the trial court.

Respectfully submitted,

/s/ *Anne B. Wetherholt*

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CERTIFICATE OF SERVICE AND CERTIFICATE OF WORD COMPLIANCE

I certify that a true copy of the foregoing brief has been served on Niles Illich, Attorney for Appellant, 701 Commerce Street, Suite 400, Dallas, Texas 75202, by sending an electronic communication through eFileTexas.gov to Niles@appealstx.com on June 12, 2017.

I further I certify that the total word count in this document, which is prepared in Microsoft Word 2010, is 8,089.

/s/ *Anne B. Wetherholt*
ANNE B. WETHERHOLT

TAB 16

Nos. 05-16-01138-CR 05-16-01139-CR 05-16-01140-CR

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IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

==========

DERRICK BRANNON SULLIVAN,
Appellant,

v.

STATE OF TEXAS ,
Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givins, Presiding
Court Cause Numbers: Trial F13-24555, F13-24563, F13-25621

APPELLANT'S OPENING BRIEF

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IDENTITY OF THE PARTIES AND COUNCIL

Pursuant to Texas rule of Appellate Procedure 38.1(a), appellant presents the following list of all parties and names and addresses of its council:

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2. TABLE OF CONTENTS

IDENTIFY A PARTIES AND COUNCIL……..2

TABLE OF CONTENTS…….3

TABLE OF AUTHORITIES……....4

STATEMENT OF THE CASE……7

STATEMENT REGARDING ORAL ARGUMENTS……....8

ISSUES PRESENTED…….9

SUMMARY OF THE ARGUMENT……13

STATEMENT OF FACTS…….14

PRAYER……...118

APPENDIX A……...171
APPENDIX B……...172
APPENDIX C……...173
APPENDIX D……174
APPENDIX E……....175
APPENDIX F……...176
APPENDIX G……...177
APPENDIX H……...178
APPENDIX I……....183

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83 (1963).....43, 80, 83

Campbell v. State, 718 S.W.2d 712, 716 (Tex.Cr.App. 1986).....41

Chambers v. Mississippi (1973) 410 U.S. 284 65

Cosio v. State, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011).....75

Crank v. State, 761 S.W.2d 328, 342n. 5 (Tex.Cr.App. 1988).....40

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) ……..

Ex parted Chabot, 300 S.W.3d. at 772……..…25, 133

Kyles v. Whitley, 514 U.S. 419, 422 n. 134, 144-451 (1995)……....89, 103

McDuff v. State, 939 S.W.2d 607, 614 (Tex.Crim.App. 1997).....80

Melendez - Diaz, 129 S. Ct. at 2532 ……..23, 57

Miller v. Pate, 386 U.S. 1, 4-7 (1967).....22, 56

Miller, 14 A.3d at 1110.……....22, 56, 71

Montgomery vs. State, 810 S.W.2d 372 (Tex. Crim. App.1991).....19,53

Napue, 360 U.S. 269 ……...…...22, 33, 56, 140

Potier v. State, 68 S.W.3d 657, 665 (Tex. Crim. App.

2002).....64

Simons, 512 U.S. at 165-65,.....123

Smith v. State, 279 SW3d 260, 276……**.....**……...23, 57

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

United States v. Berger, 473 F.3d 1080, 1089 (9th

Cir.2007).....76

United States v. Daas, 198 F.3d 1167, 1179-80 (9th

Cir.1999).....79

United States v. Delgado, 401 F3d. 290 (5th Cir.
2005)…….....59

United States v. Freeman, 498 F.3d 893, 908 (9th

Cir.2007).....79

United States v. Ottersberg, 76 F.3d 137 (7th Cir.1996).....107,

108

Waldrop v. State, 138 Tex.Crim. 166, 133 S.W.2d 969

(1940).....40 .*Zuniga v. State*, 144 S.W.3d 477,

484(Tex.Crim.App. 2004).....80

Statutes

TEX CODE CRIM PROC. Art. 1.04 ……..….62. 54

TEX CODE CRIM PROC. Art 1.05……...…54, 62, 95

TEX. CODE CRIM. PROC. art. 1.051

TEX. CODE CRIM. PROC. art. 28.01 (Pre-Trial).

TEX CODE CRIM PROC. Art 33.01……..120, 23, 127, 129, 130

TEX CODE CRIM PROC. Art 33.011……...123, 127, 130

TEX CODE CRIM PROC.Art. 36.22……...……..120, 127

TEX CODE CRIM PROC. Art. 36.29(a)…….…..…108

TEX. CODE CRIM. PROC. art. 38.072……...93, 94, 95, 96, 97

Rule 401……....19, 37, 38, 39, 40, 52, 59

Rule 402……....19, 37, 40, 49, 52

Rule 403……....19, 38, 39, 40, 52

Rule 404(b).....10, 19, 20, 30, 38, 39, 52, 53, 112, 114, 115

Other Authorities

Texas Constitution, Art.1, Section 10

Texas Constitution Art.1, Sections 13

Texas Constitution Art1, Sections 19

United States Constitution, Amendments V

United States Constitution, Amendments VI.

United States Constitution, Amendments

Confrontation Clause of the Sixth Amendment

Texas Constitution Article

STATEMENT OF THE CASE

The State obtained indictments against Sullivan appellant, in cause numbers F-1324555, F-1324563, and F-1325621. Each allegation was for a single count of indecency with a child. The jury found appellant guilty and sentenced him to serve 3

years for each offense to be served concurrently. The state then moved to have the sentences served consecutively and the trial court granted the motion.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request an oral argument. The appellant originally requested an oral argument during the time the court appointed appeal attorney, Niles Illich was assigned to this appeal. Originally an oral argument was scheduled for October 10th,

2017, and for unknown reasons, Niles Illich cancelled the oral argument. This is when appellant decided to withdraw Illich from the case, and file his own appeal brief. Appendix J, you will find an outline of the events that took place, with proof of the direct damage Mr. Illich inflicted on the appellant. Exhibits A - H are emails sent from Mr. Illich to the appellant's mother, Susan Miller, where Illich intentionally deceived the appellant by using incorrect laws and rules, to deprive appellant of a fair and just appeal. Mr. Illich lied to the appellant's mother and the appellant about the transcript, refusing to give a copy to the appellant, claiming only that he was allowed to have a copy of the transcript. After the appellant read the brief prepared by Illich, the appellant was not satisfied with the brief, and suggested to Illich all the judicial errors that took place. Mr. Illich refused to amend the appeal brief by adding the objections and the judicial errors that took place during the trial. Mr. Illich's actions against the appellant are not acceptable pursuant to the Texas Bar Rules of Misconduct 8.4.

ISSUES PRESENTED

1. Did the judge violate the appellant's Eighth Amendment of the U.S. Federal constitution by allowing out of court hearsay testimonial statements by declarants at his criminal trial?.....21

2. Did the judge violate the appellant's United States Constitution and the Texas Constitutional rights of due process, by allowing the State to offer fabricated

false evidence of extraneous offenses, and falsely accuse the appellant of being arrested for committing criminal offenses he never committed?.....25

3. Did the State corrupt the truth seeking function of appellant's trial when it failed to correct the false and highly misleading testimony of its witness during trial and during the guilt- innocence phase requiring reversal?.....35

4. The trial court was prejudiced and committed a federal constitutional error which violated appellant's due process when the court excluded appellant's relevant and necessary defense evidence……...50

5. Did the judge and the prosecutor violate appellant's 14th Amendment of the U.S. Constitution when the judge refused to allow a continuance in order to schedule a hearing to obtain CPS records?.....55

6. Did the the trial court commit prejudicial error by allowing the state to offer false evidence of extraneous offenses, and falsely accuse appellant of being arrested for committing criminal offenses he never committed?.....64

7. Did the trial court violate the appellant's Eighth Amendment of the U.S. Federal Constitution, which is barred by the Confrontations Clause of the Sixth Amendment by allowing out of court hearsay testimonial statements by declarants against the defendant at his criminal trial?.....……...75

8. Did the trial violate appellant's Federal Constitutional rights to the effective assistance of counsel, due process and due course of law, in accordance with the 5th, 6th, 14th, Amendments to the United States Constitution, Article 1, Sections 10, 13, and 19 of the Texas Constitution, and Articles 1.04. 1.05 and 1.051 of the Texas Code of Criminal by not allowing appellant's exculpatory evidence and Brady material as evidence into the record?……..... 79

9. Did the trial court err by violating the judges rules of ethics and conduct by making cumulative bias and disparaging statements in the presence of the jury throughout the entire trial……...86

10. Did the judge display prejudice and commit egregious error when she issued a jury charge that **did not require the jury to reach an unanimous verdict,** then refused to declare a mistrial?.....91

11. The judge violated appellant's State and Federal Constitutional rights of due process when the judge spoke to the state's witness and instructed her not to mention her sister's CPS or criminal background because it makes the judge "uncomfortable".....100

12. Did the prosecutor violate appellant's rights to effective assistance of counsel and due process by not providing the identity of the witnesses in advance of the trial denying the appellant the chance to conduct out-of-court investigation necessary to obtain information?.....105

13. The judge violated appellant's due process by interfering with the defense's ability to impeach the state's witness. ……....106

14. Did the judge violate the appellant's U.S. Federal Constitution and State Constitution which destroyed appellants 6th amendment and his rights of due process, by not identifying the proper outcry witness?.....114

15. Did the state deprive appellant of his rights by **not granting the defendants motion, requesting procedural determination by trial court with findings of fact and conclusions of law** secured by the 6th 14th Amendment of the United States Constitution Article 1 Section 10 of the Texas Constitution Article 1.05 the Texas code of criminal procedure.
……....119

16. The judge violate the appellant's State and Federal Constitutional Rights of due process by interfering with the defense's ability to **impeach the state's witness**.……....122

..

17. The prosecution deprived appellant of a fair trial through repeated misconduct in the trial and during the guilt-innocence phase…….128

18. Did the judge violate the appellant's State and Federal Constitutional Rights and deprive the jury of critical information it needed to determine his guilt or innocence, when it failed to provide the jury with the trial exhibits, as well as statements made by the state's main witness'…….……..130

19. The trial court erred and violated his State and Federal Constitutional Rights when it allowed the alternate jurors to be present for deliberations when the alternate jurors had not been impaneled as regular juror…….133

20. Did the State corrupt the truth seeking function of appellant's trial when it failed to correct the false and highly misleading testimony of its witnesses during the pretrial and at the guilt - innocence phase requiring reversal……..139

21. Did the trial judge violated the appellant's due process when the judge excluded all of the appellant's relevant and necessary defense evidence?..…152

22. Did the judge violate her rules of ethics and conduct by making cumulative bias and disparaging statements to the defense's witnesses in the presence of the jury throughout the entire trial?.....157

23. Did the judge disable the jury's ability to conclude a unanimous verdict? ….163

SUMMARY OF THE ARGUMENT

Derrick Sullivan, the appellant was unjustly convicted on 3 counts of indecency with a child and sentenced to 3 years. The State obtained three indictments against appellant in cause numbers F13-24555, F13-24563, F13-25621. Each charge was for a single count of indecency with a child. [55 CR 11; 63 CR 10; 21 CR 8.] On one count, the reporting party was not the mother of the alleged victims. Instead the original police report was made by Tammy Punt, who is the ex girlfriend and the mother of appellants only son. The evidence against appellant could not have been more deficient. There was no physical evidence, no eyewitness, no forensic evidence, and he did not confess, and a Brady disclosure that claims the alleged victims were coached to say these allegations about being touched by the appellant.

STATEMENT OF FACTS

The Ex-girlfriend of the appellant, Tammy Punt, who is a state witness in this case, had a motive for the reason she teamed up with her sister, Regina Punt, and fabricated this case. The facts about Tammy Punt's true character have been hidden from the jury During this case, the facts surfaced about Tammy Punt selling food stamps for cash. There is proof Tammy Punt and her sister received compensation for the victims impact. [7 RR 119} Fabricating criminal charges of sex abuse is motive for someone like Tammy Punt who unlawfully manipulates and uses the system to gain money. The irrefutable proof that Tammy Punt sells her food stamps for cash was given to the judge to admit into the case evidence. The judge refused to allow this evidence into the record. A number of errors contributed to appellant's conviction. During the pretrial hearing the judge asked both sides if there were pretrial matters that either side needed to be addressed. [3 RR 6]. Appellant's attorney stated he filed a motion and he objected to the admissibility of the extraneous offenses. The judge denied the appellant's request regarding 404(b) [3 RR 11] The State offered false evidence that falsely accused appellant of crimes he never committed. The state's witness Tammy Punt contradicted the extraneous allegations during testimony yet prosecution used the false allegations to confuse the jury. This violated appellant's right to due process, and his state and federal constitutional rights.

Prosecution, John McMillin, failed to disclose the “original” hand written interview by Shelly Fox at pretrial, unaware that appellant and his mother viewed the document in Bill Wirskye’s office in January, 2014, as disclosed by Shelley Fox.

During the pre trial hearing on September 12, 2016, the appellant requested the Brady disclosure of the District Attorney Shelly Fox’s handwritten interview notes that documented a confession that BH and KH were “coached” and told to say these allegations against the appellant, as well as Tammy Punt’s knowledge and consent of the alleged abuse. Defense attorney requested the hand written notes as evidence to be admitted. In response to the appellant's request, Mr. McMillin failed to provide a copy of the hand written interview after numerous requests by defense. Instead Mr. McMillin provided a typed "summary" of the interview, that left out several statements that prove the appellant’s defense, including the statement that BH and KH were told to say the allegations. After defense counsel alerted Mr. McMillin that the handwritten interview notes had been previously viewed, he produced and handed the original handwritten notes to the appellant's attorney. The appellant and his mother in court verified the handwritten notes he presented were the correct handwritten interview notes from the assistant District Attorney Shelly Fox. The defense counsel asked the judge to admit the handwritten interview into evidence.

The events just described were unlawfully removed from this case transcript.

The transcript does however, prove the judge acknowledged the defendant's Brady evidence in the form of handwritten notes. [3 RR 35] The judge stated she reviewed the handwritten notes in camera. The judge admits on record that she compared the handwritten notes to the typed notes and the judge instructed the State to disclose the handwritten notes in addition to the typed notes. [3 RR 35] The appellant assumed the State followed the judge's instruction and entered the handwritten notes into the official case trial record as Defendant's exhibit 8. Post conviction after review of the trial record, the appellant discovered the State did not admit the handwritten notes as exhibit 8. These handwritten notes were suppressed and kept from the jury and removed from the defendants exhibit 8 and replaced with an incorrect typed version that excluded the statements made by the witnesses. These statements that were removed are considered Brady disclosures. The hand written Brady disclosure evidence, in its original unadulterated form, was never returned to the defendants exhibit 8 case file by the judge or the prosecutor.

During the pre trial hearing the judge asked Mr. Guinan if he was planning on going into the criminal history of the State witness Regina Punt. [3 RR 46] 1 Guinan responded that he did plan on going into Regina Punt's criminal history. On a side note, the fact that the judge just asked Guinan directly about Regina Punts criminal history, which is documented in the official case transcript, found on proves all three

officers of the court, the judge, the prosecutor and the defense attorney, acknowledge that Regina Punt does have a criminal history, yet all three officers have violated their ethical and professional rules of conduct by their intentional deceptive proves that McMillin then responded by requesting a ruling and made the false claim to the court that the witness Regina's Punt was not a convicted felon. This falls under prosecutorial misconduct as well as ineffective assistance of counsel.

The judicial bias and errors started during the opening statements. [3 RR 52] The defense attorney, Guinan brought to the jury's attention, Regina Punt, is a state witness who has a background of 5 CPS investigations. McMillan objected and the judge asked both attorneys to approach the bench. [3 RR 52-53]

During both pretrial, guilt and innocence phase of trial appellant's attorney attempted 3 times to get the Brady disclosure admitted into the record and the judge refused to allow it. The judge said he would have to wait until after the trial [4 RR 247-248]. At the very end of the trial before the jury was sent for deliberations, the appellant's attorney reopened the evidence to read the altered Brady disclosure to the jury in an attempt to impeach the witness Tammy Punt. The jury however never heard the complete brady disclosure including the statement that the girls were coached and told what to say. The judge took the notes to her chambers and never returned the handwritten notes to Mr. Guinan. The judge then read the typed altered version that

left out the Brady disclosures. The handwritten notes that included the Brady disclosure would have impacted the jury, causing reasonable doubt finding the appellant not guilty.

During the trial, the state's witness Tammy Punt testified using inadmissible hearsay. The defense attorney objected to hearsay and the court overruled. [3 RR 72] The defense asked for a ruling from the court due to the hearsay affecting his cross examination and the judge overruled. [3 RR 73] The State's witness continued answering the questions using hearsay. The Defense objected and the judge overruled. During the cross, the state's witness Tammy Punt stated on record that her sister, Regina Punt had been in prison and had CPS charges filed against her. The judge did not want the state's witness to offer any testimony that would impeach the credibility of the other state's witnesses. At one point the judge interrupted the defense's cross examination, and instructed the jury to be removed from the court so the judge could speak to the State witness herself. [3 RR 77] Outside the presence of the jury the Defense stated to the judge why he was objecting. He explained to the judge that one of the State's witness is Ryan Hester. This witness was not able to testify due to his medical condition of being in a coma. [3 RR 78] Defense objected to any hearsay statement from Tammy Punt regarding Ryan Hester and the judge overruled, allowing hearsay from Tammy Punt about what Ryan Hester "said" as testimony. [3 RR 79]

This is a violation of appellant's due process. Defense attorney also stated to the judge that Regina Punts criminal background is open since the State's witness Tammy Punt brought it out. [3 RR 79] The judge responded by stating that she is not going to allow it and then had a direct conference with Tammy Punt. [3 RR 80] The judge stated the testimony about Regina Punt's CPS charges and criminal background made her "uncomfortable" and she was not allowing that information in. [3 RR 80] The Judge instructed States witness Tammy Punt to not mention any further information about the fact her sister had been in prison or has CPS issues. The judge stated that just because she "slipped" and the information was offered, she is not allowing it in. The judge asked the witness directly if she understood and the witness said she did understand. This shows the judge is bias and has violated appellant's rights to a fair trial. This evidence would have impeached the State's witness. The judge called the jury back in. The State witness Tammy Punt offered hearsay statements about what another state witness said, the defense objected and the judge overruled. [3 RR 83]

The State offered into evidence irrelevant text messages between Tammy Punt and Derrick appellant. [3 RR 88] The defense objected to the text messages as relevance probative value and undue bias by probative value in the case. The judge reviewed the exhibits and overruled defense's objection to all exhibits except 17 and 18. [3 RR 87, 88]

On cross examination the Defense questioned the State witness Tammy Punt about how she refused to tell the defendant he was the father of her child, and the State objected. Defense stated that his objection to this evidence goes to credibility, and the judge overruled.

This pattern continued throughout the trial. The judge overruled almost every objection made by the defense, which made the trial one sided. The judge also directly cross examined the witnesses' and cross examined appellant in front of the jury, which displayed judicial bias and created the impression the judge was against the appellant. During the closing arguments, the State resorted to name calling, and again used the false extraneous offenses as his main focus, when these offenses were fabricated by the State during the time the district attorney was preparing for trial. There is no evidence that the appellant ever committed any crimes, he was not charged with alleged extraneous offenses. The appellant had a clean record.

During the entire trial the judge allowed 2 alternate jurors take part in the jury process. These alternates were not kept separate and were included with the jury panel during the deliberation. This violated the appellant's right to a fair and impartial jury.

ARGUMENTS

1st Summary of Issue

The trial court violated the appellant's Eighth Amendment of the U.S. Federal constitution by allowing out of court hearsay testimonial statements by declarants at his criminal trial.

Issue

The trial court violated the appellant's Eighth Amendment of the U.S. Federal constitution by allowing out of court hearsay testimony from witnesses who were not in court. Tammy Punt, Regina Punt and Theresa Franks all testified using out of court statements about Ryan Hester, without the appellant's ability to cross examine Hester at trial. [3 RR 73] Since the appellant is facing a sexual assault charge he should have a clear statutory right to impeach his accuser's accusations and the alleged testimony. A person should not be convicted, sent off to prison, with the help of un available State witness' when it can be shown that the adult witnesses' in this case are related family members who have a criminal background involving prostitution, drug abuse, and prior CPS investigations of child abuse.

Rules: Constitutional due process bars the State from obtaining a conviction through the use of false or highly misleading evidence. See U.S. Const. Amend. XIV. Such a conviction must be set aside unless the State can prove the error harmless beyond a reasonable doubt.

Application:

The defense attorney Guinan filed a written MOTION TO STRIKE STATEMENTS OF UNAVAILABLE STATE WITNESSES pretrial. This motion was ignored. [3 RR 72] The court violated the appellant's rights by allowing Tammy Punt, Regina Punt and Theresa Franks to testify for the State's out of court witness of Ryan Hester, without the appellant's ability to cross examine.[3 RR 73] The defense attorney objected to this and the judge overruled, allowing the jury to hear the hearsay testimony. [3 RR 74].

The court violated the appellant's Eighth Amendment of the U.S. Federal Constitution when the judge allowed the State's witness Tammy Punt to testify using inadmissible hearsay about what the appellant's told his friends. The judge also violated the appellant's due process by allowing this type of questions as well as participating herself by directly asking the state witness questions. The judge also allowed the state witness to respond to her questions by using inadmissible hearsay. The judge directly asked questions to the State witnesses about what other people said. This type of questioning by the judge is not legal nor is it ethical for a judge to ask the witness directly. This behavior by the judge is a violation of the appellants due process and displays that the judge is bias and prejudice. The following dialog between the Judge and the State witness took place.:[3 RR 24] 24 - 25.

> COURT: You said that he mentioned to friends he needed to get rid of the computer. When was that conversation?

THE WITNESS: That was after the time that he was arrested, Your Honor.

THE COURT: After the first arrest?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. And who were those friends?

THE WITNESS: Their names are Joel Medina and Katy Hommeth (phonetic).

THE COURT: And what was the conversation? I mean, did he randomly say, you know, by the way, we're talking about the weather but there's this computer I need to get rid of, can you-all take it? What was the substance of the conversation?

THE WITNESS: Actually, Your Honor, I wasn't there when that happened. He was in -- he successfully had them turn their backs on me at the time. We are now friends. So I've recently found out all of this once we found out that we were gonna be going to court and everything. They wanted to make sure I was aware of that.

THE COURT: Okay. So Joel and Katy told you that the defendant said these things to them?

THE WITNESS: Yes, Your Honor.

THE COURT: And did they take the computer? Do you know or --THE WITNESS No, he said he was not going to have any part of it.

THE COURT: Okay. Did they tell you why the defendant said he needed to get rid of the computer?

THE WITNESS: No, he just -- Joel said that he just seemed very concerned.
The court violated appellant's due process and his right to confront his accusers. This right is protected and statements should not be admitted unless those witnesses were made available at the time of trial. Sexual abuse allegations, especially those by children, are easy to make and even easier to prove in a court of law.

2nd Summary of Argument

Issue: The judge violated the appellant's United States Federal and State Constitutional Rights by allowing the State to offer fabricated false evidence of extraneous offenses, and falsely accuse the appellant of being charged/arrested for committing criminal offenses he never committed?

"The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause." See *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)

Rules:

The appellant has preserved the record for this issue by filing a written objection to the State's NOTICE OF EXTRANEOUS OFFENSES evidence under Rules 401, 402, 403, and 404(b). In the written objection appellant stated if the court overruled his objection, the court shall prove how such evidence has relevance other than the character of appellant or suggesting that he acted in conformance with a criminal propensity. *See Montgomery vs. State,* 810 S.w.2d 372 (Tex. Crim. App. 1991).[1]

During the pretrial hearing, defense attorney Guinan orally objected to all extraneous evidence. [2 RR 12] 6

> MR. GUINAN: I understand, Your Honor. I object because I believe that they are not relevant to the case. And I believe that they have not established sufficient predicate as extraneous offense to be used as an extraneous offense during the case-in-chief. We also believe -- I do also believe that the use of these cases -- the use of these offenses in concert with one another is unconstitutional. I would argue that the case law has now been -- beyond a

[1] “"The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause."” *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)

> doubt that I believe that using multiple defenses to convict an individual at one time in this -- in this manner is unconstitutional. [3 RR 8]

The judge denied Guinan's request regarding 404(b). [3 RR 11] 2 . Next the judge started to ask questions about Tammy Punt and who she is to the appellant. The judge stated, "[l]ets get into the sexual tendencies or nature of the defendant. {3 RR 11] 4-5. The judge asked the prosecutor if he intended to get into that information. The State responded yes and by explained that there is one specific instance. This is how the State began to fabricate a false impression about the appellant to the jury. The prosecutor knows there has never been any past abuse or any proof of violent behavior by the appellant, yet the judge, the State and the State witness are creating this false idea. See [3 RR 11] 15-20. The State wants her to testify regarding the appellant, and to claim the appellant would go into a violent rage when she would tell him no, after asking her for sex. The State then claims the appellant would punch holes in the walls with his fists. The judge the ask is if the prosecutor intends on offering this information during his case in chief or in punishment phase. [3 RR 11] 21-25. The State then explains to the judge that he wants to offer this under a 404 (b) exception. [3 RR 12] 23 - 25.

The judge calls Tammy Punt to the stand. The State begins to ask

questions, to create this false idea that the appellant is violent. These actions by the State are unconstitutional and are violating the appellants rights of due process. The appellant has never been charged or arrested for violent behavior, yet the State and the judge are assisting with creating a false impression. On cross examination, the defense asked Tammy Punt if she had ever called the police and she stated she has not.

Q. Ms. Punt, can you identify the date in which the event in where he punched the wall took place When did that happen?

A. I don't have the exact date of when it happened.

Q. What year did it take place?

A. Probably 2011, maybe. I'm not sure on the date.

Q. Did you call the police at any time as a result of that event?

A. I'm sorry?

Q. Did you call the police?

A. No, I didn't.

Q. Were you ever harmed by him physically?

A. There was one time that he grabbed me pretty hard, but it was never hard enough to where I felt the need to call the police.

