Aldape: Briefs & Opinion
-Tx Ct. of Crim. App. (8/84-7/89)

f- Alb ~~f- pldge~~ f) aldape ~~appeal~~ appeal pldge

69081 CC: Fisher [jury] (§§1-8)
Ferguson (§11
Schuatmeier (§17)
[Eri]
Bernard (§18,16)

CAUSE NO.________

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

SITTING IN AUSTIN, T E X A S

RICARDO ALDAPE GUERRA, Appellant

VS.

THE STATE OF TEXAS

On direct Appeal from the 248th District Court

of Harris County, Texas.

BRIEF OF APPELLANT

§10
1. jury selection §§1-8
2. testimony in viol. of rule - §11+12
3. lesser included charge - cop in lawful discharge of duty - §14-15
4. prior unadjudicated offense - §17
5. ~~defns.~~ defns. of "deliberately" + "continuing threat to society" - §§16,18

COUNSEL FOR THE APPELLANT
Michael B. Charlton
2715 Bissonnet, Suite 104
Houston, Texas
(713) 526-1630
Bar # 04144800

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STATEMENT OF THE CASE

The Appellant was convicted of the offense of capital murder of a peace officer and sentenced to death on October the 14th, 1982, in the 248th District Court of Harris County, Texas, Judge Henry K. Oncken, Presiding. It is from that sentence of death that this appeal proceeds. A more complete recitation of the facts will accompany of each ground error as necessary.

GROUND OF ERROR 1.

THE TRIAL COURT ERRED IN FAILING TO EXCUSE FOR CAUSE JUROR VENIREMAN, CHARLES DECKERT

During the voir dire examination of Venireman, Charles Deckert, the following exchange occurred:

Q. Would you hold it against Ricardo Aldape Guerra, in any way, during the trial of this case, if he found out that he was an illegal alien?

A. I already know that.

Q. Well, you know it because he told you, but you would really know it only when it comes off the witness stand.

A. I think so.

Q. You would hold it against him?

A. Yes.

Q. So he starts off with some kind of strike against him right now, in this trial?

A. Yes.

(R-Vol. V, pg.433).

After a defense challenge for cause, the State established that Juror Deckert felt that he was guilty of being in the country illegally. Deckert further stated that he would not base his verdict at guilt/innocence or at the punishment phase on the Appellant's alien status. (R-Vol.V, pg.438). On re-direct, Deckert stated that the he felt Appellant was not entitled to the same rights as an American citizen and that he was biased against Appellant as a member of a class-i.e., illegal aliens. (R-Vol.V, pg.439-40).

Defense counsel exhausted all of his preemptory challenges. He was granted an additional preemptory challenge, which he also exhausted. See (R-Vol.I, pg.107). In addition, he requested additional preemptory challenges twice. (R-Vol.XXI pg.3514-15; Vol.XXII, pg.3289). Further, defense counsel stated that he found two separate jurors unacceptable, Ms. Anna Petty and Mr. Tommy Ray Smith. (id).

ARGUMENT AND AUTHORITIES

Article 35.16 (a) 9, V.A.C.C.P. states that a challenge for cause to a venireman may be made, either by the State or the defense, if that venireman has a bias or prejudice in favor of or against the Defendant. In Anderson vs. State, 633 S.W.2d 851, (Tex.Crim.App. 1982) the Court stated that "bias or prejudice" within the meaning of Article 35.16, V.A.C.C.P. is "separate from and in addition to that relating to any applicable law or possible punishment, or from kinship to the Defendant, the prosecutor, or any person injured during commission of the offense...." 633 S.W.2d at 853. Bias was defined as "an inclination toward one side of an issue rather than to the other....[which] leads to the natural inference that [a juror] will not or did not act with impartiality." Prejudice means simply prejudgment.

> Bias exists as a matter of law when a prospective juror admits that he is biased for or against a Defendant, (citations omitted); admits

> prejudice against persons who use intoxicating beverages when the Defendant is charged with an offense involving liquor, (citations omitted); or when he admits or demonstrates prejudice toward a racial or ethnic class in which Defendantisamember. (citations omitted)....(emphasis added).
>
> When a prospective juror is shown to be biased as a matter of law, he must be excused when challenged, even if he states that he can set his bias aside and provide a fair trial, (citation omitted). However, it is left to the discretion of the trial Court to first determine whether or not bias exists. Where the juror states that he believes he can set aside any influences he may have, and the trial Court overrules a challenge for cause, its decision will be reviewed in light of all the answers that the prospective juror gives. (citations omitted).