On redirect examination the State adds to this false impression, by fabricating another story about the appellant being involved in computer criminal activity. The State starts of by asking a leading question, making the false impression that appellant is very savvy on computer. [3 RR 16] 18-19. The defense objected to this type of questioning and the judge overruled. The judge should of not allowed his type of questioning. This shows bias by the judge for allowing the State to ask these types of questions. The state went on creating this false impression that the appellant uses his computer for illegal activities. The State then leads into the arrest of the appellant and began to fabricate this false idea that he appellant had to get rid of his computer The state asked the witness if something happened to the computer and her response was the following: [3 RR 19] 7-19.

Q. Did something happen to that laptop?

A. Yes. Apparently, whenever he went to jail the first time after the case with the first girls came up he -- his family came and got his things, and all of a sudden the laptop was gone. And he had talked about how he needed to get rid of it. And he mentioned it to some mutual friends of ours and asked if he can keep it at their house.

MR. GUINAN: Objection; hearsay.

THE COURT: Overruled.

THE WITNESS: He asked if he could keep the laptop at their house, and they said, no, of course, that they weren't gonna have any part of that. And I don't -- I don't know where it is. I never saw it after that.I just found it strange because he was on it from the moment he woke up until the moment he went to bed and then all of a sudden it was just gone.

Q. (BY MR. MCMILLIN) And what was the timing of the computer being

missing?

A. He had family come over and get his stuff' cause he wasn't allowed back over there. So I guess once he was -- during the process of him getting bailed out of jail.

Q. Was it right after his arrest for these current charges?

A. Right. Yes.

The defense objected to this as hearsay and the judge overruled the defense, impacting more by creating this false impression of the appellant. All of this is a violation of the appellants due process. The State and the Judge are working together and creating this false image. After this examination was finished the judge asked the witness to leave the courtroom. The following was discussed by the Judge, the Prosecutor and the defense attorney:

COURT: Because when the court of appeals reads my record, I want to be sure that I was speaking to whatever matter you guys were talking about. So right now I'm still on 404(b) notice with all the offense that are charged, the current pending offenses

that we're trying.

> COURT: Okay. So as to that, based on your response, Counsel, I'm denying your request regarding 404(b).

> The judge then has the witness Tammy Punt
>
> THE COURT: As to the State's request to discuss appellant's sexual tendencies, the evidence as presented. That request is denied. As to mentioning of the computer. Based on the testimony provided to the Court, that request is denied. Now if it comes up if -- State, if you think they've opened the door or some information they provided would cause the information that the jury is receiving to be unclear, then you let me know and we'll address the issue again.[3 RR 32]

Shortly after the judge denied the appellant's request, the State called Tammy Punt as a witness to the Punt using the same extraneous offenses the judge previously denied. Guinan the defense attorney objected to McMillian's questioning the judge overruled. Guinan objected to McMillan's questioning and the judge acted against her previous ruling where she originally denied the State's Notice of extraneous offenses, and [3 RR 55] now allowing the State to use the unproven extraneous offenses during the case in chief and during the punishment hearing. This proves the court was bias. The record proves a pattern of bias. These false allegations by the State about these criminal extraneous offenses created a false impression to the jury, falsely claiming the appellant has previously committed criminal offenses involving "dark

web child pornograpy" related activity, and domestic violence. "It is well settled that an accused may not be tried for some collateral crime or for being a criminal generally. For this reason, the courts have generally prohibited the introduction of testimony about extraneous offenses . . ."The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. These offenses were manufactured by the State to create a guilty verdict.

Application: The judge caused damage to the appellant's case by not scrutinizing the extraneous offenses first to see if the alleged offenses passes the test. The extraneous offense should not, therefore, have been admitted in the trial of this cause." See *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991) The prosecutor's constitutional duty to learn of favorable information also extends to learning whether the information is factual. The extraneous offenses the prosecution used, he knew were false. This was a deliberate action to discredit the appellant. Pursuant to the State's continual reliance on false testimony and a false confession, this violated the appellant's due-process rights to a fair trial. The State misstated critical facts when it argued that the appellant was hiding his laptop computer from the police. The prosecutor used this against the appellant during the trial as well as the punishment phase, all of which violated the appellant's rights to a fair and just trial.

The State misstated critical false facts when it argued that the appellant was involved in "deep web' and "bitcoin" child pornography activities on his computer. The State had no evidence to support these false factual assertions other than the hearsay testimony of State's witness Tammy Punt. The State also created a false history of violence by claiming the appellant's sexual nature would turn violent when he was refused sex. The defense objected to this false testimony and the judge contributed to this violation when she overruled. *See Miller v. Pate,* 386 U.S. 1, 4-7 (1967)[2] (finding due process where State presented false testimony and emphasized false testimony); See *State v. Bass*, 465 S.E.d 334, 338 (N.C. 1996) (reversing conviction where the prosecutor misleadingly argued to the jury that the child sex victim would not have known about sexual activity but for the defendants alleged abuse, when the prosecutor was aware that the contrary [was] true." Article 38.37 requires proving beyond a reasonable doubt. : the state of mind of the defendant and the child and the previous and subsequent relationship between the defendant and the child. Brantley v. State, 48 S.W.3d 318, 323 (Tex. App.—Waco 2001, pet. ref'd).1 In addition, the noticed evidence must be related to "the child who is the victim of the alleged offense." Pool

[2] More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U.S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois*, 360 U.S. 264; *Pyle* v. *Kansas*, 317 U.S. 213; cf. *Alcorta* v. *Texas*, 355 U.S. 28. There can be no retreat from that principle here *Miller v. Pate*, 386 U.S. 1, 7 (U.S. 1967)

v. State, 981 S.W.2d 467, 469 (Tex. App.—Waco 1998).

Conclusion: These errors by both the judge and prosecutor are reversible because the false offenses the appellant was accused of committing, was so prejudicial, that its harmful effect could not be removed even if the judge would have given instruction to disregard, which never happened. The State filed a Notice of Extraneous Offenses that includes a list of 5 offenses from 2007 to 2014, which the State attributed to the appellant. In appellant's case, the prosecutor knew that there was no proof of child pornography on the appellant's laptop, nor had the appellant ever been charged with this type of criminal offence, yet the prosecutor filed a false and misleading "Notice of "Extraneous Offenses" into the case record, knowing this was false. The prosecutor also used this against the appellant during the trial as well as the punishment phase, all of which violated the appellant's rights to a fair and just trial. This denial and errors by both the judge and prosecutor is a reversible error because the false offenses the appellant was accused of committing, was so prejudicial, that its harmful effect could not be removed even if the judge would have given instruction to disregard, which never happened. The State filed a Notice of Extraneous Offenses that includes a list of 5 offenses from 2007 to 2014, which the State attributed to the appellant. The non confrontational assertions in this record prepared in anticipation of litigation is

inadmissible under the Confrontation Clause of the Sixth Amendment. See *Melendez - Diaz,* 129 S. Ct. at 2532 (applying Crawford, 541 U.S. at 540. See also *Smith v. State*, 279 SW3d 260, 276 (Tex,Crim.App.2009) Finding assertion of unconfronted testimonial hearsay in the Notice of Extraneous Offenses violates the Confrontation Clause.

Additionally, the trial court violated appellant's right to due process of law failing to follow black-letter Texas procedure. *Logan* 455 U.S. at 432-34; U.S. Const. amends. V, XIV. Moreover, the court violated appellant's Eighth Amendment to a fair and reliable punishment phase because the State's proof of offenses that falsely accused appellant of "dark web" computer related criminal actions, and using his sexual tendencies to make him dangerous, proves the weakness of the State's case. "The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause."" *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)The erroneous introduction of these offenses could well have made the difference between guilty, or not guilty, and a difference between 3 years or 20 years. The error was not harmless under any standard. This is a reversible error.

3rd Summary of Argument

The State corrupted the truth seeking function of appellant's trial when it **failed to correct the false and highly misleading testimony of its witness during tria**l and during the guilt- innocence phase requiring reversal.

Issue:

This court has been extremely diligent in protecting their rights of defendants

convicted or sentenced at trial at which false testimony is presented.

Appellant is entitled to a reversal because (1)Tammy Punt falsely reported to the Garland police the appellant confessed that he touched these girls. This is a fabricated false confession that never took place. Tammy Punt also falsely reported to the police the appellant blamed his behavior on his "Asperger's syndrome" which is another false allegation made by Tammy Punt to convince the Garland Police that appellant was guilty of this crime. The prosecution never mentioned this, nor was the "Asperger's syndrome" mentioned during the trial in front of the jury. This proves the prosecution knew the charges made by Tammy Punt to the Garland police and during the trial were false. This false confession to the Garland Police is what the police used as probable cause to issue a warrant of arrest. Another false testimony during the trial, by Tammy Punt were the false accusations that the appellant was violent when he would not get sex. The police report did not mention these false accusations; therefore, the prosecution knew these false allegations never took place. (2) Theresa Franks and (3) Regina Punt also gave false, contradictory and misleading testimony about what the girls said happened to them. McMillan, representing the state, knew or should've known that the testimony made by Tammy Punt, Regina Punt and Theresa Franks was false and highly misleading, (4) the state cannot prove beyond a reasonable doubt that its failure to correct the testimony did not contribute to the Jury's

verdict. Therefore, appellant is entitled to a new trial. Ex parted Chabot, 300 S.W.3d. at 772 (remanding for new trial.)

Factual History:

When Tammy Punt was first questioned in court, her testimony was a different story. The criminal complaint was made by Tammy to the police. The judge report is reviewed, there is no mention of these events that Tammy Punt testified in court, not found in the police report. In her testimony, both during the pretrial phase and the guilt innocence phase, Tammy Punt made false statements claiming the appellant would get angry when he did not get sex from her. She stated:

> Q. Can you tell the Court about how the defendant would act if he was denied sex? [3 RR 14-16]
>
> A. He would just get really angry and frustrated and say that I don't love him. And there was a time that it got just really kind of more irate than it should have and he actually -- we just argued more and more, and then he ended up punching a hole in our bedroom wall.
>
> Q. These arguments happened -- how frequently were those argument?
>
> A. I would say on average of at least once a week.
>
> Q. Once a week?
>
> A. Probably.
>
> Q. Would he ask you for sex regularly?
>
> A. Yes, every day.

Whereas she made a report to the police that told a different story, one that never mentioned anything about this alleged violent temper the appellant was falsely being accused of. When the defense cross examined Tammy Punt, the testimony proves Tammy Punt is fabricating a false story with the State's help:[3 RR 15]

> Q. Ms. Punt, can you identify the date in which the event in where he punched the wall took place? When did that happen?
>
> A. I don't have the exact date of when it happened.
>
> Q. What year did it take place?
>
> A. Probably 2011, maybe. I'm not sure on the date.
>
> Q. Did you call the police at any time as a result of that event?
>
> A. I'm sorry?
>
> Q. Did you call the police?
>
> A. No, I didn't.
>
> Q. Were you ever harmed by him physically?
>
> A. There was one time that he grabbed me pretty hard, but it was never hard enough to where I felt the need to call the police.

This false testimony by Tammy Punt also took place during the punishment phase. The State and Tammy Punt knowingly continued to present the fabricated false facts, accusing the appellant of other crimes he has never been charged or even accused of until this trial. The State questioned Tammy Punt during the punishment phase of the trial about the same false accusations that were made during the pretrial. The State

created this highly false and misleading idea that the appellant was committing crimes using his laptop and the appellant had hidden his laptop from the police. None of this was the truth yet both the State and the Judge were fully aware of the severe damage impacted against the appellant. The following was during the testimony of Tammy Punt during the punishment phase:

> Q. Tell the jury -- you said he was on his laptop. Did the defendant like computers?
>
> A. Yes.
>
> Q. Tell the jury about his fascination with computers.
>
> A. He just enjoyed always being on them. Building process servers is what he always talked about doing.
>
> Q. Doing something called Bitcoin.
>
> MR. GUINAN: Objection, Your Honor. May we have a sidebar?
>
> THE COURT: Come on up.
>
> (At the Bench, on the record)

The defense objected and demanded a mistrial due to the State did not uphold the judge's former rulings, and the judge overruled, allowing these false statements to be stated to the jury, when the State and the Judge both knew this was all false testimony.

> MR. GUINAN: I object based on former ruling of the Court concerning motion in limine concerning our objections and the findings of the Court concerning this specific subject. I move for a mistrial at this time because this witness should have been instructed as per the former rulings of the Court and findings having to do with Bitcoin and the dark web and the things that we discussed that the Court ruled on. And she should have been instructed and we believe that this -- well, I don't think Mr. McMillin intentionally drew this out, but I still

think this is a violation of rule and I move for mistrial.

THE COURT: State?

MR. MCMILLIN: Your Honor, this is the punishment phase here. Your ruling regarding that was only for the guilt/innocence. I -- she mentioned Bitcoins, but there hasn't been any talk about the dark web. I was going to talk about the -- him --about the computer going missing after his arrest, and I think that's a proper avenue in 3707.

MR. GUINAN: We still have --

THE COURT: Mr. --

MR. GUINAN: Yes, Your Honor.

THE COURT: I've heard both of you. That ruling was for the guilt/innocence portion. I believe under 3707 that this is proper for punishment.

The State created another highly false and misleading idea that Regina Punt was not a convicted felon, and directly covered up the facts about Regina Punt's background involving CPS investigations, drug abuse, prostitution and pornography. Reviewing the record, you will find that Regina Punt also changed her stories from the allegations made in the police report to what she testified during the trial. The following was a portion of Regina Punt's testimony during trial: [3 RR 40]

Q. Okay. And you said she was wearing a dress?

A. She was wearing a Mickey Mouse dress.

Q. She wasn't wearing pants?

A. She had panties on.

Q. No, no, pants, as in --

A. No pants, no.

Q. Okay. So it was a Mickey Mouse dress, correct?

A. Yes.

Q. Okay. Now when did you -- when did she say this to you?

A. I can't recall the date, but we were in the car and she overheard me saying that I didn't want the girls around Derrick, and that's when she told me.

The State and the Judge both knew Regina Punt has a criminal history involving drug abuse, child abuse, and involvement in pornography. The State and the Judge knew about these facts , yet the State and the Judge worked together to keep this information from getting admitted into evidence. The following statement was made in court by Regina Punt's sister Tammy Punt.

Q. Did -- who had custody of those kids in their early childhood?

A. I had Brooklyn when I was 19 at six months. I didn't have her, I'm sorry. I was given custody of her through CPS when she was six months old. And I had Katelyn when she was born. She was born **while her mother was incarcerated** so I picked her up from the hospital the day that she was born.

The district attorney did not stop there. With the help of the State, Tammy Punt fabricated a false impression that the appellant was involved in criminal activity on the "dark web" activity, child pornography and the internet. The following testimony

was made during pretrial: [3 RR 16]

REDIRECT EXAMINATION BY MR. MCMILLIN:

> Q. Ms. Punt, I also want to talk to you briefly about the defendant and his computers. Does the defendant -- is he very savvy when it comes to computers?
>
> A. Yes.
>
> MR. GUINAN: Objection; leading.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, he is.
>
> Q. (BY MR. MCMILLIN) Can you tell the Court how -- can you expound on that answer for me, please.

Tammy Punt's trial testimony described appellant in a false light, by alleging the appellant was involved in dark web computer related activities. Falsely alleging appellant was into pornography. [3 RR 22-23] The State knew the appellant had no prior criminal charges or any criminal history, yet the State and the judge fabricated this impression to the jury by using the State's witnesses' false testimony.

FURTHER RECROSS-EXAMINATION BY MR. GUINAN:

> Q. Again, you don't know when it came back into the house. Do you know what was on the computer?
>
> A. No.

Q. Do you have any personal --

A. There was some things that I saw and -- at glances, but I --

Q. What did you see?

A. I mean, he was -- he did watch pornography on it. But I never really would watch anything that was on it -- or just like I would walk by or something, you know, and I would see something. But I never like stayed to look or anything. He was just very --

Q. Was it -- I'll need to ask you this. What kind of pornography was it? Did you -- do you have any personal knowledge?

A. I wasn't -- I never watched it long enough. I could only identify that it was. But I never -- I don't know exactly what kind.

Q. Okay. So all you know that you've ever seen on that computer was glancing that one time -- was it one time or more than one time that you saw him watching pornography on a laptop?

A. It was more than one time.

Q. Okay. How many times was it?

A. I can't give you an exact number.

Q. Okay. So beyond that, you don't know what was being done on that computer, correct?

A. Right.

Q. All right. Do you remember when you saw the pornography?

A. No.

Q. Do you remember -- and you said it was more than once. Was it two times? Three times?

A. Mind you it's been three years, so I'm not -- I'm not certain on how many times or when exactly those times were. I just know that that happened.

Q. It's fine to say you don't know. You don't know exactly how many times correct?

A. I do not know how many times. More than three.

MR. GUINAN: Pass the witness, Your Honor.

Actually false and highly misleading:

The State then bolstered Tammy and Regina Punt's lies rather than the prosecutor following his constitutional duty to correct them. *The State and the judge knew Theresa Frank, Regina and Tammy Punt's Testimonies were False and Highly Misleading.* In this case, the State generally knew, and the district attorney specifically knew that the Punt sisters' testimonies were false. When the State called these witnesses to testify and they all lied on the stand, the State had a duty to correct the lies. "A lie is a lie, no matter what its subject and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue,* 360 U.S. at 269-70. During the State's direct examination, Tammy Punt was asked about her having full custody of her 2 nieces,

KH and BH. Tammy Punt began to tell the truth about her sister being incarcerated. This is critical to the appellant's defense. The following was stated during trial by Tammy Punt:

> Q. Did -- who had custody of those kids in their early childhood?
>
> A. I had Brooklyn when I was 19 at six months. I didn't have her, I'm sorry. I was given custody of her through CPS when she was six months old. And I had Katelyn when she was born. **She was born while her mother was incarcerated** so I picked her up from the hospital the day that she was born.

By this statement made by Tammy Punt, she just stated the fact that her sister has been incarcerated, which means she was convicted of a crime. The transcript is the official record of the trial. The truth about the State's witness Regina Punt has now been disclosed by the other State witness Tammy Punt.

> Q. And without going into specifics. When you talk about their mother are you talking about Regina?
>
> A. Yes.
>
> Q. And CPS thought that it was better for you to have custody of kids at that time?
>
> A. Yes.
>
> MR. GUINAN: Objection; speculation, Your Honor.
>
> THE COURT: Sustained.
>
> Q. (BY MR. MCMILLIN) Who gave you custody of the kids?
>
> A. CPS.
>
> Q. Who's Dean Dyslin as we see in State's Exhibit 2?

A. That's Regina's boyfriend -- fiance, excuse me.

Q. You said fiance. Have they -- were they dating back in 2012, 2013?

A. Yes.

Q. Fast-forward to when Madeline was born a couple years later. Who had custody of Madilyn when she was born?

A. Her dad -- her dad's side of the family was taking care of her at the time.

Q. And when you're talking about dad's side of the family, when we're looking at State's Exhibit 2, you're talking about Justin Greene?

A. Yes.

Q. When did -- in October 2012, I know it's been awhile ago, but did you have custody of Brooklyn or Kaitlyn or Madilyn?

During this testimony, the judge stopped Tammy Punt from testifying, and had the jury exit the court.[3 RR 77] 1. The judge spoke directly to the state's witness giving false facts about admissible evidence.[3 RR 77] 9-11.

COURT: Ms. Punt, so when the State -- and for record sake we are out of the presence of the jury panel. When the State tells you don't say what somebody else has told you, that means you -- also you can't offer anything either. So if the State doesn't ask you a question, and there's some silence, you don't have to fill the void, okay? Just wait for your next question and make sure you're answering the question that's asked of you, okay?

The judge also refused to allow the truth about the State's witness Regina Punt, who has a criminal record and has been incarcerated. The judge instructed the state's witness Tammy Punt, not speak about her sister Regina Punt's incarceration. This is a

lie by the court to the jury. The district attorney has the responsibility to correct these false statements, even when the false statement is from the judge.

> MR. GUINAN: One last thing, Your Honor. I believe that issue of incarceration of Ms. Regina Punt is now open. The -- Tammy Punt did testify and was -- a question was elicited and she did testify that she was in jail.
>
> THE COURT: I'm not gonna allow it in. That's one of the things that -- maybe we should have had a conference with Ms. Punt on the record. Ms. Punt, there are things that are not admissible, okay? And the fact of where your sister was when you had the kids, not admissible. I'm even uncomfortable with the fact that you mentioned CPS. Just limit it. Okay, because I'm not letting y'all get into that. She did say it. I heard her say it. I looked up when she said it. Okay. But I'm not gonna let you because she slipped. The State didn't ask the question; she offered the information. Don't reference it again. Do you understand?
>
> THE WITNESS: Yes, Your Honor.
>
> MR. MCMILLIN: Just for the record I have informed the witness of the two rulings that we had earlier this morning not to discuss those two issues.
>
> THE COURT: Okay.
>
> MR. MCMILLIN: You remember that, right? And we're not talking about those two things?
>
> THE WITNESS: Right. Those two things, yes, sir.

The jury panel was brought back in and the judge stated on the record to disregard the last statement.

Application

Where the state and the judge unprofessional errors have resulted in injuries and imposing a sentence based upon unreliable information, Texas Courts have not hesitated to correct the Injustice. Here we have recorded proof of the Judge and the

State prosecutor's complete failure to correct false and misleading testimony. In fact, the record reflects the proof of the judge and the state prosecutor encouraging and demanding the state witnesses to give some false and misleading testimony. We also have the proof of the state and judge fabricating false facts to the jury as well as concealing and withholding critical information from the jury.

Conclusion: For these and the previously reasons discussed, the prejudice flowing from the Judge by working to help the State cover up the truth about the State's witness Regina Punt's CPS Investigations and criminal history, creates a reasonable probability that the outcome would have been a not guilty verdict if the judge had not helped the State cover up these facts. If the jury had the facts and truth about the criminal background of Regina Punt, and had the evidence about why she lost custody of her children, the jury would of questioned the credibility and character of the States witness and caused a reasonable doubt. See *Strickland,* 466 U.S. at 687. Had the state prosecutor and the judge upheld their duty to correct any false accusations and statements, and encourage the state witnesses' to tell the truth, the whole truth and nothing but the truth, there would of been a different verdict.

Further, the district attorney and the judge, allowing the jury to act upon unreliable false, and incomplete information was not only unreasonable and unprofessional, but

also caused more than enough prejudice to warrant relief from this conviction. This requires a reversal.

4th Summary of Argument

The trial court was prejudiced and committed a federal constitutional error which violated appellant's due process when the court excluded appellant's relevant and necessary defense evidence.

Issue

Evidence is "relevant" that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R.Cr.Evid., Rule 401." All relevant evidence is admissible, except as otherwise provided by . . . these rules. . . . Evidence which is not relevant is inadmissible." Tex.R.Cr.Evid., Rule 402. Tex.R.Cr.Evid., Rule 404, generally prohibits "the circumstantial use of character evidence." *Goode, Wellborn Sharlot,* Texas Practice: Texas Rules of Evidence: Civil and Criminal Sec. 404.2 (1988), at 106. Thus, although relevant, "[evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Rule 404(b), supra. Evidence of "other crimes, wrongs, or acts" "may, however, be admissible" if it has relevance *apart from* its tendency "to prove the character of a person in order to show that he acted in conformity therewith.

Rule

" Rule 404(b), supra. Hence, a party may introduce such evidence where it logically serves "to make . . . more probable or less probable" an elemental fact; where it serves "to make . . . more probable or less probable" an evidentiary fact that inferentially leads to an elemental fact; or where it serves "to make . . . more probable or less

probable" defensive evidence that undermines an elemental fact. Rules 404(b) and 401, both supra. Illustrative of the permissible "purposes" to which evidence of "crimes, wrongs, or acts" may be put are "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" Rule 404(b), supra. Extraneous offense evidence that logically serves any of these purposes is "relevant" *beyond* its tendency "to prove the character of a person to show that he acted in conformity therewith." It is therefore admissible, subject only to the trial court's discretion nevertheless to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Rule 403, supra. On the other hand, if extraneous offense evidence is not "relevant" apart from supporting an inference of "character conformity," it is absolutely inadmissible under Rule 404(b). For if evidence of "other crimes, wrongs, or acts" has only character conformity value, the balancing otherwise required by Rule 403 is obviated, the rulemakers having deemed that the probativeness of such evidence is so slight as to be "substantially outweighed" by the danger of unfair prejudice *as a matter of law. United States v. Beechum,* 582 F.2d 898, at 910 (CA5 1978). *Montgomery v. State*, 810 S.W.2d 372, 383-87 (Tex. Crim. App. 1991)

Application

The trial court refused to allow appellant's necessary defense evidence in the record, and ruled all appellant's evidence as inadmissible except for 2 exhibits. This destroyed appellant's defense. Texas rules of Evidence 401 is the test to determine if evidence is relevant. Starting with appellant's Exhibit 4, this evidence was relevant because it makes the state's accusations about the appellant committing this crime less probable than it would've been without the evidence. The judge is required to accept the appellant's offer of relevant evidence for the jury to decide the facts in the case. Finding a piece of evidence to be "relevant" is the first step in a trial court's determination of whether the evidence should be admitted before the jury as "[a]ll relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." Tex.R.Crim.Evid. 402. The new rules favor the admission of all logically relevant evidence for the jury's consideration. See *Crank v. State,* 761 S.W.2d 328, 342 n.5 (Tex.Cr.App. 1988). 28[3] "Relevant evidence means having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."Tex.R.Crim.Evid. 401; Fed.R.Evid. 401. "Relevancy is not an inherent characteristic of any item of

[3]Rule 403 of the Texas Rules of Criminal Evidence provides as follows: "Although relevant, evidence may be excluded if 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."*Crank v. State*, 761 S.W.2d 328, 342 n.5 (Tex. Crim. App. 1988)

evidence but exists as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Note to Fed.R.Evid. 401. As this Court said in *Waldrop v. State,* 138 Tex.Crim. 166, 133 S.W.2d 969 (1940)[4]:Rules 401, 402 and 403 of the Texas Rules of Criminal Evidence are identical in all material aspects to the same numbered rules in the Federal Rules of Evidence from which they were derived.

The State withheld from the jury, the exculpatory evidence which identifies an "outcry" by the alleged victims, accusing someone other than the appellant, for sexually abusing the alleged victim.

Conclusion

This evidence could have been the determining factor of guilt or innocence if properly accepted it into evidence by the Judge. This evidence would have raised a reasonable doubt in the minds of the jurors. Although this Court is not bound by lower federal court decisions, when the Texas Rule duplicates the Federal Rule, greater than usual

[4] "1) [to] show the context in which the criminal act occurred . . .; 2) to circumstantially prove identity where the State lacks direct evidence on this issue; 3) to prove scienter, where intent or guilty knowledge cannot be inferred from the act itself; 4) to show malice or state of mind where malice is an essential element of the State's case and it cannot be inferred from the criminal act; 5) to show the accused's motive; or 6) to refute a defensive theory raised by the accused." *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)

deference should be given to the federal court's interpretations. See *Campbell v. State,* 718 S.W.2d 712, 716 (Tex.Cr.App. 1986); *Rodda v. State,* 745 S.W.2d 415, 418 (Tex.App. — Houston [14th Dist.] 1988, pet. ref'd); *Cole v. State,* 735 S.W.2d 686, 690 (Tex.App. — Amarillo 1987, no pet.) The State Liaison Committee, appointed by the Legislature in 1981 to propose codified rules of evidence, consistently considered the Federal Rules, although it rejected verbatim adoption. Caperton and McGee, *Background, Scope and Applicability of the Texas Rules of Evidence,* 20 Hous.L.Rev. 49, 51 (1983). *Bargas v. State*, 252 S.W.3d 876, 887 (Tex. App. 2008) The jury, as the trier of fact, "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex.Crim.App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex.Crim.App *Bargas v. State*, 252 S.W.3d 876, 887 (Tex. App. 2008) The judge withheld the appellant's evidence which violated the appellant's U.S. and State. Constitutional rights, therefore this is a reversible error.

5th Summary of Argument

Issue:

Did the judge and the prosecutor violate appellant's 14th Amendment of the U.S. Constitution when the judge excluded the appellant's evidence?

The judge and the prosecutor violated appellant's 14th Amendment of the U.S. Constitution when the judge **refused to allow a continuance in order to schedule a hearing to obtain evidence of the State's witnesses CPS records.** [2 RR 23] "Exclusions of evidence are unconstitutional only if they 'significantly undermine fundamental elements of the accused's defense.'" Potier v. State, 68 S.W.3d 657, 666 (Tex. Crim. App. 2002). The defense requested from the court a continuance. [2 RR 5] The judge denied his request. The following is the proof of how the judge and the State together did not follow the rules of evidence regarding the admissibility of appellant's exculpatory evidence. The transcript also proves the State already had in their possession a copy of this evidence on a disk. [2 RR 8]

Rules:

The exclusion of defense evidence did prevent the defendant from presenting a defense and the evidence excluded would have furthered appellant's defensive theory by impeaching the State's "outcry" witness and the state's other witnesses. Pursuant to the rules of evidence, this evidence falls under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). By not allowing these CPS

records to be admitted in the case, this is a violation of appellant's due process. On February 26, 2016, this error was preserved by the defense pre trial when defense counsel filed a written motion titled, "**MOTION FOR EXAMINATION AND INSPECTION OF EXCULPATORY MATERIAL PURSUANT TO BRADY VS. MARYLAND.**" The State did not respond to this motion nor did the State object. Pursuant to the CODE OF CRIMINAL PROCEDURE TITLE 1. CODE OF CRIMINAL PROCEDURE CHAPTER 28. MOTIONS, PLEADINGS AND EXCEPTIONS, Art. 28.01. PRETRIAL, The pretrial hearing shall be to determine any of the following matters:

> 5) Motions for continuance either by the State or defendant; provided that grounds for continuance not existing or not known at the time may be presented and considered at any time before the defendant announces ready for trial.

The State did not timely respond to this motion. The fact that the records requested by the appellant in this motion, is information exclusive of the federal, state, and other agencies acting in conjunction, was unavailable to the appellant, but easily available to the State prosecutor. The prosecutor was aware of the information about the State's witnesses' that was included in this information. In fact the State prosecutor is who gave this evidence to the appellant. The State violated the appellant by his objection to the evidence being admitted into the record, and by not fulfilling his duty to disclose

all these records to the court. The State also violated his rules of ethics by not disclosing this information to the court under exculpatory evidence about the State's witnesses. Due to the State's intentional misrepresentation, and making false statements to the court about this evidence, the defense attempted to acquire his own a custodian of records to authenticate the records were all true. The Texas Rule 902 Evidence that is Self Authenticated, states: items are self authenticating; they require no extrinsic evidence of authenticity. This issue was the very first issue brought to the judges attention on the first day of the trial. [2 RR 4]

> THE COURT: Okay. I have before the Court today a motion for continuance. Counsel, would you like to be heard?
>
> MR. GUINAN: Yes, Your Honor.
>
> THE COURT: Okay. You may proceed.
>
> MR. GUINAN: Your Honor, there -- in this case -- involves among other things during -- I'll start this way. In this case during discovery at least six different case files from CPS were delivered to us through discovery. I did an investigation and found out that all of the caseworkers have -- are no longer with CPS. I believe the Court is familiar with the turnover with CPS. And I made an attempt to serve the designated individual who is the custodian of records so that we could have at least the business records be available to us for court so that we can cross -- properly cross-examine the -- both the mother and one of the outcry witnesses that are critical to this case. I believe you read in the -- you read in our attempt to serve notably those certain persons - trying to serve -- was a 30-year veteran down at the Dallas Sheriff's office and that he knows very much how what he's doing. And I believe that the -- is quite clear that the individual who is designated who I knew was there who my process server figured out was there, ducked out the back door and refused to turn over the

records. Your Honor, I hate filing motions for continuance. I didn't want to continue this case but, Your Honor, a short continuance so that we can get this service taken care of, I will deeply appreciate it.

THE COURT: And, State, have you heard from this witness?

MR. MCMILLIN: I have not, Your Honor. If I may --

THE COURT: Yes.

MR. MCMILLIN: -- just briefly respond. The State -- what I believe the defense is asking for is a custodian of records to stipulate or I guess testify as to the authenticity of the records. I didn't -- do not have -- would not object to that portion of them being business records.The State has other objections as to the relevance and possible hearsay within the hearsay objection within the records themselves. And so, what I would say is that if the Court deems portions of those records to be relevant or admissible, then I don't have any objection to stipulating to its authenticity. And I don't think we need a continuance just for someone to say that these -- that I'm the custodian of records -- or those records.I have no objection to that because we're the ones who provided the defense the records themselves.

The State violated the following Rules of Evidence:

MR. GUINAN: I appreciate that, Your Honor,but it does give the ability to the State to object as to hearsay as to certain statements made within the records, and we believe, Your Honor, that it is necessary to have the custodian of records to be able to fully cross-examine and confront the witnesses that I am talking about.

THE COURT: The witness that you're referring that's mentioned in the affidavit

MR. GUINAN: Ms. Holloway, I believe it is.

THE COURT: Okay. Did she author those records or is she just the custodian?

MR. GUINAN: She's just the custodian. Each one of the individuals who authored the records no longer works for CPS.

THE COURT: Don't know that you would be able to delve into those matters with the -- with that witness anyway; however, in the motion I know the code requires that you tell me what they would testify to. Can you give me some background? And I know the State mentioned, but I don't know what your intentions are.

MR. GUINAN: The records reflect literally a devil's resume of conduct, Your Honor, that we would like to go into involving things that go to directly to the credibility of these witness. And we believe that they would be such that the -- that the record's custodian would be able to provide us a clear foundation and the ability to avoid hearsay objections, which we would need to get around in order to make -- to make --to be able to make our case and defend my client and to fully confront these witnesses. She, obviously, as custodian of the record

has no factual knowledge except that she can testify as to the records, and she will eliminate certain objections that the State would have concerning those -- those records.

THE COURT: Let me see the records.

MR. GUINAN: I have them in my car, Your Honor. I have hardcopies. I can bring them up.

THE COURT: State, do you have --

MR. MCMILLIN: I have it on a disk.

THE COURT: Okay.

MR. GUINAN: They are rather voluminous, Your Honor, close to 500 pages.

THE COURT: Well, I'd like to see them because I don't -- you know, I don't know. State, are you gonna object to them in their entirety? Or --

MR. MCMILLIN: Well, I'm -- certain records that -- you know, that CPS generates in their ordinary course, I believe is fine. I -- if he's trying to elicit secondary, out of court, statement made that was heard by one of the caseworkers, that's where we're making the hearsay within hearsay objection. And that's where I don't think the custodian can alleviate any of those. He needs the actual person himself to testify. The business record exception doesn't apply to statements within, you know, the document itself. And also we're going doing down a road here of character evidence that I believe we're gonna have a relevance objection as well. And so if the Judge -- if you deem those admissible, I mean, the custodian of records is merely laying the predicate that we're willing to stipulate to you if the Judge -- if, Your Honor, where to find that admissible.

THE COURT: I'm going to set you-all for a hearing on those records. 'Cause this isn't something that I'm gonna have a panel waiting for anyway. I'll set you-all this Friday for this hearing.Actually, Mr. McMillin, are you the number one prosecutor on my trial?

MR. MCMILLIN: Yes. And, Your Honor, the reason we're protesting this continuance is the number one case has some issues that me and Mr. Schopmeyer would like to discuss. Considering these offenses occurred in the summer of 2012, we'd really like to have this case heard this week.

THE COURT: And you-all tried to serve her a week ago?

MR. GUINAN: Last week, yes, Your Honor. And I will say the conduct with the CPS in this matter I find rather offensive given the circumstances, Your Honor. And I address this to the Court as much to the Court's dignity. And how they respond to what would be effectively be your court order. But, Your Honor, we need the records, and this is a bond case. My client has dutifully shown up with prior counsel. And, again, I hate filing motions for continuance but I'm only asking for a short one, Your Honor.

THE COURT: Stand by. I'll let you know what my decision is. In the meantime, Counsel, you may want to go get those hard records.

MR. GUINAN: I'll be happy to, Your Honor.

(Off the record)

THE COURT: Let's go back on the record on Derrick Sullivan. All right. So I've read over the motion and the affidavit again and asked some additional questions off the record that I'm gonna clarify on the record. I asked if the actual author of the statements that the State presents to the Court as hearsay, if counsel had subpoenaed the author of those statements. And, Counsel, your response was no, that they are retired. And the Court did inquire you need to have gotten a subpoena application for an address unknown and done a -- oh, I forget what the check is called. Where you can find out where a person last received a check. You know, the State of Texas has this database that is available to investigators where you can find out essentially people's tax information, and then, therefore, find out where they work. That was not done. So you would have been left with the custodian anyway that you-all attempted to serve a week before trial. On the face of the motion, I'm gonna have to deny it based on the arguments made by both counsel.

Rule:

The judge committed error by denying and excluding these records. Pursuant to 902 3(b), it states: (B) If Parties Have Reasonable Opportunity to Investigate. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: (i) order that it be treated as presumptively authentic without final certification; or 54 (ii) allow it to be evidenced by an attested summary with or without final certification.

The fact that these records were given to the appellant by the State, should

verify the authenticity of these records.

Application::

The appellant did not receive a fair trial absent the admission of this evidence. These records were critical to the appellant's defense because they prove the State's witnesses, Tammy Punt, Regina Punt, Ryan Hester, and Theresa Franks all have criminal histories. These records contained critical information, which legally is exculpatory evidence, that suggests these alleged victims were exposed to drugs, pornographic material, as well as identifying a man who the family barely knew who baby sat the girls by himself around the time allegations were made that they were sexually assaulted by people other than appellant. "Exculpatory" information is information "of a[ny] kind that would suggest to any prosecutor that the defense would want to know about it." *Miller*, 14 A.3d at 1110[5]. It typically refers to information that in itself, tends to reduce the likelihood of guilt or bears favorably on culpability or some other component of punishment.

Conclusion:

[5] At least in the abstract, it is easy to articulate what constitutes "favorable" information subject to disclosure under Brady. It is information "of a kind that would suggest to any prosecutor that the defense would want to know about it" because it helps the defense. See Miller, 14 A.3d at 1110

Both the prosecutor and the judge have duties to allow this evidence into the trial and to be presented to the jury. When the courts deny and excludes the defense's right to impeaching evidence, this violates the US Constitution, and the State Constitution. The foundation of Brady is part of [the Constitution's] basic 'fair trial' guarantee. See *United States v. Ruiz*, 536 U.S. 622 (2002).[6] The records of the CPS investigations admitted by the appellant should have been allowed in as appellant's evidence and sent to the jury during deliberation. This falls under exculpatory evidence which would have impeached the state's witnesses and caused the jury a reasonable doubt as to the credibility of the State's witnesses. When an error, such as this, impacts in a strong negative way on the appellant's theory of the case, a reversal should be the result. The judge stated there would be a hearing of Friday, yet this hearing never took place. By the judge not following through and granting the continuance, this impacted the appellants theory, because if the CPS evidence would of been presented to the jury, then the facts about the State's witnesses would of been disclosed which would of given the jury a reasonable doubt about the credibility of these witnesses. The remedy to this violation is to reverse the conviction.

[6] " Among other things, it specifies that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the defendant," and it acknowledges the Government's "continuing duty to provide such information."" *United States v. Ruiz*, 536 U.S. 622, 625 (U.S. 2002)

6th Summary of Argument

The trial court committed prejudicial error by allowing the state to offer false evidence of extraneous offenses, and falsely accused appellant of being arrested for committing criminal offenses he never committed.

Issue

TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(b)(1), (2) (West Supp. 2016) (emphasis added). Before a trial court can admit such evidence, it must first, "determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt,"14 and then "conduct a hearing out of the presence 14 Initially, the trial court informed the parties that it would not include a "reasonable doubt" instruction in the jury charge. A review of the record, however, reflects that it did, in fact, include the instruction, stating, You cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other crimes, wrongs, or acts against the child, if any, and even then you may only consider the same in determining its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child, and for no other reason. 13 of the jury for that purpose." In this case, the trial court held the appropriate hearing before the commencement of trial and determined that the complained-of extraneous-offense evidence would be admitted.15 Aguillen contends that Article 38.37 of the Texas Code of Criminal Procedure does not address a defendant's

nonsexual acts committed against persons other than the complaining witness. Article 38.37, Section 1, carves out an exception to Rule 404(b), but it does so in relation to a defendant's extraneous bad acts against the victim in the case, not against others. The State maintains, however, that at least two courts have allowed such evidence, citing to Jones v. State, 119 S.W.3d 412, 420–21 (Tex. App.—Fort Worth 2003, no pet.),16 and Joseph v. State, No. 01- 15In addition, "The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 no later than the 30th day before the defendant's trial." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 3 (West Supp. 2016). In this case the Notice that was filed by the State, had false offenses that the appellant had never committed nor had he ever been accused of these extraneous offenses. The appellant filed an objection and this objection was not argued until the day of trial. The appellant argued that he The State argued that the evidence was admissible under Article 38.37 because it had a bearing on relevant matters, including that it was necessary in order to show Jones' and the victim's states of mind and to explain their prior relationship. Id. The appellate court agreed with the State, reasoning, Here, it would have been extremely difficult for the girls who testified to separate [the defendant's] actions toward [the victim] from his actions toward them because his actions and words were directed at all the girls simultaneously. Even if the girls could have somehow distinguished [the defendant's]

conduct toward the group from [the defendant's] conduct specifically toward [the victim], this distinction would have given the jury an inaccurate picture of [the defendant's] relationship with [the victim]. Accord Wyatt v. State, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000) (indicating jury is entitled to know all relevant surrounding facts and circumstances of charged offense). [The defendant's] prior relationship with [the victim] was developed through group activities that included [the other girls]. Their testimony was relevant to give an accurate picture of [the defendant's] prior relationship with [the victim]. 14 02-01109-CR, 2004 WL 637924 (Tex. App.—Houston [1st Dist.] Apr. 1, 2004, pet. ref'd) (mem. op., not designated for publication).17 Notably, the holdings in Jones and Joseph were decided before the Legislature's amendment to Rule 38.37. In 2013, Sections 2 and 2-a were added to Article 38.37 to allow "evidence of other sexual-related offenses allegedly committed by the defendant against a child to be *admitted in the trial of certain sexual-related offenses for any bearing the evidence has on relevant matters." Bradshaw v. State, 466 S.W.3d 875 (Tex. App.— Texarkana 2015, pet. ref'd) (quoting House Comm. on Criminal Procedure Reform, Select, Bill Analysis, Tex. S.B. 12, 83d Leg., R.S. (2013)). Section 2(b) states,*

The failure to fulfill the prosecutor's duties to disclose violate ethical rules. Rule

3.04(a). This rule bars the State prosecutor from "unlawfully" obstructing another party's access to evidence, which is what the State has done against the appellant by not allowing this evidence to be admitted. Rule 3.04(e) admonishes a lawyer not to request a person to refrain from voluntarily giving relevant information to another party. Rule 4.01(a), which prohibits an attorney from knowingly making false statements of material fact or law to a third person. Rule 8.04(a) prohibits a lawyer from violating any of the State Bar rules and prohibits him or her from engaging in conduct constituting the obstruction of justice or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

1) Pursuant to Texas Rules of evidence, character evidence is generally inadmissible under Rule 404. 2) Evidence of other crimes or wrongs is the most damaging character evidence is inadmissible. Therefore, evidence of other crimes or wrongs must be closely scrutinized. 3) The evidence must be offered for a proper purpose, that is, to prove a material fact in issue and not to prove bad character or propensity. 4) The test for admissibility under Rule 404(b)[7] is whether the evidence is logically

[7] "[T]he protection against unfair prejudice [associated with the introduction of extraneous offense evidence under Fed.R.Evid. 404(b)] emanates . . . from four sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 — as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, see Advisory Committee's Note on Fed.R.Evid. 404(b) . . .; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered

relevant under Rule 401 to the purpose for which it is offered, not whether the extrinsic bad conduct is “similar” to the crime being tried. 6) Even if the evidence is relevant and admissible under rules 401 and 404, strong policy reasons exist in every case for keeping it out under the Rule 403 balancing test. The weight on the prejudice side of the scale is greater than with other kinds of evidence. 7) In close cases, the defendant wins.

The appellant filed a written objection to the State's NOTICE OF EXTRANEOUS OFFENSES evidence under Rules 401, 402, 403, and 404(b). In the written objection appellant stated if the court overruled his objection, the court shall prove how such evidence has relevance other than the character of appellant or suggesting that he acted in conformance with a criminal propensity. *See Montgomery vs. State,* 810 S.w.2d 372 (Tex. Crim. App. 1991).[8]

During the pretrial hearing, defense attorney Guinan also orally objected to all extraneous evidence. [2 RR

> MR. GUINAN: I understand, Your Honor. I object because I believe that they are not relevant to the case. And I believe that they have not established

only for the proper purpose for which it was admitted." *Huddleston,* 108 S.Ct. at 1502) (footnote omitted). *Montgomery v. State*, 810 S.W.2d 372, 381 n. (Tex. Crim. App. 1991)

[8] “"The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause."” *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)

> sufficient predicate as extraneous offense to be used as an extraneous offense during the case-in-chief. We also believe -- I do also believe that the use of these cases -- the use of these offenses in concert with one another is unconstitutional. I would argue that the case law has now been -- beyond a doubt that I believe that using multiple defenses to convict an individual at one time in this -- in this manner is unconstitutional. [3 RR 8]

The judge denied Guinan request regarding 404(b). [3 RR 11] The judge stated:

> COURT: Because when the court of appeals reads my record, I want to be sure that I was speaking to whatever matter you guys were talking about. So right now I'm still on 404(b) notice with all the offense that are charged, the current pending offenses that we're trying.
>
> COURT: Okay. So as to that, based on your response, Counsel, I'm denying your request regarding 404(b).

This violated appellant's Fifth, Sixth, and Fourteenth Amendments to United States Constitution, Article 1, Sections 10, 13, and 19 of the Texas Constitution, and Articles 1.04, 1.05, and 1.051 of the Texas Code of Criminal Procedure. After the judge heard the State's witness Tammy Punt, the Judge made the following ruling on the extraneous evidence:

> THE COURT: As to the State's request to discuss appellant's sexual tendencies, the evidence as presented. That request is denied. As to mentioning of the computer. Based on the testimony provided to the Court, that request is denied. Now if it comes up if -- State, if you think they've opened the door or some information they provided would cause the information that the jury is receiving to be unclear, then you let me know and we'll address the issue again.[3 RR 32]

Later in the trial, when the State used the extraneous offenses, questioning the state

witness Tammy Punt, Guinan the defense attorney objected and the Judge overruled. Guinan objected to McMillan's questioning and the judge acted against her previous ruling [3 RR 55] by allowing the State to use the unproven extraneous offenses during the case in chief and during the punishment hearing. This proves a pattern that the court was bias.

The judge caused damage to the appellant's case by not scrutinizing the extraneous offenses first to see if the alleged offenses passes the test. These false allegations by the State about these criminal extraneous offenses created a false impression to the jury, falsely claiming the appellant has previously committed criminal offenses involving "dark web child pornograpy" related activity, and domestic violence. "It is well settled that an accused may not be tried for some collateral crime or for being a criminal generally. For this reason, the courts have generally prohibited the introduction of testimony about extraneous offenses . . ."The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause." See *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)

Application

The prosecutor's constitutional duty to learn of favorable information also extends to

learning whether the information is factual. The extraneous offenses the prosecution used, he knew were false. This was a deliberate action to discredit the appellant. Pursuant to the State's continual reliance on false testimony and a false confession, this violated the appellant's due-process rights to a fair trial. The State misstated critical facts when it argued that the appellant was hiding his laptop computer from the police. The State misstated critical false facts when it argued that the appellant was involved in "deep web' and "bitcoin" child pornography activities on his computer. The State had no evidence to support these false accusations other than the testimony of State's witness Tammy Punt. The State also created a false history of violence by claiming the appellant's sexual nature would turn violent when he was refused sex. The defense objected to this false testimony and the judge contributed to this violation when she overruled. *See Miller v. Pate,* 386 U.S. 1, 4-7 (1967)[9] (finding due process where State presented false testimony and emphasized false testimony); See *State v. Bass*, 465 S.E.d 334, 338 (N.C. 1996) (reversing conviction where the prosecutor misleadingly argued to the jury that the child sex victim would not have known about sexual activity but for the defendants alleged abuse, when the prosecutor was aware

[9] More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U.S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois*, 360 U.S. 264; *Pyle* v. *Kansas*, 317 U.S. 213; cf. *Alcorta* v. *Texas*, 355 U.S. 28. There can be no retreat from that principle here *Miller v. Pate*, 386 U.S. 1, 7 (U.S. 1967)

that the contrary [was] true."

Conclusion:

In appellant's case, the prosecutor knew that there was no proof of child pornography on the appellant's laptop, nor had the appellant ever been charged with this type of criminal offence, yet the prosecutor filed a false and misleading "Notice of "Extraneous Offenses" into the case record, knowing this was false. The prosecutor also used this against the appellant during the trial as well as the punishment phase, all of which violated the appellant's rights to a fair and just trial. This denial and errors by both the judge and prosecutor is a reversible error because the false offenses the appellant was accused of committing, was so prejudicial, that its harmful effect could not be removed even if the judge would have given instruction to disregard, which never happened. The State filed a Notice of Extraneous Offenses that includes a list of 5 offenses from 2007 to 2014, which the State attributed to the appellant. The non confrontational assertions in this record prepared in anticipation of litigation is inadmissible under the Confrontation Clause of the Sixth Amendment. See *Melendez - Diaz,* 129 S. Ct. at 2532 (applying Crawford, 541 U.S. at 540. See also *Smith v. State*, 279 SW3d 260, 276 (Tex,Crim.App.2009) Finding assertion of unconfronted testimonial hearsay in the Notice of Extraneous Offenses violates the Confrontation

Clause.

Additionally, the trial court violated appellant's right to due process of law failing to follow black-letter Texas procedure. *Logan* 455 U.S. at 432-34; U.S. Const. amends. V, XIV. Moreover, the court violated appellant's Eighth Amendment to a fair and reliable punishment phase because the State's proof of offenses that falsely accused appellant of "dark web" computer related criminal actions, and using his sexual tendencies to make him dangerous, proves the State's case is weak. The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause."" *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1991)The erroneous introduction of these offenses could well have made the difference between guilty, or not guilty, and a difference between 3 years or 20 years. The error was not harmless under any standard. This is a reversible error.

7th Summary of Argument

The trial court erred by allowing out of court hearsay testimonial statements by declarants against the defendant at his criminal trial, which violated the appellant's Eighth Amendment of the U.S. Federal constitution, which is barred by the Confrontations Clause of the Sixth Amendment.

Issue

The Supreme Court of the United States ruled in *Crawford v. Washington,* 541 U.S. 36 (2004) holding out of court hearsay testimonial statements by declarants are barred under the Confrontation Clause of the Sixth Amendment from admission against the defendant at his criminal trial unless : (1) the declaring appears before the witness in trial or (2) the declaring regarding the out of court statement, irrespective of whether such out of court statement is deemed reliable by the trial court. In defining the Supreme Court held, " Whatever term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. See *United States v. Delgado*, 401 F3d. 290 (5th Cir. 2005)

The Sixth Amendment's right of confrontation is one of the fundamental guarantees deemed essential to the type of due process necessary for the protection of life and liberty. The judge destroyed the appellants opportunity to defend himself by overruling the defense's objections, and allowing the State's witness to use hearsay. The defense attorney Guinan filed a written MOTION TO STRIKE STATEMENTS OF UNAVAILABLE STATE WITNESSES pretrial. The state did not object. The controlling law cited in the motion is *Crawford v. Washington,* 541 U.S. 36 (2004). This motion to strike was directed towards the false allegations of events that took place in 2009 through 2014. The State ignored the Motion to Strike and the Judge allowed Tammy Punt's hearsay testimony about what Ryan Hester "said" during the

trial. These statements are not admissible and are considered hearsay, yet the court allowed the testimony. [3 RR 72] The court allowed Tammy Punt, Regina Punt and Theresa Franks to testify about the out of court statements of the complainant Ryan Hester, without the appellant's ability to cross examine Hester at trial. [3 RR 73] This is a violation of appellant's due process and his right to confront his accusers. This right is protected and statements should not be admitted unless those witnesses were made available at the time of trial. Sexual abuse allegations, especially those by children, are easy to make and even easier to prove in a court of law. Since the appellant is facing a sexual assault charge he should have a clear statutory right to impeach his accuser's accusations and the alleged victim's testimony. A person should not be convicted, sent off to prison, and become a registered sex offender for life based solely on a victim's testimony when it can be shown that the adult accusers are all related family members who have a criminal history of prostitution, drug abuse, and prior CPS investigations of child abuse. The jury should hear State witnesses history in order to properly weigh the State witnesses credibility, and the alleged victim's credibility See [3 RR 72] The defense attorney objected and the judge overruled, allowing the jury to hear hearsay testimony. [3 RR 74].

The court: OVERRULED

THE WITNESS: Ryan Hester told me on the phone while I was at my parent's house and Derrick and I were ---

MR. GUINAN: I object to the answer containing hearsay, Your honor.

The Court: Objection -- excuse me. Objection overruled, Counsel.

Q. By Mr. McMillan: Ms. Punt, you can continue.

A. Thank you.

The State's witness continued answer using hearsay, and the defense objected again, this time demanding the judge to give a ruling from the court. [3 RR 72]

The judge stated:

THE COURT: Who did you learn the allegations from was the question. That is overruled Counsel.

MR. GUINAN: Okay then nonresponsive

THE COURT: Overruled

THE WITNESS: Ryan Hester told me on the phone while I was at my parents house and Derrick and I were --

MR. GUINAN: I object to the answer containing hearsay, Your Honor.

THE COURT: Objection -- excuse me. Objection overruled, Counsel.

This type of questions and hearsay answers continued. The defense attorney then objected again to hearsay when the State witness said: *"This is when I started to build a relationship with her, and she said that this happened to her and that's when I knew that something happened."* [3 RR 76] The judge then told the attorneys to come to

the bench and she instructed the jury panel to be removed from the court.

Conclusion

The Confrontation Clause's mandate is violated when an accused right to cross examine a witness on any matter relevant to the accusation is restrained. It is only through full and fair cross examination that defense lawyers can probe and expose faulty, confusing or evasive testimony. Any rule that limits this robust testing of the evidence, especially in sex crimes involving children where defendants are often "presumed" guilty, is contrary to the spirit and letter of the Constitution. If this evidence and information was allowed during the trial, the jury would have had a different opinion of the credibility of the State's witnesses which would have caused a reasonable doubt. This is a reversible error.

8th Summary of Argument

The trial court violated appellant's Federal Constitutional rights to the effective assistance of counsel, due process and due course of law, in accordance with the 5th, 6th, 14th, Amendments to the United States Constitution, Article 1, Sections 10, 13, and 19 of the Texas Constitution, and Articles 1.04. 1.05 and 1.051 of the Texas Code of Criminal Procedure by intentionally obstructing appellants justice by not allowing appellant's exculpatory evidence and Brady material as evidence into the record, this violated appellant's due process.

Issue

The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused.... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith prosecution." The prosecution team must disclose this information "at such a time and is such a manner as to allow the defense to use favorable material effectively." The due process obligation under Brady to disclose exculpatory information is for the purpose of allowing defense an opportunity to investigate the facts of the case, with the help of the defendant, craft an appropriate defense.

The State assistant district attorney Shelly Fox did follow her duties of the disclosure of Brady information. In January of 2014, the appellant was informed about the interview. During this interview, Mrs. Fox took handwritten notes about the statements the alleged victims stated. Prosecution, John McMillin, failed to disclose the original hand written interview by Shelly Fox at pretrial, unaware that appellant and his mother viewed the document in Bill Wirskye office in January, 2014, as disclosed by Shelley Fox shortly after her interview with the alleged victims BH and KH. During the pre trial hearing on September 12, 2016, the state did not allow the defense to use the Brady evidence favorably to the appellant. The appellant requested

the Brady disclosure of the District Attorney Shelly Fox's handwritten interview notes that documented a confession BH and KH were "coached" and told to say these allegations against the appellant, as well as Tammy Punt's knowledge and consent of the alleged abuse. This should've been allowed to be presented at the beginning and throughout the trial to impeach the witnesses. Defense attorney requested the judge to allow him to present the handwritten notes as evidence to be admitted. In response to the appellant's request, Mr. McMillin failed to provide a copy of the hand written interview after numerous requests by defense. Instead Mr. McMillin provided a typed "summary" of the interview, that left out several statements that prove the defendant's defense, including the statement that B.H and K.H were told to say the allegations. After defense counsel alerted Mr. McMillin the handwritten interview notes had previously been viewed, he produced and handed the original handwritten notes to the appellant's attorney. The appellant and his mother in court verified the handwritten notes he presented were the correct handwritten interview notes from the assistant District Attorney Shelly Fox. The defense counsel asked the judge to admit the handwritten interview into evidence. The appellant assumed the State followed the judge's instruction and entered the handwritten notes into the official case trial record as Defendant's exhibit 8.

During the trial, the defense attorney Mr. Guinan requested a sidebar and the judge instructed both attorney to come up. [3 RR 170] Mr. Guinan stated the following: [3 RR 171]

> Mr. GUINAN: This all comes down to the Brady Material that I want to try to get --I want to get it in some way. and I'm trying to get an agreement from the prosecution and we haven't gotten one yet. And so I'd like to do is see if we can figure out that, and I don't have to recall this witness or any other (unintelligible) witnesses as long as I can get the Brady material in.
>
> MR MCMILLIN: Well, you've said, did you make the statement? So I think you've covered that. What we want to do is if we're going to do the stipulation, we want to make sure that those statements have been denied at first.
>
> MR. GUINAN: Okay. That's fine.
>
> MR.MCMILLAN: And I think that is something we can do overnight.
>
> MR. GUINAN: I understand.

Rule

The state has committed a federal constitutional error by excluding the Brady material which was highly relevant and necessary to the defense. "Those defendants were effectively precluded from presenting a defense at all. We hold that the exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from

presenting a defense." *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002) *See also Rock v. Arkansas* (1987) 483 U.S. 44, 53-56.) This violated the appellant's rights by withholding the Brady material during the trial. The court continued to delay the defense's ability to present and use the Brady disclosure to impeach the witnesses. In *Chambers v. Mississippi* (1973) 410 U.S. 284, illustrates this principle. There the defendant sought to admit a confession made by a third party. Under state law, the confession was inadmissible under the hearsay rule. Notwithstanding this well established state rule, the Supreme Court held the exclusion of the confession constituted a violation of the due process clause. The Brady information has the proof of the state witnesses confessing that they were told what to say about the appellant. This Brady material is critical to the appellant's defense. This evidence would have caused a reasonable doubt about the credibility of all the state witnesses if the original Brady evidence was admitted. This record shows that substantial error infected the proceedings.

Application

Appellant was denied a fair trial under the federal due process clause. Under *People v. Watson* Supra. 46 Cal.2d 818, reversal is warranted for any error which undermines confidence in the result of the trial court proceedings. Under Article VI section 13 of the Constitution, a judgement may not be reversed on appeal absent a showing that an

error resulted in a miscarriage of justice. As interpreted by the Supreme Courts this provision means that a reversal may not be awarded absent a showing "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *(People v. Watson supra,* 46 Cal.2d.818,836.) The State has committed prosecutorial misconduct by withholding the defense from presenting unadulterated original Brady material during the trial. The judge has committed judicial misconduct by abusing her discretion of sustaining the State's objections towards the defense's attempts to impeach the State's witnesses. Both of these errors could have been avoided had the State and court followed the law and admitted the correct unadulterated original Brady disclosure. Post conviction after review of the trial record, the defense discovered the State did not admit the original handwritten notes as exhibit 8. These handwritten notes were suppressed and kept from the jury and removed from the defendants exhibit 8 and replaced with an incorrect typed version that excluded the statements made by the witnesses. This evidence that was altered and statements that were removed is legally considered Brady disclosures. The hand written Brady disclosure evidence, in its original unadulterated form, was never returned to the defendants exhibit 8 case file by the judge or the prosecutor. This is a direct violation by both the State, and the Judge against the appellant. This type of action by the judge and the prosecutor is actually

criminal. The Texas Penal Code § 37.10. TAMPERING WITH GOVERNMENTAL RECORD.

(a) A person commits an offense if he:

(1) knowingly makes a false entry in, or false alteration of, a governmental record;

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;

(3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;

(5) makes, presents, or uses a governmental record with knowledge of its falsity; or states that anyone who tampers, conceals or alters an official court document, has committed a felony.

Conclusion:

As interpreted by the Supreme Court a reversal may not be awarded absent a showing *"*that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *(People v. Watson supra,* 46 Cal.2d.818,836.) This applies to this case at hand. It is highly probable that a result more favorable to Sullivan would have been reached in the absence of the error. In this case, the facts prove the error committed by the court and the State, actually is a criminal offense of tampering with the appellants Brady evidence. If the State and the

court had not tampered with the appellant's evidence and the jury reviewed the proof of the original handwritten notes, then they would of had a reasonable doubt and found appellant not guilty.

9th Summary of Argument

The judge erred by violating her rules of ethics and conduct by making cumulative bias and disparaging statements in the presence of the jury throughout the entire trial:

Neutrality is required during the entire trial, not just the charge conference. *Russell*, 90 N.C. App. at 680; Saintsing v. Taylor, 57 N.C. App. 467, 472 (1982). "Juries entertain great respect for [the judge's] opinion, and are easily influenced by any suggestion coming from him. As a result, he must abstain from conduct or language which tends to discredit or prejudice (any party) or his cause with the jury." *Searcy*, 20 N.C. App. at 561. The judge's actions were prejudice, and "the effect upon the jury was determinative." Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103 (1984).

The "cumulative prejudicial effect" of the comments and the judges behavior, happened when the judge openly complimented an juror about her hair do," See McNeill v. Durham City ABC Bd, 322 N.C. 425, 429–30 (1988). The judge also became frustrated with the appellant and his family when they were emotional, the judge threatened the appellants and his witnesses to remove them and impeach their testimony if they do not stop " With further "sharp remarks," the statement "tended to discredit defendant's' counsel, and hence their cause, in the eyes of the jury." See Board of Transp. v. Wilder, 28 N.C. App. 105, 107–08 (1975); *see also* Worrell v. Hennis Cred. Union, 12 N.C. App. 275, 279 (1971) (judge sustained own objections to

ten defense questions, struck defense testimony on own motion, and displayed "antagonistic attitude" toward defendant).

Rule4:

The test is not whether the plaintiff has proved harm but rather the court's comments and behavior would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal. These behaviors by the judge prove cumulative bias, prejudice, and are in violation of the judge's ethical and professional rules of judicial rules of conduct.

An independent judiciary is essential to maintaining the rule of law. Judges should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions. Judges also must explain their decisions in public written opinions, and their decisions can be appealed to a higher court for review. The judge has a duty to maintain impartiality. Violations of this duty are so serious as to constitute a reversal. Appellant's right to a fair trial presides over a fair and impartial judge. The Judge in this case became

embroiled in the proceedings, assumed the role of a prosecutor, made disparaging remarks, considered matters not in evidence, formed an opinion in trial court before the defense presented the defense, and/or exhibited clear bias and prejudice. The list below is not fully complete, but gives good overview of violations that took place throughout the appellant's trial. The trial transcript has been edited by the court, and many of these instances will not be found in the transcript. Therefore it is necessary to have the audio record of the trial available to confirm and verify these issues actually took place. The following comments and actions by the judge are reversible per se:

A. The judge told appellant's family and appellant they were not allowed to cry.

B. The Judge threatened to impeach the defense witnesses if they continued to show any emotion. (this has been removed from the transcript, therefore please review the trial audio to hear the proof)

C. The judge called out the appellant and told him he would be removed from the courtroom if he continued to show emotions.

D. The judge told the witnesses they were not allowed to ask the jury for mercy on sentencing. [7 RR 87] 1-4

E. The judge knowingly lied to the jury about the State witness Regina Punt's criminal history, falsely claiming to the jury she was never convicted.

F. After State witness Tammy Punt slipped during her testimony, the judge then stopped the testimony and removed the jury panel from the court so the Judge could speak directly to the state witness.

G. The Judge instructed State witness Tammy Punt not to discuss the criminal background or the CPS investigations involving her sister. Tammy Punt apologized and obeyed the judges instructions.

H. The Judge threatened to impeach the defense witness Susan Miller and not allow her to testify because the Judge did not like the way the defense witness was answering the questions.

I. The judge sent the jury out multiple times during Susan Miller's examination to reprimand both the defense attorney and defense witness.

J. The judge threatened the defense witness with impeaching her if she did not stop with her behavior.

K. The judge threatened defense attorney with jail if he did not get control of his witnesses.

L. The judge sent the bailiff to stand next to the appellant's witnesses to intimidate and create a false impression about the witnesses.

M. The judge reprimanded the defense witness in front of the jury

N. The judge was working on other cases and allowed interruptions during the trial.

O. On multiple occasions during the trial the judge spoke to the witnesses directly after removing the jury from the court, to control what was going to be allowed in as testimony and what the judge did not allow, regardless of the rules of evidence.

P. The judge committed fraud by altering and tampering with the appellant's exhibits.

Q. The judge deceived the appellant by giving the false impression that she filed the original Brady evidence into the appellant's exhibit file.

R. The judge has committed fraud by replacing this case file with a adulterated version of the trial transcript.

S. The judge gave compliments to a jury member about her hair style.

T. The judge refused to allow the defense attorney to state on the record the law, claiming he is making her look bad in front of the jury.

U. The judge made the comment to the State witness that the judge felt uncomfortable when the State witness mentions her sisters criminal record and past CPS Investigations.

V. This judges deputy clerk refuses to release a copy of the audio recording of trial proceedings to the appellant.

The judge's actions were prejudice, and "the effect upon the jury was determinative.

A reversal is required.

10th Summary of Argument

The judge was prejudiced and committed egregious error when she issued a jury charge that did not require the jury to reach an unanimous verdict, then refused to declare a mistrial?

Issue

The presumption of prejudice approach is consistent with the Texas Const. Art. 1 which provides in pertinent part, pursuant to the rules of criminal procedure, when a jury can not reach a unanimous verdict, it is the duty of the judge to declare a hung jury and call for a mistrial if they so choose. The judge disabled the jury's ability to conclude a unanimous verdict. During the Jury Charge Conference, the attorney for the state asked for a definition of the phrase "on or about" to be included in the jury charge. [5 RR 4-7]. The trial court rather than read all three charges combined them into a hybrid jury charge. [5 RR 9-14] The trial court told the jury:

> COURT: [t]here are three specific complaining witnesses in each cause. A majority of the charges apply to all three causes; however, there are three distinct portions that apply individually to each individual cause number. So I'm gonna read them in conjunction. (Emphasis added).
>
> COURT: You'll get the entire charge for each number, but it would waste your time if I read three separate charges, okay?

The trial court then combined the three charges and read that hybrid charge to the jurors. [5 RR 9-17].

The judge acted in prejudice and did not accept the jury's request for a mistrial. The

eighth note the jury sent to the judge stated:

> "We the jury, have a disagreement on the 2 counts of three. We, the jury, are not able and cannot come to an unanimously -- unanimous agreement."

The judge did not accept the fact that the jury could not come to an agreement.

The judge read her answer which stated:

> "I am not satisfied that you have not deliberated sufficiently. In good conscience at this moment, I cannot accept any report that you are unable to arrive at an agreement. Accordingly I return you to your deliberation." [6 RR 11]

The judge called the jury back in the court, and requested an extra chair for the second alternate. [6 RR 11] The judge then stated: [6 RR 12] 4

The jury sent a total of 8 questions to the judge, which proves the jury struggled. The evidence was limited to only the State's evidence.

Rule

The jury can find the evidence factually insufficient in two ways. First, when considered by itself, the evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. Second, after weighing the evidence supporting the verdict and the evidence contrary to the verdict, the contrary evidence may be strong enough that the beyond-a-reasonable-doubt standard could not have been met. *Richardson v. State, 14-04-00764-cr (tex.app.-Houston [14th Dist.] 2006)*, No. 14-04-00764-CR (Tex. App. Apr. 20, 2006) The fact that the jury told the judge

they could not come to an unanimous verdict proves the evidence was too weak for the jury to find the appellant guilty. First the court needs to determine whether the charges were erroneous, by allowing for the possibility of non-unanimous verdicts, as held by the majority of the court of appeals. Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged."

Application:

There are several ways in which non-unanimity issues arise, and in this context, based on the court's precedent, they have recognized three variations that may result in non-unanimous verdicts as to a particular incident of criminal conduct that comprises the charged offense. Non-unanimity may result in each of these situations when the jury charge fails to properly instruct the jury, based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous. *See Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011)[10] In *Richardson*, as in the present case,

[10] Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged." There are several ways in which non-unanimity issues arise, and in this context, based on our precedent, we have recognized three variations that may result in non-unanimous verdicts as to a particular incident of criminal conduct *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011)

it is not enough that the jurors might be convinced beyond a reasonable doubt that the defendant committed "a series of violations in concert with others," it must be unanimous about each specific violation that it found the defendant had committed.

Application:

The appellant's evidence, which was Brady and exculpatory evidence, the judge did not allow nor was presented to the jury. The Judge only allowed After 2 days of deliberation, the jury asked the judge for a mistrial and the judge's response was that she would keep them until 7:00 pm if she had too. The total actual trial duration was shorter than the time the jury took to deliberate.When this occurs and the jury deliberated longer than the evidentiary phase of the trial, a reversal should be ordered. *See LeMons v. Regents of University of California* (1978) 21 Cal.3d 869. After 2 days of deliberations, the jury vote was 9 innocent and 3 guilty. The jury was deadlocked. Also during this phase of the trial, the judge was involved in a different trial's jury selection, and explained to the panel that there may be some delays. [6 RR 11-12.] The Supreme Court explained that a federal criminal jury must unanimously agree on each "element" of the crime in order to convict, but need not agree on all the "underlying brute facts [that] make up a particular element." Under the Almanza

standard, the record must show that a defendant has suffered actual, rather than merely theoretical, harm from jury instruction error. Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." Appellant argues that he suffered actual harm from the faulty jury instruction and that he was, in fact, deprived of his valuable right to a unanimous jury verdict.

Ngo v. State, 175 S.W.3d 738, 750 (Tex. Crim. App. 2005)The crucial distinction is thus between a fact that is a specific *actus reus* element of the crime and one that is "but the means" to the commission of a specific actus reus element. *Richardson* is precisely analogous to the present *Ngo v. State*, 175 S.W.3d 738, 747 (Tex. Crim. App. 2005)[11]

Conclusion:

The jury, as the trier of fact, "**is the sole judge of the credibility of the witnesses and of the strength of the evidence.**" *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex.Crim.App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex.Crim.App.

[11] "Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases." *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005)

1986).

Allen charges are proper ‘in all cases except those where it’s clear from the record that the charge had an impermissibly coercive effect on the jury.’" *United States v. Banks,* 514 F.3d 959, 974 (9th Cir.2008) (quoting *United States v. Ajiboye,*961 F.2d 892, 893 (9th Cir.1992)). The name derives from the first Supreme Court approval of such an instruction in *Allen v. United States,* 164 U.S. 492, 501-02 (1896). In their stronger forms, Allen charges have been referred to as "dynamite charges," because of their ability to "blast" a verdict out of a deadlocked jury.

Caution was not used by the judge when she read the Allen charge. The record proves how the Allen charges impacted the jury. *See United States v. Evanston*, 651 F.3d 1080, 1085-88 (9th Cir.2011)(extraordinary caution to be exercised when giving an "*Allen* charge"). The judge did not use any caution. The judge knew the jury was having trouble and could not agree to an unanimous verdict. This is proven by the amount of time the jury had been deliberating. The timing of this Allen charge also had an effect on the jury. It was Friday at 5:00 pm when the judge read the Allen charge. This was the end of the second day that the jury had been deliberating. The deadlocked jury sent a letter to the judge informing her that they were not able to come to an agreement. The jury specifically informed the judge they could not come

to a unanimous verdict. The judge should have discharged the jury, but instead she used the Allen Charge to control the jury and push a unanimous guilty verdict. As the Ninth Circuit explained in *United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir.2007): The term "*Allen* charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; The proof of the judge using the Allen charge unlawfully can be identified by assessing the coerciveness of an *Allen* charge by considering

(1) the form of the instruction,

(2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and

(3) any other indicia of coerciveness." See *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir.2007) (citing *United States v. Daas,* 198 F.3d 1167, 1179-80 (9th Cir.1999));

Nonetheless, it is even a reversible error to give even a neutral *Allen* charge that has a coercive effect on the jury's deliberations: The following requires reversal if the judge gave an *Allen* charge after inquiring into the numerical division of the jury, "the charge is per se coercive and requires reversal." *Ajiboye,* 961 F.2d at 893-94. "Even

when the judge ... is inadvertently told of the jury's division, reversal is necessary. If the holdout jurors could interpret the charge as directed specifically at them-that is, if the judge knew which jurors were the holdouts *and* each holdout juror knew that the judge knew he was a holdout." *Id.* at 894 (citing *United States v. Sae-Chua*, 725 F.2d 530, 532 (1984)). See *United States v. Williams*, 547 F.3d 1187, 1205 (9th Cir.2008) (reversing conviction after neutral *Allen* charge when "holdout" juror knew her identity was known by the court). *See Evanston*, 651 F.3d at 1085-88. It is also a reversible error to allow supplemental closing arguments to deadlocked jury after court has given *Allen* instruction and inquired as to reason for deadlock.

The fact that the judge did have a coercive effect on the jury is obvious. After the judge read the charge she told the panel she will keep them until 7:00 pm if she has too. The judge also allowed 2 alternates to be included in the jury panel, and then released the 2 alternates after the jury came out of a deadlock and brought a guilty verdict, which proves another violation of the appellants due process. A reversal is required due to the judges violations against the rights of the appellants, and she coerced the jury into a unanimous guilty verdict, which caused the appellant to not have a fair and just trial.

Richardson v. State, 14-04-00764-cr (tex.app.-Houston [14th Dist.] 2006), No.

14-04-00764-CR (Tex. App. Apr. 20, 2006) Therefore, if any **rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm.** *McDuff v. State*, 939 S.W.2d 607, 614 (Tex.Crim.App. 1997). In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence in a neutral light and inquire whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State*, 144 S.W.3d 477, 484(Tex.Crim.App. 2004).

In this case the jury was not rationally justified in finding a , the jury was only given the

11th Summary of Argument

Issues

> The judge violated appellant's State and Federal Constitutional rights of due process, when the judge instructed the State's witness not to mention her sister's CPS or criminal background because this evidence is inadmissible, and it makes the judge feel "uncomfortable".

The State created another highly false and misleading idea that Regina Punt was not a convicted felon, and directly covered up the facts about Regina Punt's background involving CPS investigations, drug abuse, prostitution and pornography. The State and the Judge both knew Regina Punt has a criminal history involving drug abuse, child abuse, and involvement in pornography. The State and the Judge knew about these facts , yet the State and the Judge worked together to keep this information from getting admitted into evidence.

During the State's direct examination, Tammy Punt was asked about her having full custody of her 2 nieces, KH and BH. Tammy Punt began to tell the truth about her sister being incarcerated. This is critical to the Appellant's defense. The following was stated during trial by Tammy Punt:

> Q. Did -- who had custody of those kids in their early childhood?
>
> A. I had Brooklyn when I was 19 at six months. I didn't have her, I'm sorry. I

was given custody of her through CPS when she was six months old. And I had Katelyn when she was born. **She was born while her mother was incarcerated** so I picked her up from the hospital the day that she was born.

By this statement made by Tammy Punt, she just stated the fact that her sister has been incarcerated, which means she was convicted of a crime. The transcript is the official record of the trial. The truth about the State's witness Regina Punt has now been disclosed by the other State witness Tammy Punt.

Q. And without going into specifics. When you talk about their mother are you talking about Regina?

A. Yes.

Q. And CPS thought that it was better for you to have custody of kids at that time?

A. Yes.

MR. GUINAN: Objection; speculation, Your Honor.

THE COURT: Sustained.

Q. (BY MR. MCMILLIN) Who gave you custody of the kids?

A. CPS.

Q. Who's Dean Dyslin as we see in State's Exhibit 2?

A. That's Regina's boyfriend -- fiance, excuse me.

Q. You said fiance. Have they -- were they dating back in 2012, 2013?

A. Yes.

Q. Fast-forward to when Madeline was born a couple years later. Who had custody of Madilyn when she was born?

A. Her dad -- her dad's side of the family was taking care of her at the time.

Q. And when you're talking about dad's side of the family, when we're looking at State's Exhibit 2, you're talking about Justin Greene?

A. Yes.

Q. When did -- in October 2012, I know it's been awhile ago, but did you have custody of Brooklyn or Kaitlyn or Madilyn?

During this testimony, the judge stopped Tammy Punt from testifying, and had the jury exit the court.[3 RR 77] 1. The judge spoke directly to the State's witness giving false facts about admissible evidence.[3 RR 77] 9-11.

COURT: Ms. Punt, so when the State -- and for record sake we are out of the presence of the jury panel. When the State tells you don't say what somebody else has told you, that means you -- also you can't offer anything either. So if the State doesn't ask you a question, and there's some silence, you don't have to fill the void, okay? Just wait for your next question and make sure you're answering the question that's asked of you, okay?

The judge also refused to allow the truth about the State's witness Regina Punt, who has a criminal record and has been incarcerated. The judge instructed the State's witness Tammy Punt, not speak about her sister Regina Punt's incarceration. This is a lie by the court to the jury. The district attorney has the responsibility to correct these false statements, even when the false statement is from the judge.

MR. GUINAN: One last thing, Your Honor. I believe that issue of incarceration of Ms. Regina Punt is now open. The -- Tammy Punt did testify and was -- a question was elicited and she did testify that she was in jail.

THE COURT: I'm not gonna allow it in. That's one of the things that -- maybe we should have had a conference with Ms. Punt on the record. Ms. Punt, there

are things that are not admissible, okay? And the fact of where your sister was when you had the kids, not admissible. I'm even uncomfortable with the fact that you mentioned CPS. Just limit it. Okay, because I'm not letting y'all get into that. She did say it. I heard her say it. I looked up when she said it.Okay. But I'm not gonna let you because she slipped. The State didn't ask the question; she offered the information. Don't reference it again. Do you understand?

THE WITNESS: Yes, Your Honor.

MR. MCMILLIN: Just for the record I have informed the witness of the two rulings that we had earlier this morning not to discuss those two issues.

THE COURT: Okay.

MR. MCMILLIN: You remember that, right? And we're not talking about those two things?

THE WITNESS: Right. Those two things, yes, sir.

Conclusion

Where the State and the judge unprofessional errors have resulted in injuries and imposing a sentence based upon unreliable information, Texas Courts have not hesitated to correct the Injustice. Here we have recorded proof of the Judge and the State prosecutor's complete failure to correct false and misleading testimony. In fact, the record reflects the proof of the judge and the State prosecutor encouraging and demanding the State witnesses to give some false and misleading testimony. We also have the proof of the State and judge fabricating false facts to the jury as well as concealing and withholding critical information from the jury. For these and the

previously reasons discussed, the prejudice flowing from the Judge and the district attorney creates a reasonable probability that the outcome would have been a not guilty verdict. *See Strickland,* 466 U.S. at 687. Had the State prosecutor and the judge upheld their duty to correct any false accusations and statements, and encourage the State witnesses' to tell the truth, the whole truth and nothing but the truth. Further, the district attorney and the judge, allowing the jury to act upon unreliable false, and incomplete information was not only unreasonable and unprofessional, but also caused more than enough prejudice to warrant relief from this conviction. This requires a reversal.

12th Summary of Argument

Issue:

Did the state violate appellant's rights to effective assistance of counsel and due process by not providing the identity of the witnesses in advance of the trial denying the appellant the chance to conduct out-of-court investigation necessary to obtain information?

Rule:

Under *Brady v. Maryland,* 373 U.S. 83 (1963), or which would impeach the state witnesses under *Giglio v. United States,* 405 U.S. 150 (1972), and *United States v. Martinez-Mercado*, 888 F.2d 1484 (5th Cir. 1989), the appellant filed a motion for discovery that requested production of all evidence in the possession of the State or its agents which would tend to exculpate the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963), or which would impeach the state witnesses under *Giglio v. United States,* 405 U.S. 150 (1972). See also *United States v. Martinez-Mercado*, 888 F.2d 1484 (5th Cir. 1989). This included any records and information revealing prior convictions or guilty verdicts, deferred adjudications or juvenile adjudications in the United States or in any state, including but not limited to rap sheets, National Crime Information Center (NCIC) reports, and or any judgments and commitment orders.

Application:

The motion requested any records and information revealing prior misconduct, bad acts, or other crimes attributed to any state witness, particularly those which may be admissible under Rules of Evid. 608(b) to impeach the truthfulness of the witness. The State never objected to this motion until during the pre trial hearing.

The motion also requested evidence that arguably could be helpful to the defense in impeaching or otherwise detracting from the probative force of the state's evidence or which arguably could lead to such records or information. This specifically included any occasion when the witness may have identified someone other than the defendant as the perpetrator of the alleged crime, failed to identify the defendant as the perpetrator, or failed to make any identification whatsoever. We have proof identifying someone other than the appellant as a possible perpetrator of the allegations made by the State's witnesses. This proof is documented within the CPS records and including the text messages. The judge did not allow this evidence to be entered into the appellant's exhibit list.

Conclusion:

If this evidence would have been allowed, this would have impeached the credibility of the State's witnesses and caused a reasonable doubt in the minds of the jury as to whether the State's witnesses testimony was based on truth, or possibly based on false

allegations with an alternate motive behind these false allegations directed towards the appellant. If the jury would have been informed of the fact that Regina Punt lost her parental rights due to drug abuse, child neglect, and prostitution, and her sister Tammy Punt was given custody.

13th Summary of Argument

The judge violated appellant's due process by interfering with the defense's ability to impeach the state's witness.

Issue

Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if: (1) the crime was a felony or involved moral turpitude, regardless of punishment; (2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record. The judge stopped every attempt the defense started to impeach the state's witness. The following took place during the pre trial hearing during Tammy Punts cross examination. Punt began to disclose to the court that her sister Regina Punt, has a criminal history and also has a long history of CPS investigations due to drug abuse, prostitution, and child abuse. The judge stopped Guinan from making the record. This took place during Tammy Punts testimony: [3 RR 58]

> THE COURT: Attorneys approach (At the Bench, on the record)
>
> THE COURT: All right. State?
>
> MR. MCMILLIN: We just talked about bad acts regarding Regina Punt. He's about to mention an incident where -- regarding her probation and UAs. It's absolutely not relevant to this whatsoever and it's clearly her character assassination.
>
> MR. GUINAN: It is a character assassination, Your Honor, but that's my job.

THE COURT: Okay. So I'm gonna tell them to -- did you have anything else that you want to add, Counsel?

MR. GUINAN: Your Honor, it was going to be a reference to a urinalysis test, not to anything having to do with her jail time or that she had been arrested or anything. The context of it was -- I'm not going to get into the context as it was ordered.

THE COURT: Well, it sounds like it's related to the offense that you said that you weren't gonna talk about --

MR. GUINAN: Okay.

THE COURT: -- 'cause she wasn't convicted. So I'm gonna instruct the jury to disregard the statement, okay? And then just make sure that you-all approach before you get to any topics that you think — that you even think are mentioned in their motion in limine, okay?

MR. GUINAN: I understand, Your Honor.
(End of Bench conference)

THE COURT: I'm going to instruct everyone at this point in the courtroom to put their phones on silent or turn them off. If I hear a phone go off I will fine you $500.

THE COURT: All right. Members of the panel, you are instructed to disregard counsel's last statement.

Rule:

The judge violated Article VI. Rule 609 Impeachment by Evidence of Criminal Conviction, states: Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if: (1) the crime was a felony or involved

moral turpitude, regardless of punishment; (2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record. The evidence the appellant attempted to offer the court was relevant to the appellant's case, and was admissible by law. The judge interrupted the defense's ability to impeach the state's witnesses. The facts and record prove Regina Punt was convicted of crimes. The records also prove that CPS investigations of child neglect and child abuse were filed against all 3 state witnesses. Regina Punt, Ryan Hester and Theresa Franks all have served time in prison. This is documented within the exhibits filed by the appellant. The judge denied this evidence as inadmissible. This is a violation of appellant's rights of due process, prosecutorial misconduct by the State and judicial misconduct by the judge. All which are reversible errors. The court's denial violated appellant's rights under the Texas law and his constitutional rights to rebut the State's evidence. *See Simons,* 512 U.S. at 165-65, to present a defense, *Holmes,*547 U.S. at 345-25, to a reliable sentencing determination, and to a trial in which Texas rules were followed. *Logan,*455 U.S. During the pretrial phase the State's witness Tammy Punt was testifying, and during her testimony she mentioned her sister had previous CPS charges filed and that she had been incarcerated. The judge stopped the hearing and removed the jury from the court. The following was said on record: [3 RR 46]

MR. MCMILLIN: I do have one motion in limine that I filed. [3 RR 45] Are you planning on going into criminal history as to Regina Punt?

MR. GUINAN: I will.

MR. MCMILLIN: And I'd like a ruling on that. She was not convicted of the felony, so…

MR. GUINAN: Oh, oh, I'm sorry. Regina, I'm sorry. Yes, I will not go into that.

MR. MCMILLIN: Okay. Then we have no issues.

THE COURT: "Ms. Punt, so when the state, and for the record sake we are out of the presence of the jury panel. When the state tells you don't say what… what somebody else has told you, that means you — also you can't offer anything either."

Application:

These actions by the judge fall under judicial misconduct. The judge intentionally informed the jury false facts about Regina Punt's criminal background, and demanded the State witness Tammy Punt not to speak about these facts to the jury. This evidence the judge has declared as inadmissible, is in fact admissible. The criminal background of Regina Punt's convictions is actually legally considered exculpatory evidence. Its is critical to understand that exculpatory evidence is not only limited to things that prove the defendant did not commit the crime, rather it includes any information or material that might lead to the jury to conclude the defendant

should be found not guilty of the crime. Due process also requires disclosure of any evidence that proves grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigations, to the credibility of the of the state's witnesses, or to bolster the defense case against prosecutorial attacks. *See Kyles v. Whitley,* 514 U.S. 419, 422 n. 134, 144-451 (1995). Any material that might help to establish any of the testimony about Regina Punt's criminal history and CPS investigations is relevant and critical to the appellant. This evidence would have impeached the State witness credibility. Before the judge interrupted the testimony of Tammy Punt, during testimony, openly claimed that Regina Punt did in fact serve time in prison. The judge then stopped this testimony and sent the jury out so the Judge could speak to the State's witness and remind her not to speake of these facts again. This is judicial abuse and malfeasance by the State and the judge. This Sullivans conviction was fabricated by the egregious conduct by the judge and the prosecutor. These actions prove the judge was biased and acted unlawfully to gain a conviction against appellant. These actions by the judge require a reversal. The actions of the prosecution and the trial judge's non disclosure of the exculpatory information was akin to the admission by conduct, the State was conscious that its case was weak. The judge and the prosecutor made sure to sabotage the appellants opportunity to present his evidence. The prosecution knew about the Brady information and

deliberately did not fully disclose it. *See United States v. Shelton.*

Conclusion

As interpreted by the Supreme Courts this provision means that a reversal may not be awarded absent a showing *"*that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *(People v. Watson supra,* 46 Cal.2d.818,836.) In this case, it is reasonably probable to believe the jury would of found the appellant not guilty if they were presented with all the facts and evidence. The facts and evidence about the State witness's previous criminal convictions involving drug abuse and pornography, would of ended with a result more favorable to the defendant such as not guilty.

This is a reversible error.

14th Summary of Argument

The court violated the appellant's U.S. Federal Constitution and State Constitution which destroyed appellants 6th amendment and his rights of due process, by not identifying the proper outcry witness.

Issue

An outcry witness is the first adult to whom a child (14 years of age, or younger), or disabled person, tells about being a victim of a statutory designated offense, mostly sexual offenses, as set forth in Article 38.072, Texas Code of Criminal Procedure. This statute permits a witness to testify about a victim's out-of-court description of the offense as an "exception" to the hearsay rule. Rule 801(d), Texas Rules of Evidence, defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Texas jurisprudence prohibits the use of hearsay unless it falls into one of the designated exceptions set forth in Rules 803 or 804—one of those exceptions being Art. 38.072 outcry testimony. Whether such testimony is admissible at a criminal trial is determined by the Texas Rules of Evidence and the Sixth Amendment to the United States Constitution.

Rule:

Pursuant to Art. 38.072, the State is required, at least 14 days before the trial begins, to provide notice to the defendant of its intention to call an outcry witness,

identify the witness, and provide a summary of the outcry statement it intends to offer into evidence. This was never provided for the appellant. In fact, the state did not identify who the outcry witness was, until the day of trial.

The appellants attorney informed the judge that he had some pre trial matters that he needed to address regarding the outcry. [3 RR 32] The State then stated that he believes the proper outcry is Patti Flowers as the person who "kind of " knew about this was Terry Franks. [3 RR 33] McMillin then named Regina Punt as MH's outcry witness. All 3 witnesses were to testify to allow the court to make a finding. This is a violation of Rule Art. 38.072, which requires a 14 day window that allow the defendant to object and prepare for his defense. The appellant had no time to prepare. These witnesses all contradict what the police report says. The police report lists Theresa Franks as the cry out witness for KH and BH. Regina Punt is listed for MH's outcry. McMillan violated the law by his attempt of bringing in more reputable people to help convince the jury. The defense requested a hearing due to the confusion with who is the actual outcry witness. [3 RR 34] Regina Punt was the first witness to testify. After the examination, McMillan immediately stated:

> MCMILLIN: Your honor, I believe testimony shows this allegation did not come out until the moment Ms. Punt testified that MH was touched on her private part, and for that reason she is the proper cry out witness for M.H. Ms. Punt was not able to give a time, which is required for her credibility. The defense objected to this point, that the witness did not meet the standard of

> credible to be an outcry witness. [3 RR 42]. time to determine whether the outcry statement is reliable based on the time, content, and circumstances of the statement."

Application:

In determining reliability, an indicia of reliability is whether there is evidence of prior prompting or manipulation by an adult (influenced, for example, by bias the outcry witness may have against the defendant). Additional indicia of reliability is whether the outcry witness can, in a discernible manner, describe the alleged offense; and recall the time, content and circumstances of the outcry. **The defendant has an indisputable procedural right under Art. 38.072 to explore these issues.** The conduct of the State in Sullivan's case was nothing short of shameful—even borderline close to being prosecutorial misconduct. The State initially waited until the day of trial, then noticed the judge that Ryan Hester was in a coma and Theresa Franks and Regina Punt would be the outcry witness. Subsequent to that notice, the same day the court held a hearing and Regina Punt and Theresa Franks both testified. The State then noticed the court that it had designated Regina Punts for M.H. as its outcry witness. The record was not fully developed about whether the State "discovered" that Theresa Franks was the first adult the alleged victim that K.H. and B.H. out-cried to before Ryan Hester's coma. We suspect this information was readily

available to the State.. We further suspect the State did not designate Regina Punts as its outcry witness from the outset because the State knew Regina Punt had a criminal history and CPS investigations that made her a less than a desirable outcry witness. However, once it became known Theresa Frank's testimony of her alleged "outcry" of abuse was obvious that she made up all of the so called "abuse" about KH and BH, along with the fact that Theresa Franks also has a criminal history of being incarcerated for prostitution, the State decided to go with Regina Punt as the "outcry" witness. . Significantly the State did not inform the court about Ryan Hester's unavailability as a state witness until the day of trial during the pre trial hearing and the court had accepted Regina Punt as the State's outcry witness for MH. . The State informed the jury it would call Regina Punt as a witness for MH who would testify the victim told her about the indecent exposure she had experienced. At that procedural juncture the State knew it was not going to call Theresa Franks to testify as an outcry witness nor would the State call her son, Ryan Hester as a witness due to his coma. So the State used its opening statement and the State witnesses Regina Punt and Tammy Punt to effectively get the unavailable Ryan Hester's testimony before the jury fully knowing it could not produce Ryan Hester as a witness.

Conclusion

We believe this was a planned, methodical prosecutorial strategy to get before the jury outcry testimony the State did not have within the meaning of Art. 38.072. Defense counsel made all the necessary objections. Due to the State's shameful conduct in the case, these issues should cause a reversal on appeal. It is exactly this type of questionable strategy and ends justify the means mentality that leads to wrongful convictions and innocent people spending years in prison. This is a reversible error.

15th Summary of Argument

Did the state deprive appellant of his rights by not granting the defendants motion, requesting procedural determination by trial court with findings of fact and conclusions of law secured by the 6th 14th Amendment of the United States Constitution Article 1 Section 10 of the Texas Constitution Article 1.05 the Texas code of criminal procedure.

Issue

All evidence brought up in a trial should be definitive and clear. The State made speculative statements during the testimony, falsely accusing the appellant of hiding the laptop from the police. [7 RR 18] The judge overruled the defense's objection which violated the appellant's rights to a fair trial. The following questions were asked during the punishment phase of the trial:

> Q. What happened to the computer after Derrick was originally arrested for these charges?

Tammy Punt did not have direct knowledge of this information. This only way for her to answer is by speculation. This question should not of been allowed. The defense Objected and the judge overruled. The following is how the witness responded:

> A. It was picked up by a family member immediately after his arrest.

The State continued by making more speculative questions for the witness to answer. The defense objected to speculation and the judge again overruled.

> Q. It was out of the house right?
>
> A. Yes

Q. In case the police were gonna come search your house? Right?

The type of speculative questions and evidence should have been disallowed from the trial proceedings, because speculative is not actually considered evidence.

Conclusion

The violations by the court created a false impression that the appellants laptop computer was used for illegal criminal activity, which never happened. The State's witness provided testimony that was, ultimately, speculative in its form. The question was not appropriately phrased, nor was the answer appropriate because both were speculative. The state witness did not have direct knowledge of what she stated. This gave a false impression to the jury. If the jury was not given this false impression, it is highly probable that there would have been a reasonable doubt and the verdict would have been not guilty. This is a reversible error.

Theresa Franks testified using speculative testimony. The defense objected and the judge overruled. [4 RR13] 3

A. Because the girls were with him.

Q. And when you have primary custody, you aren't ordered to pay child support; is that correct?

MR. GUINAN: Objection; speculation and calling for a legal conclusion, Your Honor.

THE COURT: Overruled. If you know.

Q. (BY MR. MCMILLIN) Do you know?

16th Summary of Argument

The judge violate the appellant's State and Federal Constitutional Rights of due process by interfering with the defense's ability to **impeach the state's witness**.

Issue:

Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if: (1) the crime was a felony or involved moral turpitude, regardless of punishment; (2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record.

The judge stopped every attempt the defense started to impeach the state's witness'. The following took place during the pre trial hearing during Tammy Punts cross examination. Punt began to disclose to the court that her sister Regina Punt, has a criminal history and also has a long history of CPS investigations due to drug abuse, prostitution, and child abuse. The judge stopped Guinan from making the record. This took place during Tammy Punts testimony:

> THE COURT: Attorneys approach (At the Bench, on the record)
>
> THE COURT: All right. State?
>
> MR. MCMILLIN: We just talked about bad acts regarding Regina Punt. He's about to mention an incident where -- regarding her probation and UAs. It's absolutely not relevant to this whatsoever and it's clearly her character assassination.

MR. GUINAN: It is a character assassination, Your Honor, but that's my job.

THE COURT: Okay. So I'm gonna tell them to -- did you have anything else that you want to add, Counsel?

MR. GUINAN: Your Honor, it was going to be a reference to a urinalysis test, not to anything having to do with her jail time or that she had been arrested or anything. The context of it was -- I'm not going to get into the context as it was ordered.

THE COURT: Well, it sounds like it's related to the offense that you said that you weren't gonna talk about --

MR. GUINAN: Okay.

THE COURT: -- 'cause she wasn't convicted. So I'm gonna instruct the jury to disregard the statement, okay? And then just make sure that you-all approach before you get to any topics that you think — that you even think are mentioned in their motion in limine, okay?

MR. GUINAN: I understand, Your Honor.
(End of Bench conference)

THE COURT: I'm going to instruct everyone at this point in the courtroom to put their phones on silent or turn them off. If I hear a phone go off I will fine you $500.

THE COURT: All right. Members of the panel, you are instructed to disregard counsel's last statement.

The judge violated Article VI. Rule 609 Impeachment by Evidence of Criminal Conviction, states: Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if: (1) the crime was a felony or involved moral turpitude, regardless of punishment; (2) the probative value of the evidence

outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record. The evidence the appellant attempted to offer the court was relevant to the appellant's case, and was admissible by law. The judge interrupted the defense's ability to impeach the state's witnesses. The facts and record prove Regina Punt was convicted of crimes. The records also prove that CPS investigations of child neglect and child abuse were filed against all 3 state witnesses. Regina Punt, Ryan Hester and Theresa Franks all have served time in prison. This is documented within the exhibits filed by the appellant. The judge denied this evidence as inadmissible. This is a violation of appellant's rights of due process, prosecutorial misconduct by the State and judicial misconduct by the judge. All which are reversible errors. The court's denial violated appellant's rights under the Texas law and his constitutional rights to rebut the State's evidence. *See Simons,* 512 U.S. at 165-65, to present a defense, *Holmes,*547 U.S. at 345-25, to a reliable sentencing determination, and to a trial in which Texas rules were followed. *Logan,*455 U.S. During the pretrial phase the State's witness Tammy Punt was testifying, and during her testimony she mentioned her sister had previous CPS charges filed and that she had been incarcerated. The judge stopped the hearing and removed the jury from the court. The following was said on record: [3 RR 46]

> MR. MCMILLIN: I do have one motion in limine that I filed. [3 RR 45] Are you planning on going into criminal history as to Regina Punt?

MR. GUINAN: I will.

MR. MCMILLIN: And I'd like a ruling on that. She was not convicted of the felony, so…

MR. GUINAN: Oh, oh, I'm sorry. Regina, I'm sorry. Yes, I will not go into that.

MR. MCMILLIN: Okay. Then we have no issues.

THE COURT: "Ms. Punt, so when the state, and for the record sake we are out of the presence of the jury panel. When the state tells you don't say what… what somebody else has told you, that means you — also you can't offer anything either."

These actions by the judge fall under judicial misconduct. The judge intentionally informed the jury false facts about Regina Punt's criminal background, and demanded the State witness Tammy Punt not to speak about these facts to the jury. This evidence the judge has declared as inadmissible, is in fact admissible. The criminal background of Regina Punt's convictions is actually is legally considered exculpatory evidence. Its is critical to understand that exculpatory evidence is not only limited to things that prove the defendant did not commit the crime, rather it includes any information or material that might lead to the jury to conclude the defendant should be found not guilty of the crime. Due process also requires disclosure of any evidence that proves grounds for the defense to attack the reliability, thoroughness, and good

faith of the police investigations, to the credibility of the of the state's witnesses, or to bolster the defense case against prosecutorial attacks. *See Kyles v. Whitley,* 514 U.S. 419, 422 n. 134, 144-451 (1995). Any material that might help to establish any of the testimony about Regina Punt's criminal history and CPS investigations is relevant and critical to the appellant. This evidence would have impeached the State witness credibility. Before the judge interrupted the testimony of Tammy Punt, during testimony, openly claimed that Regina Punt did in fact serve time in prison. The judge then stopped this testimony and sent the jury out so the Judge could speak to the State's witness and remind her not to speake of these facts again. This is judicial abuse and malfeasance by the State and the judge. This conviction was fabricated by the egregious conduct by the judge and the prosecutor. These actions prove the judge was biased and acted unlawfully to gain a conviction against appellant. These actions by the judge require a reversal. The actions of the prosecution and the trial judge's non disclosure of the exculpatory information was akin to the admission by conduct, the State was conscious that its case was weak. The judge and the prosecutor made sure to sabotage the appellants opportunity to present his evidence. The prosecution knew about the Brady information and deliberately did not fully disclose it. *See United States v. Shelton.*

Conclusion

As interpreted by the Supreme Courts this provision means that a reversal may not be awarded absent a showing *"*that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *(People v. Watson supra,* 46 Cal.2d.818,836.) In this case, it is reasonably probable to believe the jury would of found the appellant not guilty if they were presented with all the facts and evidence. The facts and evidence about the State witness's previous criminal convictions involving drug abuse and pornography, would of ended with a result more favorable to the defendant such as not guilty.

This is a reversible error.

17th Summary of Argument

The prosecution deprived appellant of a fair trial through repeated misconduct in the trial and during the guilt-innocence phase.

Issue:

The State's punishing phase of the trial, strayed far from permissible bounce end to a minefield of inflammatory arguments. The state distracted the jury and aroused it's passion and prejudice by relying upon false testimony and miss stating critical facts, name-calling, baseless assertions. and misstatements of law.

Rule:

Both singularly and combined, the State's tactics "so infected the trial with unfairness as to make the resulting conviction a denial of due process" *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974) . See also U.S. Const amends. V, VI, VIII, XIV. Relying on false testimony and misstating critical facts, rather than correcting false and misleading testimony. The state's continual reliance on false testimony violated appellant's due process rights and rights to a fair trial. The state misstated a critical fact when the prosecutor made the false statement that appellant confessed to Tammy Punt. The false evidence in the case, starting with the police report, uncover the inconsistencies with Tammy Punt's accusations. Tammy Punt's stories changed from her claiming that the appellant confessed to her and blamed his behaviour on his

“asperger's syndrome.”. The police report and affidavits filed by Ms. Tammy Punt claim asperger's syndrome. When comparing the testimony of Tammy Punt to the affidavit she filled out for the police, she falsely claims that appellant confessed. A point to consider is about Tammy Punt’s testimony in trial, and how Punt only mentioned the syndrome one time. The prosecutor instead chose to direct his entire focus on the false extraneous offenses, which the prosecutor and Punt both know are false. As stated earlier, there is no evidence to prove that the appellant committed any crimes in the past involving the dark web, and sexual violent behavior, yet the prosecution and Tammy Punt focus on this the entire trial. This is what assisted with getting the appellant convicted. It's a very probable to believe that if the jury never heard of these false extraneous offenses that the appellant has been accused of committing, then the appellant very likely would have gotten a not-guilty verdict. These false extraneous offenses impacted the jury and gave them a reasonable doubt.

This is a reversible error.

18th Summary of Argument

Issue:

The trial court violated Sullivan's State and Federal Constitutional Rights rights, and deprived the jury of critical information it needed to determine his guilt or innocence, when it failed to provide the jury with the exhibits it had and statements of some of the state's main witnesses

Pursuant to the Texas rules Article 36.25[12] requires a trial court to furnish to the jury upon its request, all content and exhibits admitted as evidence into the case. This means all evidence from both sides. All evidence from the prosecution as well as the defense evidence. The appellant's evidence that was not admitted into the case. This evidence falls under exculpatory evidence. The trial court was highly prejudiced and denied the appellant's substantial rights. During its deliberations, the jury requested various pieces of evidence for review. The following took place in trial:

The court has received a note from the panel. [5 RR 75] 19 And it reads as follows:

> Could we please have the diagram of the family tree. I can't read that first word. But it says, we -- maybe that's can. Could? Could we please have a copies of the text messages?

The judge stated the following:

> So before I received this note, Ms. Jackson and I went over the exhibits and we have them all off to the side. I'll let you-all know which ones are going back. What you should know about the ones that were admitted that were for record

[12] Art. 36.25. WRITTEN EVIDENCE. There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case.Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

> purposes and/or were not admitted will not go to the back. So for State's exhibits, we have State's 1, 2, 3, 14 through 16, 19, 20, 21, 24, 25, 26, and 27. For the State, there were two that are for record purposes only, 17 and 18. And those will not go to the back. Defendant's 1, 2, 4, and 7 will not go to the back because they were not admitted. Defendant's 3 and 8 will go to the back. [5 RR 75] 1-15.

Rule:

This is a violation by the judge along with judicial bias. The State's evidence in the form of text messages the judge allowed the jury to have for their deliberations. The judge denied the appellant evidence in the same form of text messages. The jury was not allowed to review the appellant's evidence. The violation and judicial bias is proven once you learn that both sets of evidence in the forms of text messages, we're from the same source which was Tammy Punt cell phone. These were from the exact same device. The judge allowed the state's evidence, but not the defense. This shows judicial prejudice, bias, and another violation of the appellants rights of due process. These text messages from both the State and defense, were from the same cell phone. The state admitted all of the State's text messages but denied 100% of the appellants. The appellants text message's the court did not admit into the record were critical to the appellant's defense. The appellant's exhibit number 4 is a text message between the State's witness Tammy Punt and the defense's witness, Susan Miller. This text message discusses an "outcry" of sexual assault by someone other than the appellant.

This text message demonstrated that the alleged victims were sexually assaulted by someone other than the appellant.

Application:

Nonetheless the trial court failed to furnish the appellant's evidence and text messages to the jury prior to it's reaching a guilty verdict.

Conclusion:

The Court's failure was a reversible error. Article 36.25[13] requires a trial court to furnish to the jury of contents request any exhibits admitted as evidence into the case. This type of evidence falls under exculpatory evidence. The judge's actions were highly prejudice, and the judge denied the appellant's substantial rights. Texas rules of Appellate Procedure for 4.2 B requires reversal. Moreover, the judge denied the appellant his constitutional rights to due process of law, to a fair jury trial, assistance of counsel, and to be free and from cruel and unusual punishment. See United States Constitution Amendments V, VI, VIII, XVI; Texas Constitution Article 1 chapter 13. By failing to follow the Texas statutory law, the appellant's due process was violated. This is an reversible error

[13] Art. 36.25. WRITTEN EVIDENCE. There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case.Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

19th Summary of Argument

The trial court erred and violated his State and Federal Constitutional Rights when it allowed the alternate jurors to be present for deliberations when the alternate jurors had not been impaneled as regular jurors.

Issue:

Appellant argues that allowing the alternate juror's in the jury deliberation room violated his constitutional right to a twelve member jury under the Texas Constitution, as well as articles 33.01, 33.011, 36.22, and 36.29 of the Texas Code of Criminal Procedure. Article V, Section 13 of the Texas Constitution and article 33.01 of the Texas Code of Criminal Procedure both provide that the jury shall consist of twelve qualified jurors. After the completion of testimony and the attorneys' closing arguments, the trial court instructed the 2 alternate jurors to continue with the jury until a verdict is reached. During the deliberation, there were a total of 14 jurors in the panel. The following transcript proves there were 14 jurors present during the 2 days of deliberation: [6 RR 19] 1-9

THE COURT: And you're still under the same instruction. You are not to discuss the facts of the case with anyone, okay? You will only be relieved from those instructions after the entire trial has been completed. You-all understand that?

JUROR PANEL: Yes

THE COURT: Okay. So keep your white badges on until you make it to the car. Keep your pink numbers because as I used them here, I will use them again in the punishment phase. Do not discard those numbers, bring them back with you tomorrow, okay? **The alternates, you are excused.** Your duty is over. Okay. So you-all can hand Sheriff Grant your white and pink badges. And if you need work

excuses, which I'm sure you will, just be patient with them. They will get those to you today, okay, before you leave. I really appreciate your patience.

In the present case, appellant's trial counsel did not object to the inclusion of the alternate juror in the jury deliberations. Appellant urges this court to address the error as systemic or waivable-only error that does not require a timely objection. Because article 36.29 specifically allows a defendant to waive the required twelve person jury and proceed with fewer jurors, we cannot agree that a twelve-member jury is a systemic right so fundamental to the administration of justice that it cannot be waived even by a party's request. Tex.Code Crim. Proc. Ann. art. 36.29(c) (Vernon 2007); Mendez, 138 S.W.3d at 340.

Rule:

We, therefore, examine whether the alleged violation is a waivable only right under the Texas Constitution. See Tex. Const. art. V, §13.A systemic requirement is "a law that a trial court has a duty to follow even if the parties wish otherwise." Id. at 340. Systemic rights include those that are statutorily or constitutionally mandated, or are otherwise not optional, waivable or forfeitable by either party. Sanchez v. State, 120 S.W.3d 359, 365-66 (Tex.Crim.App.2003). Absolute, systemic rights are rights about which a litigant has no choice and are independent of the litigant's wishes. Marin v. State, 851 S.W.2d 275, 279 (Tex.Crim.App.1993), overruled on other grounds, Cain

v. State, 947 S.W.2d 262 (Tex.Crim.App.1997). The implementation of these absolute requirements and prohibitions is not optional and is therefore, neither waived nor forfeited by any party. Waivable rights are rights that a judge has an independent duty to implement absent an effective waiver by the defendant. Id. at 280. "Although a litigant might give [waivable rights] up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record." Id. at 280 (citing Goffney v. State, 843 S.W.2d 583, 585 (Tex.Crim.App.1992)). These rights are "so fundamental to the proper functioning of our adjudicatory process" that they do not vanish easily. Marin, 851 S.W.2d at 278-79.

Forfeitable rights arise from rules that are optional at the request of a defendant. Id. at 279. Rule 33.1 applies only to these rights. The judge is required to implement them only at the request of a party, and they are forfeited absent objection made at trial. Id. at 279-80; Tex.R.App. P. 33.1.

Appellant argues that his right to a twelve-person jury is a right that is waivable-only and "[w]aivers of Constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748,

90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); see also Mendez, 138 S.W.3d at 344.

Although the United States Constitution does not require that a specific number of jurors be seated on a jury panel, Article V, Section 13 of the Texas Constitution and article 33.01 of the Texas Code of Criminal Procedure both provide that the jury shall consist of twelve qualified jurors. Tex.Code Crim. Proc. Ann. art. 33.01 (Vernon 2006); Tex. Const. art. V, §13. In Marin, the Court of Criminal Appeals explained that "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system." Marin, 851 S.W.2d at 278. These are rights that cannot be forfeited or relinquished without an express waiver and "are not extinguished by inaction alone." Id. (citing Janecka v. State, 823 S.W.2d 232, 243 n. 2 (Tex.Crim.App.1990) (opinion on rehearing)). In its analysis, the Marin court identified two such rights: assistance of counsel and the right to a jury trial. Id. at 279. More specifically, the "State may not successfully put [a defendant] to trial without counsel or jury merely because he voiced no objection to the procedure." Id.

The Constitutional right to a twelve person jury appears to be the type of right that requires special protection. It cannot be denied absent an express waiver. Accordingly, the right to a twelve member jury is a waivable-only right and appellant

was not required to comply with rule 33.1 in order to preserve error. Tex.Code.Crim. Proc. Ann. art. 33.011(b) (Vernon 2007); Tex.R.App. P. 33.1.

Application:

The trial court instructed the alternates to "go with the twelve members of the jury into the jury room for the deliberations.: The record is silent as to any effect the alternate juror's had on the jury deliberations. Rojas, 171 S.W.3d at 450-51 (testimony of the jurors and the alternate juror rebutted any allegations of harm resulting from alternate juror remaining in the jury room during deliberations for fifteen minutes). Here, the trial court simply instructed the alternate juror's to be present during deliberations, but not to vote. Cf. United States v. Olano, 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (presence of alternate juror in jury deliberations was viewed in light of trial court's instructions that "according to the law, the alternates must not participate in the deliberations . [We are going to ask [the alternate] that you not participate" and thus did not prejudice defendant).

Conclusion:

The Constitutional right to a twelve person jury appears to be the type of right that requires special protection. It cannot be denied absent an express waiver.

Accordingly, the right to a twelve member jury is a waivable-only right and appellant was not required to comply with rule 33.1 in order to preserve error. Tex.Code.Crim. Proc. Ann. art. 33.011(b) (Vernon 2007); Tex.R.App. P. 33.1. The transcript does not have any instructions by the judge to the alternate jurors. Accordingly, we cannot conclude, beyond a reasonable doubt, that the alternate juror's presence in the jury room did not contribute to the conviction or punishment of the appellant, therefore, this is an reversible error by the court. Therefore this is conviction shall be reversed.

23rd Summary of Argument

The State corrupted the truth seeking function of appellant's trial when it failed to correct the false and highly misleading testimony of its witnesses during the pretrial and at the guilt - innocence phase requiring reversal.

Issue:

Constitutional due process bars the State from obtaining a conviction through the use of false or highly misleading evidence. See U.S. Const. Amend. XIV. Such a conviction must be set aside unless the State can prove the error harmless beyond a reasonable doubt. This court has been extremely diligent in protecting their rights of defendants convicted or sentenced at trial at which false testimony is presented. Appellant is entitled to relief because (1)Tammy Punt falsely reported to the Garland police the appellant confessed that he touched these girls. This is a false confession that never took place. Tammy Punt also falsely reported to the police the appellant blamed his behavior on his "Asperger's syndrome" which is another false allegation made by Tammy Punt to convince the Garland Police that appellant was guilty of this crime. The prosecution never mentioned this false confession, nor was the "Asperger's syndrome" mentioned during the trial in front of the jury. This proves the prosecution knew the charges made by Tammy Punt to the Garland police and during the trial were false. Tammy Punt never mentioned this during any of her testimony. This false confession to the Garland Police is what the police used as probable cause

to issue a warrant of arrest. During the trial Tammy Punt made false accusations that the appellant was violent when he would not get sex. The police report did not mention these false accusations; therefore, the prosecution knew these false allegations never took place. (2) Theresa Franks and (3) Regina Punt also gave false, contradictory and misleading testimony about what the girls said happened to them. McMillan, representing the state, knew or should've known that the testimony made by Tammy Punt, Regina Punt and Theresa Franks was false and highly misleading, (4) the state cannot prove beyond a reasonable doubt that its failure to correct the testimony did not contribute to the Jury's verdict. Therefore, appellant is entitled to a new trial. Ex parted Chabot, 300 S.W.3d. at 772 (remanding for new trial).

When Tammy Punt was first questioned in court, her testimony was a different story. When the police report is reviewed, there is no mention of these events that Tammy Punt testified in court, are found in the police report. In her testimony, both during the pretrial phase and the guilt innocence phase, Tammy Punt made false statements claiming the appellant would get angry when he did not get sex from her. She stated:

> Q. Can you tell the Court about how the defendant would act if he was denied sex? [3 RR 14-16]
>
> A. He would just get really angry and frustrated and say that I don't love him. And there was a time that it got just really kind of more irate than it should have

and he actually -- we just argued more and more, and then he ended up punching a hole in our bedroom wall.

Q. These arguments happened -- how frequently were those argument?

A. I would say on average of at least once a week.

Q. Once a week?

A. Probably.

Q. Would he ask you for sex regularly?

A. Yes, every day.

Whereas she made a report to the police that told a different story, one that never mentioned anything about this alleged violent temper the appellant was falsely being accused of accused of. When the defense cross examined Tammy Punt, the testimony proves Tammy Punt is fabricating a false story with the State's help:[3 RR 15]

Q. Ms. Punt, can you identify the date in which the event in where he punched the wall took place? When did that happen?

A. I don't have the exact date of when it happened.

Q. What year did it take place?

A. Probably 2011, maybe. I'm not sure on the date.

Q. Did you call the police at any time as a result of that event?

A. I'm sorry?

Q. Did you call the police?

A. No, I didn't.

Q. Were you ever harmed by him physically?

A. There was one time that he grabbed me pretty hard, but it was never hard enough to where I felt the need to call the police.

This false testimony by Tammy Punt also took place during the punishment phase. The State and Tammy Punt knowingly continued to present the fabricated false facts, accusing the appellant of other crimes he has never been charged or even accused of until this trial. The State questioned Tammy Punt during the punishment phase of the trial about the same false accusations that were made during the pretrial. The State created this highly false and misleading idea that the appellant was committing crimes using his laptop and the appellant has hidden his laptop from the police. None of this is the truth yet both the State and the Judge are fully aware of the damage this has impacted against the appellant. The following was during the testimony of Tammy Punt during the punishment phase:

Q. Tell the jury -- you said he was on his laptop. Did the defendant like computers?

A. Yes.

Q. Tell the jury about his fascination with computers.

A. He just enjoyed always being on them. Building process servers is what he always talked about doing.

Q. Doing something called Bitcoin.

MR. GUINAN: Objection, Your Honor. May we have a sidebar?

THE COURT: Come on up.

(At the Bench, on the record)

The defense objected and demanded a mistrial due to the State did not uphold the judge's former rulings, and the judge overruled, allowing these false statements to be stated to the jury, when the State and the Judge both knew this was all false testimony.

> MR. GUINAN: I object based on former ruling of the Court concerning motion in limine concerning our objections and the findings of the Court concerning this specific subject. I move for a mistrial at this time because this witness should have been instructed as per the former rulings of the Court and findings having to do with Bitcoin and the dark web and the things that we discussed that the Court ruled on. And she should have been instructed and we believe that this -- well, I don't think Mr. McMillin intentionally drew this out, but I still think this is a violation of rule and I move for mistrial.
>
> THE COURT: State?
>
> MR. MCMILLIN: Your Honor, this is the punishment phase here. Your ruling regarding that was only for the guilt/innocence. I -- she mentioned Bitcoins, but there hasn't been any talk about the dark web. I was going to talk about the -- him --about the computer going missing after his arrest, and I think that's a proper avenue in 3707.
>
> MR. GUINAN: We still have --
>
> THE COURT: Mr. --
>
> MR. GUINAN: Yes, Your Honor.
>
> THE COURT: I've heard both of you. That ruling was for the guilt/innocence portion. I believe under 3707 that this is proper for punishment.

The State created another highly false and misleading idea that Regina Punt was not a convicted felon, and directly covered up the facts about Regina Punt’s background involving CPS investigations, drug abuse, prostitution and pornography. Reviewing the record, you will find that Regina Punt also changed her stories from the

allegations made in the police report to what she testified during the trial. The following was a portion of Regina Punt's testimony during trial: [3 RR 40]

> Q. Okay. And you said she was wearing a dress?
>
> A. She was wearing a Mickey Mouse dress.
>
> Q. She wasn't wearing pants?
>
> A. She had panties on.
>
> Q. No, no, pants, as in --
>
> A. No pants, no.
>
> Q. Okay. So it was a Mickey Mouse dress, correct?
>
> A. Yes.
>
> Q. Okay. Now when did you -- when did she say this to you?
>
> A. I can't recall the date, but we were in the car and she overheard me saying that I didn't want the girls around Derrick, and that's when she told me.

The State and the Judge both knew Regina Punt has a criminal history involving drug abuse, child abuse, and involvement in pornography. The State and the Judge knew about these facts , yet the State and the Judge worked together to keep this information from getting admitted into evidence.

The State did not stop there, with the help of the State, Tammy Punt fabricated a false impression that the appellant was involved in criminal activity on the "dark web"

activity, child pornorgraphy and the internet. The following testimony was made during pretrial: [3 RR 16]

REDIRECT EXAMINATION BY MR. MCMILLIN:

> Q. Ms. Punt, I also want to talk to you briefly about the defendant and his computers. Does the defendant -- is he very savvy when it comes to computers?
>
> A. Yes.
>
> MR. GUINAN: Objection; leading.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, he is.
>
> Q. (BY MR. MCMILLIN) Can you tell the Court how -- can you expound on that answer for me, please.

Tammy Punt's trial testimony described appellant in a totally false light, by falsely alleging the appellant was involved in dark web computer related activities. Falsely alleging appellant was into pornography. [3 RR 22-23] The State knew the appellant had no prior criminal charges or any criminal history, yet the State and the judge fabricated this impression to the jury by using the State's witnesses' false testimony.

FURTHER RECROSS-EXAMINATION BY MR. GUINAN:

> Q. Again, you don't know when it came back into the house. Do you know what was on the computer?
>
> A. No.

Q. Do you have any personal --

A. There was some things that I saw and -- at glances, but I --

Q. What did you see?

A. I mean, he was -- he did watch pornography on it. But I never really would watch anything that was on it -- or just like I would walk by or something, you know, and I would see something. But I never like stayed to look or anything. He was just very --

Q. Was it -- I'll need to ask you this. What kind of pornography was it? Did you -- do you have any personal knowledge?

A. I wasn't -- I never watched it long enough. I could only identify that it was. But I never -- I don't know exactly what kind.

Q. Okay. So all you know that you've ever seen on that computer was glancing that one time -- was it one time or more than one time that you saw him watching pornography on a laptop?

A. It was more than one time.

Q. Okay. How many times was it?

A. I can't give you an exact number.

Q. Okay. So beyond that, you don't know what was being done on that computer, correct?

A. Right.

Q. All right. Do you remember when you saw the pornography?

A. No.

Q. Do you remember -- and you said it was more than once. Was it two times? Three times?

A. Mind you it's been three years, so I'm not -- I'm not certain on how many times or when exactly those times were. I just know that that happened.

Q. It's fine to say you don't know. You don't know exactly how many times correct?

A. I do not know how many times. More than three.

MR. GUINAN: Pass the witness, Your Honor.

Application:

Actually false and highly misleading: The State then bolstered Tammy and Regina Punt's lies rather than following his constitutional duty to correct them.

The State knew Theresa Frank, Regina and Tammy Punt's Testimonies were False and Highly Misleading. In this case, the State generally knew, and the district attorney specifically knew that the Punt sisters' testimonies were false. When the State called these witnesses to testify and they all lied on the stand, the State had a duty to correct the lies. "A lie is a lie, no matter what its subject and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue,* 360 U.S. at 269-70. During the State's direct

examination, Tammy Punt was asked about her having full custody of her 2 nieces, KH and BH. Tammy Punt began to tell the truth about her sister being incarcerated. This is critical to the appellant's defense. The following was stated during trial by Tammy Punt:

> Q. Did -- who had custody of those kids in their early childhood?
>
> A. I had Brooklyn when I was 19 at six months. I didn't have her, I'm sorry. I was given custody of her through CPS when she was six months old. And I had Katelyn when she was born. **She was born while her mother was incarcerated** so I picked her up from the hospital the day that she was born.

By this statement made by Tammy Punt, she just stated the fact that her sister has been incarcerated, which means she was convicted of a crime. The transcript is the official record of the trial. The truth about the State's witness Regina Punt has now been disclosed by the other State witness Tammy Punt.

> Q. And without going into specifics. When you talk about their mother are you talking about Regina?
>
> A. Yes.
>
> Q. And CPS thought that it was better for you to have custody of kids at that time?
>
> A. Yes.
>
> MR. GUINAN: Objection; speculation, Your Honor.
>
> THE COURT: Sustained.
>
> Q. (BY MR. MCMILLIN) Who gave you custody of the kids?

A. CPS.

Q. Who's Dean Dyslin as we see in State's Exhibit 2?

A. That's Regina's boyfriend -- fiance, excuse me.

Q. You said fiance. Have they -- were they dating back in 2012, 2013?

A. Yes.

Q. Fast-forward to when Madeline was born a couple years later. Who had custody of Madilyn when she was born?

A. Her dad -- her dad's side of the family was taking care of her at the time.

Q. And when you're talking about dad's side of the family, when we're looking at State's Exhibit 2, you're talking about Justin Greene?

A. Yes.

Q. When did -- in October 2012, I know it's been awhile ago, but did you have custody of Brooklyn or Kaitlyn or Madilyn?

During this testimony, the judge stopped Tammy Punt from testifying, and had the jury exit the court.[3 RR 77] 1. The judge spoke directly to the state's witness giving false facts about admissible evidence.[3 RR 77] 9-11.

COURT: Ms. Punt, so when the State -- and for record sake we are out of the presence of the jury panel. When the State tells you don't say what somebody else has told you, that means you -- also you can't offer anything either. So if the State doesn't ask you a question, and there's some silence, you don't have to fill the void, okay? Just wait for your next question and make sure you're answering the question that's asked of you, okay?

The judge also refused to allow the jury to learn the facts about the State's witness Regina Punt, who has a criminal record and has been incarcerated. The judge

instructed the state's witness Tammy Punt not speak about her sister Regina Punt's incarceration. This is a lie by the court to the jury. The district attorney has the responsibility to correct these false statements, even when the false statement is from the judge. [3 RR 79-81]

> MR. GUINAN: One last thing, Your Honor. I believe that issue of incarceration of Ms. Regina Punt is now open. The -- Tammy Punt did testify and was -- a question was elicited and she did testify that she was in jail.
>
> THE COURT: I'm not gonna allow it in. That's one of the things that -- maybe we should have had a conference with Ms. Punt on the record. Ms. Punt, there are things that are not admissible, okay? And the fact of where your sister was when you had the kids, not admissible. I'm even uncomfortable with the fact that you mentioned CPS. Just limit it. Okay, because I'm not letting y'all get into that. She did say it. I heard her say it. I looked up when she said it.Okay. But I'm not gonna let you because she slipped. The State didn't ask the question; she offered the information. Don't reference it again. Do you understand?
>
> THE WITNESS: Yes, Your Honor.
>
> MR. MCMILLIN: Just for the record I have informed the witness of the two rulings that we had earlier this morning not to discuss those two issues.
>
> THE COURT: Okay.
>
> MR. MCMILLIN: You remember that, right? And we're not talking about those two things?
>
> THE WITNESS: Right. Those two things, yes, sir.

The jury panel was brought back in and the judge did not allow the defense to impeach the witness. [3 RR 81] 13

Conclusion

Where the state and the judge unprofessional errors have resulted in injuries and imposing a sentence based upon unreliable information, Texas Courts have not hesitated to correct the Injustice. Here we have recorded proof of the Judge and the State prosecutor's complete failure to correct false and misleading testimony. In fact, the record reflects the proof of the judge and the state prosecutor encouraging and demanding the state witnesses to give some false and misleading testimony. We also have the proof of the state and judge concealing and withholding critical information from the jury. For these and the previously reasons discussed, the prejudice flowing from the Judge and the district attorney creates a reasonable probability that the outcome would have been a "not guilty" verdict. See *Strickland,* 466 U.S. at 687.

Had the state prosecutor and the judge upheld their duty to correct any false accusations and statements, and encourage the state witnesses' to tell the truth, the whole truth and nothing but the truth. Further, the district attorney and the judge, allowing the jury to act upon unreliable false, and incomplete information was not only unreasonable and unprofessional, but also caused more than enough prejudice to warrant relief from this conviction. This requires a reversal

23rd Summary of Argument

The judge was prejudiced and committed a federal constitutional error which violated Appellant's due process when the court excluded Appellant's relevant and necessary defense evidence.

Issue:

Evidence is "relevant" that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." EVID. R. 401. "All relevant evidence is admissible, except as otherwise provided by . . . these rules. . . .Evidence which is not relevant is inadmissible." EVID. R. 402. EVID. R. 404 generally prohibits "the circumstantial use of character evidence." GOODE, WELLBORN &; SHARLOT, Texas Practice: Texas Rules of Evidence: Civil and Criminal Sec. 404.2 (1988), at 106. Thus, although relevant, "[evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." EVID. R. 404(b). Evidence of "other crimes, wrongs, or acts" "may, however, be admissible" if it has relevance apart from its tendency "to prove the character of a person in order to show that he acted in conformity therewith." EVID. R. 404(b). Hence, a party may introduce such evidence where it logically serves "to make . . . more probable or less probable" an elemental fact; where it serves "to make . . . more probable or less probable" an evidentiary fact that inferentially

leads to an elemental fact; or where it serves "to make . . . more probable or less probable" defensive evidence that undermines an elemental fact. EVID. RS. 404(b) and 401, both supra. Illustrative of the permissible "purposes" to which evidence of "crimes, wrongs, or acts" may be put are "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" EVID. R. 404(b). Extraneous offense evidence that logically serves any of these purposes is "relevant" beyond its tendency "to prove the character of a person to show that he acted in conformity therewith." It is therefore admissible, subject only to the trial court's discretion nevertheless to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice. . ." EVID. R. 403. On the other hand, if extraneous offense evidence is not "relevant" apart from supporting an inference of "character conformity," it is absolutely inadmissible under EVID. R. 404(b). For if evidence of "other crimes, wrongs, or acts" has only character conformity value, the balancing otherwise required by EVID. R. 403 is obviated, the rulemakers having deemed that the probativeness of such evidence is so slight as to be "substantially outweighed" by the danger of unfair prejudice as a matter of law. Beechum, 582 F.2d at 910. Montgomery, 810 S.W.2d at 383-87.

The trial court refused to allow Appellant's necessary defense evidence in the record, and ruled all Appellant's evidence as inadmissible except for 2 exhibits. This destroyed Appellant's defense. EVID. R. 401 is the test to determine if evidence is relevant. Starting with Defense Exhibit 4, this evidence was relevant because it makes the State's accusations about the Appellant's committing this crime less probable than it would've been without the evidence. The judge is required to accept the Appellant's offer of relevant evidence for the jury to decide the facts in the case. Finding a piece of evidence should be admitted before the jury as "[a]ll relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." EVID. R. 402. The new rules favor the admission of all logically relevant evidence for the jury's consideration. See Crank, 761 S.W.2d at 342 n.5. 28 1 "Relevant evidence means having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." EVID. R. 401; FED. R. EVID. 401."Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case."Advisory Committee Note to FED. R. EVID. 401. As the Court said in Waldrop 2 :EVID. RS. 401, 402, and 403 are identical in all material aspects to the same 1 EVID. R. 403 provides as follows: "Although relevant, evidence may be excluded if 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." Crank, 761 S.W.2d at 342 n.5.2" 1) [to] show the context in which the criminal act occurred . . .; 2) to circumstantially prove identity where the State lacks direct evidence on this issue; 3) to prove scienter, where intent or guilty knowledge cannot be inferred from the act itself; 4) to show malice or state of mind where malice is an essential element of the State's case and it cannot be inferred from the criminal act; 5) to show the accused's motive; or 6) to refute a defensive theory raised by the accused."Montgomery, 810 S.W.2d at 375.numbered rules in the Federal Rules of Evidence from which they were derived.The State withheld from the jury, the exculpatory evidence which identifies an "outcry" by the alleged victims, accusing someone other than the Appellant, for sexually abusing the alleged victim. This evidence could have been the determining factor of guilt or innocence if properly accepted it into evidence by the Judge. This evidence would have raised a reasonable doubt in the minds of the jurors. Although this Court is not bound by lower federal court decisions, when the Texas Rule duplicates the Federal Rule, greater than usual deference should be given to the federal court's interpretations. See Campbell, 718 S.W.2d at 716 ; Rodda, 745 S.W.2d at 418; Cole, 735 S.W.2d at 690. The State Liaison Committee, appointed by the Legislature in 1981 to propose codified rules of

evidence, consistently considered the Federal Rules, although it rejected verbatim adoption. CAPERTON AND MCGEE, Background, Scope and Applicability of the Texas Rules of Evidence, 20 Hous.L.Rev. 49, 51 (1983). Bargas, 252 S.W.3d at 887. The jury, as the trier of fact, "is the sole judge of the credibility of the witnesses and of the strength of the evidence." Fuentes, 991 S.W.2d at 271. The jury may choose to believe or disbelieve any portion of the witnesses' testimony. Sharp, 707 S.W.2d at 614; Bargas, 252 S.W.3d at 887. The judge withheld the Appellant's evidence which violated the Appellant's U.S. and State Constitutional rights, therefore this is a reversible error.

22nd Summary of Argument

Issue:

The judge violated the appellants State and Federal Constitution by not acting impartial during the trial and making cumulative bias and disparaging statements in the presence of the jury throughout the entire trial:

[B]efore its Caperton decision in 2009, the Supreme Court had identified only two specific instances requiring judicial recusal on constitutional grounds: (1) "where a judge had a financial interest in the outcome of a case," see id. at 2259-61 (citing Tumey, 273 U.S. at 535), and (2) "where a judge has no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding," see id. At 2261-62 (citing Murchison, 349 U.S. at 133; Mayberry v. Pennsylvania, 400 U.S. 455, 466, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971)). In Caperton, the Supreme Court identified a third circumstance requiring recusal: where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Id. at 2259 (citing Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). Villareal, 348 S.W.3d at 372-73 .See also Liljeberg (objective standard regarding appearance of impartiality); Sao Paulo Brazil (objectivity has to be based on all the relevant circumstances) (see also Potashnick, 609 F.2d at 1111); Caperton, 556 U.S. at 876 (not all recusal / disqualification issues

sound in Due Process, but some do) ($50 million judgment at risk; $3 million in judicial election campaign by prospective judgment debtor).

Rule:

In determining whether a judge's impartiality might be reasonably questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. Burkett, 196 S.W.3d at 896 (citing Kirby, 917 S.W.2d at 908). At one point in time, Texas law distinguished civil and criminal cases for 74 evaluating disqualification. Arnold. However, it appears that there is a uniform recognition of TEX. RS. CIV. P. 18a, 18b. Abdygapparova, 243 S.W.3d at 195 (construction of the civil rules to evaluate disqualification). The fundamental focus is whether the right to an impartial judge has been violated. While adverse rulings don't prove or disprove intolerable bias, comments in the present of the jury and communicative behavior of the judge may. Abdygapparova complained about the judge's conduct throughout the trial, which additional evidence the appellate court didn't consider. Id. at 199. Thus, the court appears to be suggesting that the matter either be raised in a motion for new trial or in the appeal, generally. The test is not whether Appellant has proved harm but rather the

court's comments and behavior would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceeding such as would necessitate reversal.

Application:

These behaviors by the judge prove cumulative bias, prejudice, and are in violation of the judge's ethical and professional rules of conduct. An independent judiciary is essential to maintaining the rule of law. Judges should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions. Judges also must explain their decisions in public written opinions, and their decisions can be appealed to a higher court for review. These list below is not fully complete, but gives good overview of violations that took place throughout the Appellant's trial. The trial transcript has been edited by the court, and many of these instances will not be found in the transcript. Therefore, it is necessary to have the audio record of the trial available to confirm and verify these issues actually took place. The following actions by the judge are reversible per se

A. The judge told Appellant's family and Appellant they were not allowed to cry.

B. The Judge threatened to impeach the defense witnesses if they continued to show any emotion. (this has been removed from the transcript, therefore please review the trial audio to hear the proof)

C. The judge called out the Appellant and told him he would be removed from the courtroom if he continued to show emotions.

D. The judge told the witnesses they were not allowed to ask the jury for mercy on sentencing. [7 RR 87] 1-4

E. The judge knowingly lied to the jury about the State witness Regina Punt's criminal history, falsely claiming to the jury she was never convicted.

F. After State witness Tammy Punt slipped during her testimony, the judge then stopped the testimony and removed the jury panel from the court so the Judge could speak directly to the state witness.

G. The Judge instructed State witness Tammy Punt not to discuss th criminal background or the CPS investigations involving her sister Tammy Punt apologized and obeyed the judges instructions.

H. The Judge threatened to impeach the defense witness Susan Millerand not allow her to testify because the Judge did not like the way the defense witness was answering the questions.

I. The judge sent the jury out multiple times during Susan Miller's examination to reprimand both the Defense attorney and Defense witness.

J. The judge threatened the defense witness with impeaching her if she did not stop with her behavior.

K. The judge threatened Defense attorney with jail if he did not get control of his witnesses.

L. The judge sent the bailiff to stand next to the Appellant's witnesses to intimidate and create a false impression about the witnesses.

M. The judge reprimanded the defense witness in front of the jury

N. The judge was working on other cases and allowed interruptions during the trial.

O. On multiple occasions during the trial the judge spoke to the witnesses directly after removing the jury from the court, to control what was going to be allowed in as testimony and what the judge did not allow, regardless of the rules of evidence.

P. The judge committed fraud by altering and tampering with the appellant's Exhibits

Q. The judge deceived the Appellant by giving the false impression that she filed the original Braby evidence into the Appellant's Exhibit file.

R. The judge has committed fraud by replacing this case file with a adulterated version of the trial transcript.

S. The judge gave compliments to a jury member about her hair style.

T. The judge refused to allow the Defense attorney to state on the record the law, claiming he is making her look bad in front of the jury.

U. The judge made the comment to the State witness that the judge felt uncomfortable when the State witness mentions her sisters criminal record and past CPS Investigations.

V. This judges deputy clerk refuses to release a copy the presumption of prejudice approach is consistent with TEX. CONST. art. 1 which provides in pertinent part, pursuant to the rules of criminal procedure, when a jury can not reach a unanimous verdict, it is the duty of the judge to declare a hung jury and call for a mistrial if they so choose.

Conclusion:

The judge has a duty to maintain impartiality. Violations of this duty are so serious as to constitute a reversal. Appellant's right to a fair trial presides over a fair and impartial judge. The Judge in this case became embroiled in the proceedings, assumed the role of a prosecutor, made disparaging remarks, considered matters not in

evidence, formed an opinion in trial court before the Defense presented the defense, and/or exhibited clear bias and prejudice.

23rd Summary of Argument

Issue:

The judge disabled the jury's ability to conclude a unanimous verdict. During the Jury Charge Conference, the attorney for the State asked for a definition of the phrase "on or about" to be included in the jury charge. [5 RR 4-7]. The trial court rather than read all three charges combined them into a hybrid jury charge. [5 RR 9-14] The trial court told the jury:

> COURT: [t]here are three specific complaining witnesses in each cause. A majority of the charges apply to all three causes; however, there are three distinct portions that apply individually to each individual cause number. So I'm gonna read them in conjunction. (Emphasis added).
>
> COURT: You'll get the entire charge for each number, but it would waste your time if I read three separate charges, okay? The trial court then combined the three charges and read that hybrid charge to the jurors. [5 RR9-17].

The judge acted in prejudice and did not accept the jury's request for a mistrial. The eighth note the jury sent to the judge stated:

> "We the jury, have a disagreement on the 2 counts of three. We, the jury, are not able and cannot come to an unanimously -- unanimous agreement." The judge did not accept the fact that the jury could not come to an agreement.

The judge read her answer which stated:

> "I am not satisfied that you have not deliberated sufficiently. In good conscience at this moment, I cannot accept any report that you are unable to arrive at an agreement. Accordingly I return you to your deliberation." [6 RR 11]

The judge called the jury back in the court, and requested an extra chair for the second

alternate. [6 RR 11] The judge then stated: [6 RR 12] 4 The jury sent a total of 8 questions to the judge, which proves the jury struggled. The evidence was limited to only the State's evidence. The Appellant's evidence, which was Brady and exculpatory evidence, the judge did not allow nor was presented to the jury. After 2 days of deliberation, the jury asked the judge for a mistrial and the judge's response was that she would keep them until 7:00 pm if she had too. The total actual trial duration was shorter than the time the jury took to deliberate.When this occurs and the jury deliberated longer than the evidentiary phase of the trial, a reversal should be ordered. Accord, LeMons. After 2 days of deliberations, the jury vote was 9 innocent and 3 guilty. The jury was deadlocked. Also during this phase of the trial, the judge was involved in a different trial's jury selection, and explained to the panel that there may be some delays. [6 RR 11-12.]

Rule:

First the court needs to determine whether the charges were erroneous, by allowing for the possibility of non-unanimous verdicts, as held by the majority of the court of appeals. Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must "agree upon a single and discrete incident that would constitute the commission of the

offense alleged." There are several ways in which non- unanimity issues arise, and in this context, based on the court's precedent, they have recognized three variations that may result in non-unanimous verdicts as to a particular incident of criminal conduct that comprises the charged offense. Non-unanimity may result in each of these situations when the jury charge fails to properly instruct the jury, based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous. See Cosio, 353 S.W.3d at 771. 8 In Richardson, as in the present case, it is not enough that the jurors might be convinced beyond a reasonable doubt that the defendant committed "a series of violations in concert with others," it must be unanimous about each specific violation that it found the defendant had committed. The Supreme Court explained that a federal criminal jury must unanimously agree on each "element" of the crime in order to convict, but need not agree on all the "underlying brute facts [that] make up a particular element. The crucial distinction is thus between a fact that is a specific actus reus element of the crime and one that is "but the means" to the commission of a specific actus reus element. Richardson is precisely analogous to the present. Ngo, 175 S.W.3d at 747 . 9 The jury, as the trier of fact, "is the sole judge of the credibility of the witnesses and of the strength of the evidence." Fuentes, 991 S.W.2d at 271. The Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must "agree

upon a single and discrete incident that would constitute the commission of the offense alleged." There are several ways in which non-unanimity issues arise, and in this context, based on our precedent, we have recognized three variations that may result in non-unanimous verdicts as to a particular incident of criminal conduct. Cosio, 353 S.W.3d at 771. "Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases." Ngo, 175 S.W.3d at 745.81jury may choose to believe or disbelieve any portion of the witnesses' testimony.Sharp, 707 S.W.2d at 614. Richardson. Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. McDuff, 939 S.W.2d at 614. In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence in a neutral light and inquire whether the jury was rationally justified in finding guilt beyond a reasonable doubt. Zuniga, 144 S.W.3d at 484.The judge did not allow the jury to see all the Appellant's evidence. As a matter of fact, only 2 of the Appellant's Exhibits were presented to the jury, one of which, was Exhibit 8, which was altered and changed. The lack of evidence caused a hung jury. Which meant that the jury found the evidence factually insufficient.

Conclusion

The jury can find the evidence factually insufficient in two ways. First, when considered by itself, the evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. Second, after weighing the evidence supporting the verdict and the evidence contrary to the verdict, the contrary evidence may be strong enough that the beyond-a- reasonable-doubt standard could not have been met. Richardson. The fact that the jury told the judge they could not come to an unanimous verdict proves the evidence was too weak for the jury to find the Appellant guilty.

CONCLUSION AND PRAYER

This court should reverse due to the cumulative harm of the errors. This case presents a number of clear cut indisputable errors. The outcome hangs on whether this court finds these errors caused sufficient harm to require reversal. If the court finds 2 or more of these errors harmless, appellant is entitled to reversal due to the cumulative harm of the errors.

WHEREFORE PREMISES CONSIDERED, Appellant prays this Court to uphold these points of error and order the relief requested herein. Respectfully Submitted,

/s/ Derrick Sullivan

Nov. 16, 2017

Nos. 05-16-01138-CR 05-16-01139-CR 05-16-01140-CR

==========

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

==========

DERRICK BRANNON SULLIVAN,
Appellant,

v.

STATE OF TEXAS ,
Appellee.

Appealed from the 282nd Judicial District Court of
Dallas County, Texas, the Honorable Amber Givins, Presiding
Court Cause Numbers: Trial F13-24555, F13-24563, F13-25621

CERTIFICATE OF SERVICE

On October 20, 2017, I electronically served a true copy of this APPEAL BRIEF to the following parties by email using e-file and serve.

Niles Illich
Law Office of Niles Illich, Ph.D, J.D.
701 Commerce St.Suite 400 Dallas, TX 75202
* DELIVERED VIA E-MAIL *

Anne B. WeatherholT Assistant District Attorney
133 N. Riverfront Blvd.Lock Box 19 DALLAS, TX 75207-4399
* DELIVERED VIA E-MAIL *

Nos. 05-16-01138-CR 05-16-01139-CR 05-16-01140-CR

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IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

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Court Cause Numbers: Trial F13-24555, F13-24563, F13-25621

CERTIFICATE OF COMPLIANCE

Derrick Sullivan
TDCJ No. 02092943
Wallace Unit
1675 South FM 3525
Colorado City, TX 79512
Pro Se Litigant

I, Derrick Sullivan, relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this appeal brief (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix) is 34,286. This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes

Filed on November 17, 2017 with the correction for the certificate of compliance,

/s/ Derrick Sullivan

Pro se litigant

CERTIFICATE OF SERVICE

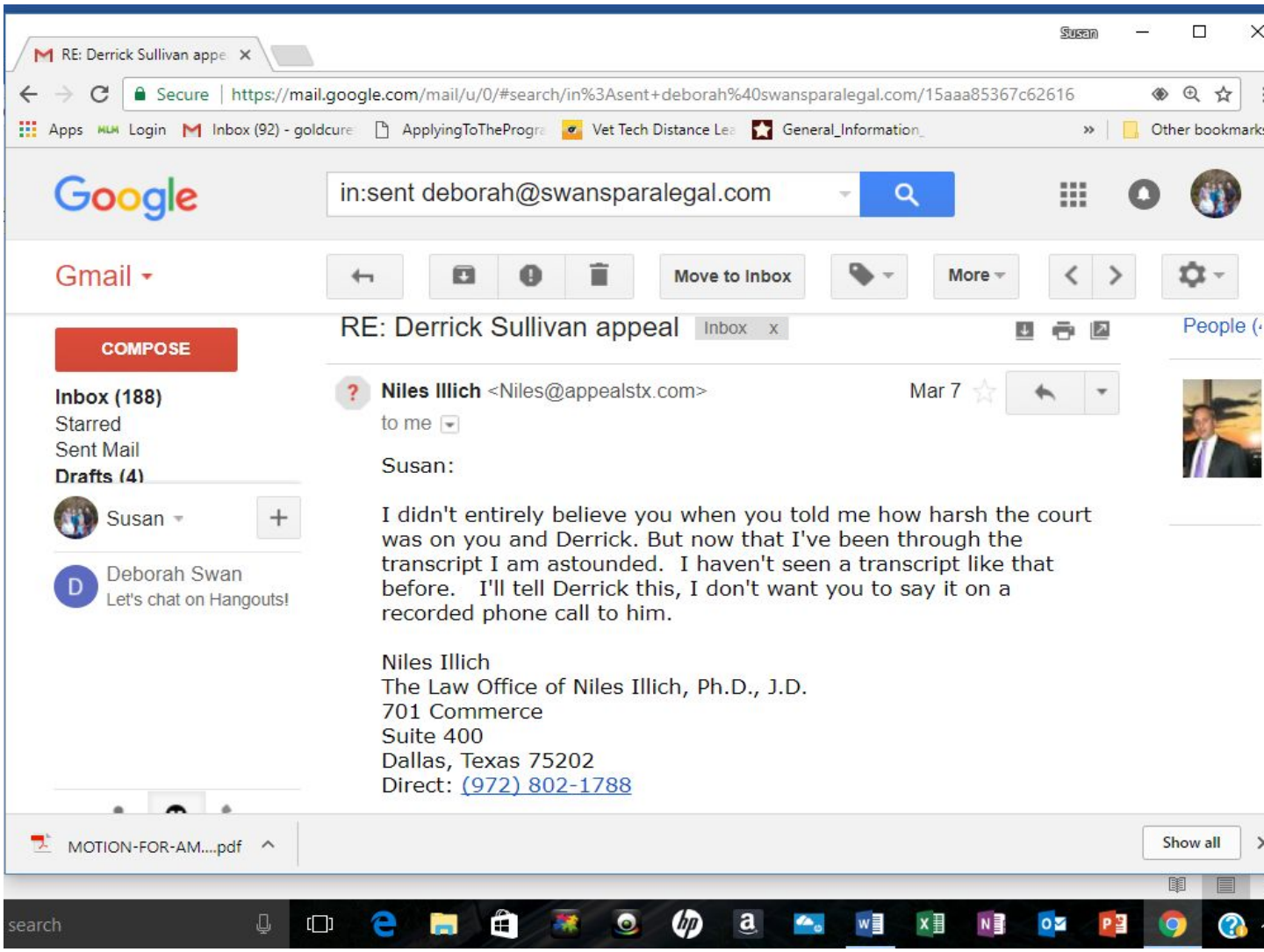
Text

I certify that the following people were served a copy of this certificate using the Tyler Tech "file and serve" system.

Anne B. Weatherholt
Assistant District Attorney
133 N. Riverfront Blvd.
Lock Box 19
DALLAS, TX 75207-4399

Law Office of Niles Illich, Ph.D, J.D.
701 Commerce St.Suite 400
Dallas, TX 75202
* DELIVERED VIA E-MAIL

APPENDIX A


RE: Derrick Sullivan appe
Secure
https://mail.google.com/mail/u/0/#search/in%3Asent+deborah%40swansparalegal.com/15aaa85367c62616
Apps
Login
Inbox (92) - goldcure
ApplyingToTheProgra
Vet Tech Distance Lea
General_Information_
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in:sent deborah@swansparalegal.com
Gmail
Move to Inbox
More
COMPOSE
Inbox (188)
Starred
Sent Mail
Drafts (4)
Susan
Deborah Swan
Let's chat on Hangouts!
RE: Derrick Sullivan appeal
Inbox x
People (4
Niles Illich <Niles@appealstx.com>
Mar 7
to me
Susan:
I didn't entirely believe you when you told me how harsh the court was on you and Derrick. But now that I've been through the transcript I am astounded. I haven't seen a transcript like that before. I'll tell Derrick this, I don't want you to say it on a recorded phone call to him.
Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788
MOTION-FOR-AM....pdf
Show all
search

APPENDIX B

-------- Original Message --------
Subject: Re: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
From: Susan Miller <goldcureteam@gmail.com>
Date: Wed, September 27, 2017 1:25 pm
To: Niles Illich <Niles@appealstx.com>

Hello Niles
I hope you are well.

I have been doing some research and both Derrick and I have issue with several things related to his appeal. Derrick should have been given a copy of the transcript/trial record to review to help with his appeal. This is his constitutional right18 U.S.C. § 3006A, 28 U.S.C. § 753(g). Legally the names and addresses can be redacted and he is entitled to the record. There was evidence not allowed by the judge and motions were filed for Brady vs Maryland, which the supreme court said any evidence which benefits the defendant to exonerate him can be used. so the 3rd case should have been appealed as well based on this. This was not new evidence but an error by the judge. Are you telling me there was no entry into the record, no objection for the evidence that the judge did not allow?

How can the jury decide without all of the evidence? Derrick was not consulted about the oral argument but you stated that he did not request oral argument.

Derrick would like to amend the appeal brief to include to evidence that was not allowed by the judge and for oral argument. An oral argument would be helpful since the state claims no harm. You are harmed when your constitutional rights are violated and prevents you from raising your child, also harm to the child. A post conviction polygraph is an option to be presented at appeal. Since he has not seen the record he cannot have a fair appeal. If he did not request the transcript correctly he should have been counseled on the proper way to obtain it, unless you don't want him to see it for some reason

"trial judge excluded certain evidence that might have benefited you, or admitted certain evidence that harmed you, that ruling may be the basis for overturning your conviction."

APPENDIX C

On Wed, Sep 27, 2017 at 1:34 PM, Niles Illich <Niles@appealstx.com> wrote:

Susan:

Thank you for your email. This case is set for oral argument on October 10.

I'm not sure I understand that issue about the transcript. Are you saying that the court or the state had a duty to provide it to him or that I had a duty or that the Court Reporter had the duty or that we all did? I'm not meaning to parse this but I don't understand. I looked up the citations that you sent and they were to federal law that is unrelated to the law that governs this case. This can be a tricky area because some federal law is going to apply and some isn't going to apply. It just depends on what the law is. In my super quick review the two citations that you provided to me do not apply.

If I remember correctly, and I may not off of the top of my head, didn't I send the records to you on dropbox?

Concerning the Brady question, I don't know what you are asking. Perhaps what I mean to say is that I don't remember the nuances of the transcript to answer the question. I can't recall every piece of evidence in this case but we can look.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

APPENDIX D

Email from appellate counsel about trial transcripts

-------- Original Message --------
Subject: Re: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
From: Susan Miller <goldcureteam@gmail.com>
Date: Wed, September 27, 2017 2:30 pm
To: Niles Illich <Niles@appealstx.com>

Niles,
Derrick requested the trial record from you, you sent me the administrative record from the clerk. He has not seen the trial record and cannot have a fair appeal without seeing it. I am saying Derrick is entitled by law to see and have a copy of the trial record. you stated in a previous email that you could not share it, due to "victims" info Derrick requested the record after redaction of names and addresses.

Evidence that was not allowed by the judge which would help Derrick were not allowed by the judges as she knew it would help him. Brady vs Maryland motion was filed prior to the trial starting and that evidence should have been allowed. In my research I found that could be used in an appeal.

Thanks

APPENDIX E

---------- Forwarded message ----------
From: **Niles Illich** <Niles@appealstx.com>
Date: Wed, Sep 27, 2017 at 3:34 PM
Subject: RE: [FWD: Notice(s): 05-16-01138-CR, 05-16-01139-CR]
To: Susan Miller <goldcureteam@gmail.com>

Susan:

I am happy to provide him with a copy of the redacted version of the transcript minus the jurors names or other identifying information and without the exhibits. I need to go over to the courthouse to get the electronic copies they are not online for me. All I have is my paper copy and I need that. But I disagree that he needed a copy for the appeal. Appeals turn on very fine grained issues, mostly things that people call "technicalities." It is a very rare instance where a client contributes to an appeal. Now in the context of a writ the client has a lot to contribute, but in an appeal there is much less that a client can do to help.

I still don't understand the Brady issue that you are presenting. What was the evidence that you are talking about? I'm assuming it is the evidence of perjury or false testimony.

There is no process to amend an appeal at this point. Many times before we have discussed the issue of a writ. This is probably a writ case. The issues of things like ineffective assistance of counsel are reserved for that. Brady evidence is also probably better raised in a writ. Typically you need some sort of evidence from outside of the record to support these claims. Especially when you are talking about claims of false or perjured testimony. That really makes it a better writ issue. Although not an absolute, bringing an issue in a direct appeal can waive it for the writ--especially if the appellate court addresses the issue substantively in its opinion.

Niles Illich
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802-1788

APPENDIX F

Email from court clerk about copy of audio record of trial

lisa jackson Oct 25 (8 days ago)

to me

Good afternoon,

The certified Reporter's Record is the official record.

The audio recordings are not the official court record, therefore, they are not released.

I cannot locate the jury notes at this time. They are, however, within the transcript that was filed. The Judge reads all notes into the record along with her reply.

Thank you,

Lisa Jackson

Official Court Reporter

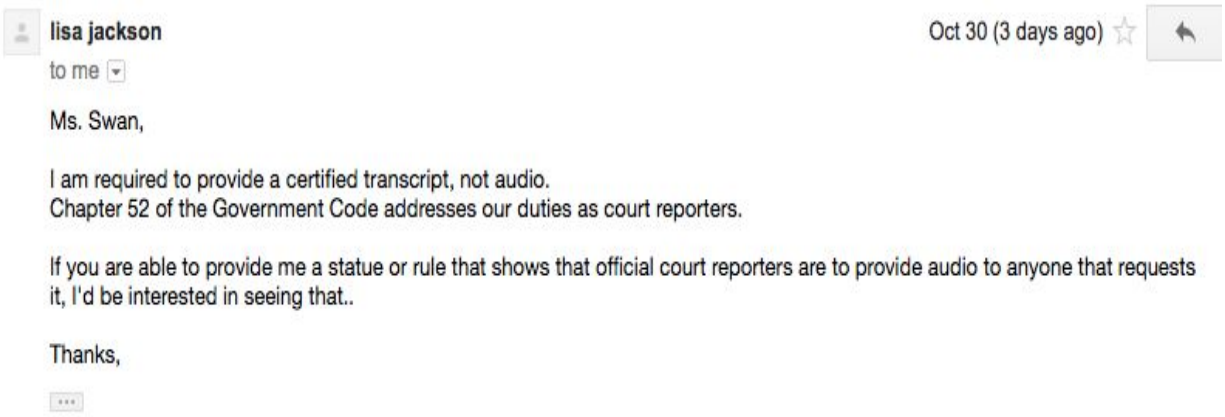
Frank Crowley, 5th Floor

282nd Judicial District Court

Phone: 214-653-5853

APPENDIX G

Email response to the clerk about the audio record of trial



lisa jackson Oct 30 (3 days ago)

to me

Ms. Swan,

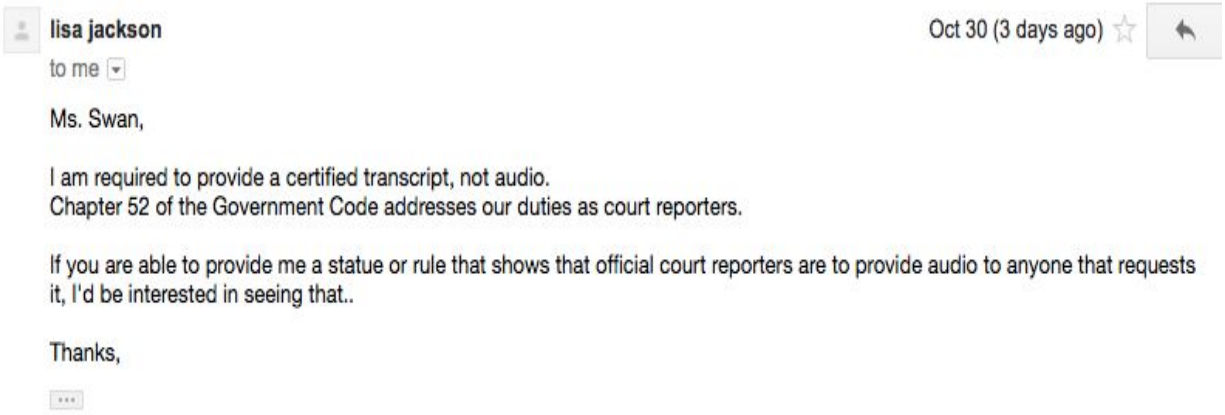
I am required to provide a certified transcript, not audio.
Chapter 52 of the Government Code addresses our duties as court reporters.

If you are able to provide me a statue or rule that shows that official court reporters are to provide audio to anyone that requests it, I'd be interested in seeing that..

Thanks,

APPENDIX G

Email response to the clerk about the audio record of trial



lisa jackson Oct 30 (3 days ago)

to me

Ms. Swan,

I am required to provide a certified transcript, not audio.
Chapter 52 of the Government Code addresses our duties as court reporters.

If you are able to provide me a statue or rule that shows that official court reporters are to provide audio to anyone that requests it, I'd be interested in seeing that..

Thanks,

APPENDIX H

Affidavit of summary of CPS records admitted as evidence

CPS evidence the judge ruled as inadmissible in appellant's case

Neglectful supervision: 07/25/06 Regina Punt, serious. 12/31/06 moderate. 04/29/10 serious. Monthly contacts were completed.

07/25/06 Caseworker Coleman Krystal, Report of Regina and Ryan using ICE in the home. Leave pipes and marijuana lying around the home, smell of burnt chemicals. They were living with FA GMO who passed away since that time there is a constant line of care coming and going from the home.

08/21/07 Neglectful supervision: Intake received Caseworker Nicole L. Rogers, Case: Regina Punt r/t BH, KH. Case initiated due to injury to KH. KH was found upside down asleep between the bed and wall, 911 called. When picked up by Tammy Punt she has an indention and red marks said to be bug bites by hospital. While CPS caseworker was in the home she found BH jumping on the bed with sharp scissors, a broken crack pipe found in maternal grandmother's room and a piece Chore Boy copper used in a crack pipe was found in grandfather's room. No electricity, dirty diapers everywhere. CPS placed children with Tammy Punt, aunt. Police told family to clean up the home. Tammy was considered the designated perpetrator

03/04/08 TCT: Spoke to Brandon Punt, He stated Regina was back in jail due to probation violation. He stated they were taking turns keeping the girls. He stated that Terri had agreed for the girls to be in Tammy's care for a while.
3/10/08 Caseworker Stephen Edwards: Regina Punt was interviewed at the George Allen tower of the Dallas County jail. She stated she did not know how long she would be in jail. She stated that when she gets out of jail she plans on moving in with the father of her current pregnancy, Justin Morgan Greene. Biological father of BH and KH is currently in jail at Lew Sterrett justice center.

09/09/2008 Face to Face: CPS worker Karen Fry went to father's address 101 N. Bowser rd, apt 111 in Richardson TX unannounced and met with the following people: Kevin Hanna age 31, DOB 10/23/76. Worker requested to speak with Ryan or Theresa. Kevin informed her that Ryan had a court date for probation and Terri was at work. He told the worker he had known the family for approximately 3 months. He stated Terri asked him if he could baby sit for about 3 months until they secured daycare down the street for both girls. He stated both Ryan and Terri have discussed with him their plans of filing for custody of the girls until their mother is stable. Kevin stated he has no problem helping out until daycare is secured. The girls were found napping. BH 2, KH 1 year of age.

05/17/10 caseworker spoke to Melissa Green PGMO of MH. Melissa said she had had MH for a week and was seeking custody, she also stated that she had a CPS case against her due to false allegations from ex-husband. She stated Regina was supposed to be giving her consent for medical treatment, Justin Green her son, is biological father of MH. Current caseworker Victoria Bogan
Caseworker Spoke with Justin Greene FA of MH. Justin was told he was not allowed to have unsupervised visits with MH until further directives were given.

05/21/10 Caseworker spoke to Regina Punt ay Lew Sterritt County jail, Regina said she did not want MH to remain with Melissa Greene or Justin Greene wanted her to be placed with her sister Tammy Punt. She then provided 3 references for MH

05/28/10 Tammy told caseworker she took a leave from her job and moving in with her father to take care of BH and MH and her 2 kids.

07/12/10 Court hearing date for MH scheduled August 11, 2010 in 304th court.

07/26/10 CPS worker spoke to Tammy Punt whose sister Candy is married to Justin Greene's brother and stated that Melissa told her that they will not be coming to court and good luck with serving them. Tammy told CPS worker that her sister Candy is married to Justin Greene's brother and that Melissa's home is very dirty and infested with roaches. She said MH was riding a wild horse and that Justin lives in the home and MH sleeps in the bed with him.

9/9/10 placement paperwork was delivered to Tammy Punt for BH and KH

Note: 2012 Regina Punt had custody of BH and KH and Terri Franks made multiple reports to CPS.

7/18/12 CPS worker and a detective Eric Willadsen attempted to find KH to ensure she was taking required medications due to Turner syndrome. A report was called in that she was not getting her medication. Regina told them KH had been getting her medication and that her sister Tammy had picked up the girls from PGMO on Wed and would be returning them on Friday. She stated that the girls were supposed to be with their father but he was in jail. Regina stated she lived with her boyfriend Dean Dyslin. Regina provided a court order for contact with her children when Ryan is unable to get them. Worker observed a gallon clear zip lock bag with marijuana in it and drug paraphernalia in the house. Regina denied it being hers. Regina had possession of the girls at the time and the case worker told her she had to call her sister Tammy to come get the girls. They then put a safety plan into effect so that Regina could only have supervised visits with the girls.

The girls were interviewed at that time and stated that they lived with their aunt Tammy, mother and Dean, BH stated that there is no one at her house that she is scared of. She stated that no one has ever tried to hurt her before. She stated that neither she nor KH have ever been left alone before. She stated that Nana-Terry or Melody watches them when their mom is not there. She stated that she has been with her mom for a little bit and her nana for a long time. KH stated she is 5 years old and her birthday is December 30th, but did not know what year. She stated that she lives with her Auntie EM-Tammy, Mommy, Dean and BH. She stated that there is no one at her house that she is afraid or scared of. She said her daddy was in jail and she was staying with her nana. She stated that her nana is Terry and they were with her for a long time. She stated that she does have to take medication and that her mom gave it to her every day. She stated that no one at her mom's house had ever tried to hurt her or anything. She stated that she likes living with all her family.

CPS took the girls to Richardson police department and had Tammy Punt come to pick them up. Tammy was told Regina was to have no unsupervised visits.

07/20/17 Regina contacted CPS wanting to know how she could get her children back, stating that they were back in Van Zandt County with their PGMO. She wanted to know how to get them back.

7/31/12 FTF-FA. He stated mother Regina irresponsible, most likely doing drugs again. Girls are not supposed to be at her home. They are only supposed to be at their aunt's home. He stated that Regina is conniving and will lie to investigator. He states that his girls are safe with his mom and that is where he wants them if he has a choice.

10/18/12 MDT learned that OV and SB have been forensically interviewed as being SXAB while being at their aunt's house. Girls were both touched outside of their clothes on their vagina

10/23/12 TCT PGMO advised that the girls had been going to their aunt's home on and off over the summer. Recently BH got upset and said. Recently BH got upset and said she did not want to go any more, telling her that Derrick always rubs her "wonkie" when they go over there. She contacted her attorney Zach Elliott and he said to call LE and report, which is how Mickey Henson got involved. She stated the girls would only be seen by anyone at her home.

CPS wrote: Factors controlled in the case as BH and KH are now residing with their PGMO as per court order. T. Franks will be petitioning the court to place more restrictions on Regina Punt. The girls were visiting their aunt during a recent visit and claimed SXAB. A criminal investigation will be opened on that matter.

11/5/12 Letter to Teresa Franks thanking her for sharing her concerns about the girls BH and KH.

CPS investigation completed. No further services offered to the family at this time.

APPENDIX I

IN THE COURT OF APPEALS

Dallas County, TEXAS

APPELLANT

Derrick Sullivan,

Vs.

The State of Texas

AFFIDAVIT MISSING EXHIBIT

THIS INSTRUMENT HEREBY ACKNOWLEDGES that the undersigned, Susan Miller, ("affiant"), does hereby swear and affirm that the following is true and accurate, to the best of their knowledge, under penalty of perjury:

Between December of 2013 and January of 2014 I received a text from attorney Bill Wirskye, who was the original attorney for Derrick Sullivan, he stated that he had received a document from the District Attorney Shelly Fox. The document received was Shelly Fox's hand written notes that she took during an interview she conducted with the alleged victims. This interview was requested by Mr. Wirskye, due to our suspicion that the girls were being told and coached about what they were to say in reference to the sexual abuse criminal charges filed against Derrick Sullivan.

The actions by, Ryan Hester, Theresa Franks who were court ordered to pay Tammy Punt child support for the girls, caused concern due to the status of my son's broken relationship with Punt, which lead to unjust motives behind the accusers filing sexual abuse criminal charges. Mr. Wirskye sent me a text message that stated, "to meet him at his new office in the Bryan Tower." As requested, Derrick and I drove to Mr. Wirskye's new office. Mr. Wirskye shared with us a piece of paper that was handwritten by DA Shelly Fox. This was a one page copied From document with

black lines on it and Shelly wrote inside the lines. The notes taken by Ms. Fox stated several things from her interview, the girls were asked if someone was telling them to say these things. The answer was "yes" they were told to say these things." The document also included accusations by the girls against Tammy Punt, stating that she was involved in this and it was ok. Due to unfortunate circumstances Mr. Wirskye was no longer practicing as a criminal defense attorney, and my sons case was taken over by criminal defense attorney Jim Guinan.

Later during the pretrial, As Derrick and I sat in the courtroom, I asked Mr. Guinan to obtain that document from prosecution and add the document into evidence. Mr. Guinan asked the prosecutor John McMillan about the document. John McMillin presented a typed Summary of Shelly Fox's notes, which did not have the same notes that were handwritten by Shelly Fox. The document presented by the District Attorney was a typed document that was missing critical parts of Shelly Fox's notes, and left out the statements about how the girls admitted to Shelly fox that they were told to say these things about my son. I told Jim Guinan that was not the correct document. I explained to Jim while Mr McMillin was there in the courtroom that the correct document is a handwritten statement by Shelly Fox. John McMillin then corrected the issue by offering the correct hand written document to the court. Jim handed me the document Derrick and I both reviewed it and verified that it was the correct document. Jim then approached the bench and presented the evidence to the judge, requesting it to be entered into the record as evidence.

During the actual trial this evidence was not allowed to be entered as evidence and was never presented to the jury. This evidence falls under the category of exculpatory evidence which was withheld from the jury.

After the case was tried and my son was found guilty, he filed for his appeal. The court appointed appellate attorney Niles Illich, My son asked numerous times to review the trial record due to the numerous judicial violations during the trial, Mr. Illich refused to give him a copy of the trial transcript and exhibits for my son's review until one week prior to the 10/10/17 scheduled submission of cause in the Court of Appeals fifth District . We have raised numerous issues of constitutional and judicial violations of which Mr Illich ignores. I believe Mr. Illich has committed fraud and misrepresentation about the law to both myself and my son on numerous occasions. Mr. Illich stated that he did not have an electronic copy of the trial record, only one paper copy and that one copy is for him. I called the court clerk to inquire

about how to get a copy of the transcripts and I was informed that a copy would be around $1500.00. After numerous requests to Mr. Illich and his refusal to consider the issues identified I emailed him the Texas rules of appeal and he then finally agreed to get me a copy at this late date. After brief review the entire record, I discovered that the exhibit of the handwritten notes from the DA Shelly Fox has been altered, and replaced with a false document. The record shows that Vol 8 is not the correct record that was filed into the record by James McMillian. In the appeal record, Defendant's Exhibits No 8, is not that document. Instead they took three different paragraphs from the prosecutor's summary and copied it onto on a blank sheet and entered it in place of the document that Mr. Guinan had requested to be entered. This evidence has been tampered with and the document requested as evidenced was switched. It was the duty of the prosecutor to ensure that the proper document was entered into evidence and presented to the jury. The prosecutor withheld this evidence which caused a Brady violation against my son.

Signed to this Day Month,

_____

STATE OF TEXAS COUNTY OF _____ In _____, on the 6th day of October 2017, before me, a Notary Public in and for the above state and county, personally appeared Susan Miller, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as her free and voluntary act and deed.

Type of ID Produced: _____

Affiant is not personally known to me

_____

NOTARY PUBLIC

My Commission Expires: _____

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Affirmed and Opinion Filed December 20, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01138-CR
No. 05-16-01139-CR
No. 05-16-01140-CR

DERRICK BRANNON SULLIVAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1324555-S, F-1324563, F-1325621

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

Appellant was indicted in three separate cases alleging a single count of indecency with a child by touching the genitals of BH, KH, and MH. The cases were tried together, and a jury found appellant guilty and assessed punishment at three years imprisonment for each offense. On the State's motion, the sentences were cumulated.

In three issues, appellant argues that the jury charge was erroneous as to BH and KH because it did not require the jurors to reach a unanimous verdict and the trial court mistakenly believed that it had to cumulate the sentences.

We conclude that (i) the charge was erroneous but did not cause appellant egregious harm and (ii) the record reflects the trial judge's understanding of her discretion to cumulate the sentences. We thus affirm the trial court's judgments.

I. BACKGROUND

The State adduced evidence including the following:

BH and KH lived with their father (Ryan) during the week and stayed with appellant's girlfriend, their aunt Tammy, every other weekend. Another of Tammy's nieces, MH, had lived with a different father, and MH did not have contact with Tammy, BH, and KH for many years.

Tammy worked and appellant did not, so he was in charge of BH and KH when Tammy was not home.

In October, 2012, Ryan told Tammy that the girls had accused appellant of sexual abuse, but Tammy did not believe Ryan. When she asked appellant about the allegations, he calmly denied them, and she believed him.

In 2013, about a week after MH accompanied Tammy, BH, KH, and appellant on a camping trip, Tammy learned that MH had accused appellant of touching her. Because, among other reasons, MH had no contact with BH and KH, Tammy concluded that what BH and KH told her in 2012 must be true.

Tammy asked appellant about MH's allegation, and he said that his finger had slipped when he helped her use the bathroom. But MH was five years old and did not require bathroom assistance. Tammy asked about BH and KH, and appellant admitted that he touched them on the outside of their clothes. She kicked appellant out of the house and called the police.

BH was ten years-old at trial. She said that she and her sister KH would go to Tammy's house on weekends and appellant was there. BH did not like appellant because "he touched [her] in the wrong place." This happened three or four times.

BH did not remember the first time it happened, but she remembered the last. She was in the living room on the couch, and appellant touched her "middle private part" on the outside of her clothes. She was scared to tell anyone because appellant told her he would hurt someone if she did.

On another occasion, BH was using the computer when appellant called her into the kitchen. Appellant was on his knees and touched the same middle part over her clothes with his hand.

Another time, appellant told her to come to the bathroom and locked the door when she entered. He then touched her middle part over her clothes with his hand.

KH was nine years-old at trial. She testified that appellant touched her on more than one occasion while in the kitchen at Tammy's house. On one occasion, appellant called her to the kitchen from the living room. He was on his knees, leaning, and touched her private part outside her clothes. The private part was what KH used "to go to the restroom to pee." When appellant would touch her private part he would tell her not to tell because he would get in trouble. But KH eventually told her grandmother.

MH was eight years-old at trial. She said appellant touched the front part of her body where she goes to the bathroom with his hand. This happened once, in the kitchen at Tammy's house. Appellant called her in, and had one knee bending and one knee on the floor, and touched her underneath her clothes. He told her that he would hurt her if she told anyone, and that made her feel sad.

Patti Flowers, a forensic interviewer with the Canton Children's Advocacy Center testified about interviewing BH and KH and their outcry to her. Anatomical drawings the girls made to illustrate where appellant touched them were admitted into evidence. Flowers said she saw no indication that the girls had been coached.

Patricia Guardiola with The Dallas Children's Advocacy Center interviewed MH in 2013, when MH outcried to her. MH told her that appellant touched her "area" with his hand over her panties when she was in the bathroom. An anatomical drawing MH made was admitted into evidence.

A therapist from the Dallas Children's Advocacy Center explained the dynamics of child sexual abuse, including delayed outcry. She also explained "inculcation," which is repeating something to a person over and over to get that person to learn new material. A person can be inculcated to a false fact by repetition.

The girls' mother, Regina, testified that MH and KH made sexual abuse allegations against appellant in 2012, but she did not know him very well and did not know what to believe. Then, in 2013, MH made an allegation against appellant as they were driving to Tammy's house, and she called Tammy.

Theresa Franks, the girls' paternal grandmother, testified that the girls made sexual abuse allegations against appellant in October 2012. She called their father (Ryan) immediately, and they filed a police report the next day.

On the other hand, appellant called several character witnesses and testified on his behalf. Appellant denied the girls' allegations, said they were lying, and claimed that Franks would do anything to get the children for herself. He claimed that he could not have been alone with KH and BH "at the time" because he was working, was only at Tammy's house one weekend a month, and was never alone with the girls. According to appellant, he thought Tammy was having an affair and trying to get rid of him. He described Tammy as manipulative and denied telling her that the girls' allegations were true. He also described a hernia that caused him great pain and prevented him from bending or stooping.

The jury sent out several notes for exhibits and the forensic interviews. One note concerned what Tammy said during the camping trip with MH, and another concerned MH's outcry to her mother. After two days of deliberations, the jury sent the judge a note that read: "We, the jury, have a disagreement on the two counts of three. We, the jury, are not able and

cannot come to an [sic] unanimously—unanimous agreement." The court read the jury an *Allen* charge, and the jury subsequently found appellant guilty of all three charges.

The jury assessed punishment at three years for each offense, and after a hearing on the State's motion to cumulate, the judge cumulated the sentences. This appeal followed.

II. ANALYSIS

A. Appellant's First Two Issues: Charge Errors

1. Was the charge erroneous because it did not require a unanimous verdict?

Appellant's first two issues argue that the charge allowed the jury to reach a non-unanimous verdict as to BH and KH because it did not limit the offenses to a specific incident or date. We agree that the charge was erroneous, but conclude that it did not cause appellant egregious harm.[1]

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed." *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). "This means that the jury must agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Id*. A non-unanimous verdict may result if the jury charge fails to instruct the jury, "based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous." *Id.*

"[N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions." *Id.* at 772. Separate instances of indecency with a child by contact are separate offenses. *Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). Therefore, in such a case, to ensure unanimity, the jury charge needs to "instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Cosio*, 353 S.W.3d at 772.

[1] There were three charges, one for each offense. But since the complained-of language is the same in the BH and KH charges, we refer to the charge singularly.

For example, in *Cosio*, the jury charge erroneously allowed for a non-unanimous verdict when there was evidence of multiple instances of misconduct supporting each count of aggravated sexual assault and indecency with a child. *See id*. at 770, 774. The "standard, perfunctory unanimity instruction," did not rectify the error because, although the jury could have believed it had to be unanimous about the offenses, the jury could have believed it did not have to be unanimous about the criminal conduct constituting the offenses. *See id.* at 774.

Here, the charge was similarly erroneous. Although there was evidence that appellant touched BH on three or four occasions and touched KH "more than one time," the charge tracked the language in the indictments and asked whether appellant engaged in sexual contact with BH "on or about August 1, 2012," and with KH "on or about July 15, 2012." Thus, the charge was erroneous because it did not require unanimity regarding which of the sexual contact the jury believed appellant committed.

2. Did the erroneous charge cause appellant egregious harm?

Having concluded that the charge was erroneous, we next consider whether appellant was harmed. When, as here, there was no objection to the charge, we reverse only if the error caused actual, egregious harm as opposed to theoretical harm. *See Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015).

Actual egregious harm occurs if the jury charge (i) affected the very basis of the case, (ii) deprived the defendant of a valuable right, or (iii) vitally affected a defensive theory. *Id.* To this end, an appellate court will "inquire about the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of the particular case." *Jourdan v. State*, 428 S.W.3d 86, 98 (Tex. Crim. App. 2014).

When assessing harm based on the particular facts of the case, we consider (i) the entire jury charge; (ii) the state of the evidence, including contested issues and the weight of the

probative evidence; (iii) the parties' arguments; and (iv) all other relevant information in the record. *Arrington*, 451 S.W.3d at 840.

a. The Entire Jury Charge

Applying the foregoing factors to this case, we first consider the entire jury charge. The State argues that the entire charge "bears minimal weight as to egregious harm" because it "limited the jury's consideration of the unindicted acts to state of mind, relationship, motive, intent, scheme or design, or the character of the defendant." But the State does not explain how this helps the jury understand the unanimity requirement. A limiting instruction concerning extraneous acts is inadequate to instruct the jury that it must unanimously agree on a single incident of criminal conduct that supports the charged offense. *See Cosio*, 353 S.W.3d at 773–74. As previously explained, the charges as to BH and KH permitted non-unanimous verdicts based on the evidence presented at trial and did not militate against that conclusion. Therefore, this factor favors finding egregious harm.

b. The State of the Evidence

Next, we consider the state of the evidence. The State's evidence came primarily from the complainants' testimony, family members testifying about the outcries, forensic interviewers, and the therapist. Each complainant testified that appellant touched her vagina through their clothes. And KG and BH said that he did that on more than one occasion.

Appellant vehemently denied doing so and denied that he was ever alone with them. He also explained that his hernia prevented him from kneeling. The defensive theory, developed primarily through cross-examination, was that some family members had a motive to "inculcate" the children into unknowingly accusing appellant.

Defense counsel also cross-examined the witnesses on inconsistencies in the interviews with the District Attorney's office, the forensic interviews, and the children's testimony. For

example, MH told the forensic interviewer that appellant touched her in the bathroom over her panties, but testified that it occurred in the kitchen over her clothes. Similarly, BH told the District Attorney's office that the offense occurred more than eight times, but testified that it happened "three or four" times.

While there were differences between the children's testimonies and the interviews, none of these inconsistencies were date specific. And with the general testimony that the touching occurred more than one time, it is unlikely that some of the jurors would have believed the conduct occurred only once while others believed that it also occurred another time.

Moreover, appellant did not argue that he was guilty of only some of the allegations. Instead, his trial strategy left the jury with an all or nothing decision—either he was guilty or he was not. According to the court of criminal appeals, in finding him guilty the jury necessarily disbelieved appellant's defensive evidence. *See Arrington*, 451 S.W.3d at 842.

Finally, there was evidence that appellant previously admitted committing the offenses. Although appellant denied doing so, the jury's verdicts suggest otherwise.

Accordingly, we conclude that the state of the evidence weighs against finding harm. *See Cosio*, 353 S.W.3d at 778.

c. The Parties' Arguments

Appellant asserts that the State's argument encouraged a non-unanimous verdict because the prosecutor referred to the touching as occurring "over and over, and over" and then argued that the State only had to prove that the appellant touched the girls' vaginas. The State responds that it was reasonable to infer that the reference was to one indicted act against one child because the complained-of argument was made in the context of arguing that the touching occurred "child after child after child."

Regardless of how isolated portions of the arguments may be interpreted, viewed as a whole, the arguments reflect that neither the State nor the defense argued that the jurors were required to be unanimous about which touching instance constituted each offense, nor were they told that they need not be unanimous. Therefore, we do not weigh this factor for or against finding egregious harm. *See Arrington*, 451 S.W.3d at 844.

d. Other Relevant Information

Finally, we evaluate other relevant information. Appellant relies on the jury's seven notes, particularly the note concerning their inability to reach a unanimous verdict, to argue that the charge errors contributed to these difficulties and thus support egregious harm. He further argues that the court's standard *Allen* charge did nothing to ameliorate the charges' unanimity problems. We disagree.

While it is possible that the jurors were confused about whether they needed to agree on a single instance of conduct, there are other plausible explanations for the jury's unanimity note. For example, it is possible that the jury understood what was required but was simply unable to reach a consensus about whether the conduct underlying one or more of the charges occurred at all. Moreover, the jury reached a unanimous verdict after the *Allen* charge, and confirmed that verdict when polled. Consequently, nothing in the record indicates that the verdict was not unanimous. Accordingly, we cannot conclude that this factor supports egregious harm.

Thus, although the charges failed to identify the particular acts necessary to support the offenses, the evidence in the entire record, viewed together with the jury's verdicts, the charges themselves, the parties' arguments, and other relevant information, show that the charge errors did not cause appellant actual, egregious harm. *See Arrington*, 451 S.W.3d at 845. We thus resolve appellant's first two issues against him.

B. Appellant's Third Issue: Did the trial court fail to exercise its discretion when it cumulated appellant's sentences?

Appellant's third issue argues that the trial court failed to exercise its discretion and "apparently believed that it was obligated to cumulate the sentences." We disagree.

Indecency with a child by contact is a second degree felony with a punishment range of between two to twenty years and a possible fine of up to $10,000. *See* TEX. PENAL CODE § 21.11(a) (1) & (d), and TEX. PENAL CODE § 12.33. The jury returned unanimous verdicts of three years imprisonment in each case.

In certain circumstances, a trial judge has discretion to stack, or cumulate sentences. *See Bonilla v. State*, 452 S.W.3d 811, 815 (Tex. Crim. App. 2014). Specifically, penal code § 3.03 provides:

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.
>
> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences *may* run concurrently or consecutively if each sentence is for a conviction of . . .
>
> (2) an offense:
>
> (A) [under Section 21.11] committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section . . . .

TEX. PENAL CODE § 3.03.

Here, the State filed a motion to cumulate appellant's sentences and argued that appellant's case met the statutory requirements permitting the court to order the sentences to run consecutively. Appellant replied that he should sentenced to three years in accordance with the jury's wishes. The court concluded:

> The statute does contemplate under these circumstances, that being of the same criminal transaction that the ***Court has the discretion*** to cumulate the sentences.
>
> Based on the fact that these are the same criminal episode as defined under 3.03 and the fact that the defendant was convicted under Penal Code Section 21.11, the Court is cumulating these sentences and so ordered.

(Emphasis added).

Appellant does not dispute that the judge had discretion to cumulate the sentences, but instead argues that she did so simply because she believed the penal code required that she do so. Nothing in the record, however, suggests that the trial judge misunderstood the statute. Indeed, the trial judge's comments show her awareness that she had discretion. Because nothing establishes that the judge's decision was based on anything other than an exercise of her discretion, we resolve appellant's third issue against him.

III. CONCLUSION

Having resolved all of appellant's issues against him, we affirm the trial court's judgments.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01138-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-24555-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01139-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-24563-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01140-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-25621-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.