633 S.W.2d at 854

In Williams vs. State, 565 S.W.2d 63 (Tex.Crim.App. 1978). the Court held that where a juror "clearly evidenced bias or prejudice", " it is not ordinarily deemed possible for such a juror to be qualified by stating that he can lay aside such prejudice." 565 S.W.2d at 65. In McBride vs. State, 7 S.W.2d 1091 (Tex.Crim.App. 1928) the Court quoting from Hooper vs. State, 292 S.W. 493 (Tex.Crim.App. 1925) reached the same conclusion:

> There is a fundamental distinction between prejudice on the part of a juror and the entertaining of an opinion on his part. When it appears that the feeling had by the proposed juror is really one of prejudice, and it is directed toward the accused, it is not ordinarily deemed possible for such a juror to be qualified by stating that he can clearly set aside such prejudice, etc. It is easily possible for one, entertaining a deep seated prejudice to believe himself able to lay it aside, but human experience teaches the contrary.

7 S.W.2d at 1093

It is not necessary that the prejudice be directed toward the Defendant; a veniremen is disqualified because of his bias if he is prejudiced or biased against a class to which the Defendant belongs. See Lumberman's Ins. Co. vs. Goodman, 304 S.W.2d 139 (Tex.Civ.App.- Beaumont 1957, writ ref'd n.r.e.) (Worker's Compensation Insurance Carriers); Johnson vs. State, 1 S.W.2d 896 (Tex.Crim.App. 1927), (Black People); Texas and P. Ry. Co. vs. Phelps, 289 S.W. 708 (Tex.Civ.App.- Texarkana 1926); see also 292 S.W. 155, (Black People) and Makey vs. Dryden, 128 S.W. 633 (Tex.Civ.App.- 1910).

In Brown vs. State, 289 S.W. 392 (Tex.Crim.App. 1926) the Court held that "the Constitutional and Statutory guarantee to every person tried for a crime, that he shall have a trial before a fair and impartial jury, is violated if one man of the twelve is partial and unfair, as completely as if the whole panel had prejudged the case." In Whither vs. State, 17 S.W. 936 (Tex.Crim.App. 1891) the Court set forth the underlying legal philosophy behind excusing veniremen on the basis of bias or prejudice:

> To constitute a jury of jurors who are prejudiced against the Defendant would be a denial of any hope of justice, would lead to swift conviction of innocent parties, inflict disgrace upon honorable men and pure women without cause, fill our penitentiaries with convicts untainted with crime in fact, and set at naught the safeguards guaranteed by the bill of rights, and the subversion of the fundamental theory of the due administration of justice.

17 S.W. at 938. See also Potter vs. State, 216 S.W. 886 (Tex.Crim.App. 1919).

Because Venireman Deckert stated that he felt illegal aliens were not entitled to the same rights as American Citizens and that an illegal alien started off a trial with "some kind of strike against him", he was biased or prejudiced against the Appellant within the meaning of Article 35.16, even though he stated his bias was against Appellant as a member of the class of illegal aliens.

GROUND OF ERROR II.

THE TRIAL COURT ERRED IN EXCUSING VENIREMAN THOMAS FOSTER BOONE FOR CAUSE.

During the voir dire examination of Venireman Thomas Foster Boone, the State ascertained from Boone his philosophical opposition to the death penalty. (R-Vol.VII, pg.745). The venireman stated that his feelings on the death penalty had waivered somewhat but that he had, for the most part, felt that way all his life. (R-Vol.VII, pg.746). He stated that he could not answer the Article 37.07(1) V.A.C.C.P., special issues "yes", knowing that the death penalty would result.

Q. Can you imagine any circumstance where you would feel differently than what you told us?

A. I can't imagine any circumstance. It is possible for anything to happen, but not likely.

Q. Can you think of exceptions?

A. Not off hand.

(R-Vol.VII, pg.747).

Defense counsel then questioned the venireman based upon a hypothetical set of facts:

Q. Now, could you in that kind of situation --

A. I think, in an extreme set of circumstances like that I would favor the death penalty, yes.

Q. So you are not automatically opposed against the death penalty, are you?

A. I guess not, if you include extreme situations.

Q. There are all kinds of circumstances in this world. We see all kinds in the Courtroom, and that is why I gave you that example.

> There are others, so then you can answer those two questions yes if the evidence called for it and if you believed it beyond a reasonable doubt?

A. In a situation such as you have described, yes.

(R-Vol.VII, pg.750).

The State objected to Defense counsel's use of a hypothetical fact situation, arguing that only the venireman's responses to the "general application of the law" should be considered; in effect, the venireman could not be rehabilitated or requalified by the use of hypotheticals. (R-Vol.VII, pg.751). The State was permitted to ask additional questions. The venireman stated that he felt he could serve, but "I feel my judgment would be effected by my personal objection to the death penalty." (R-Vol.VII, pg.753). He then stated that he could not answer the special issues yes knowing a Defendant would get the death penalty. (R-Vol.VII, pg.754). The States challenge for cause was then sustained.

ARGUMENT AND AUTHORITIES

In Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.

391 U.S. at 520; 20 L.Ed.2d at 783. To exclude such people from a jury leaves a jury that can only speak for those in favor of the death penalty instead of the community. 391 U.S. at 521, 20 L.Ed.2d at 784. It produces a jury "uncommonly willing to condemn a man to die." Id. The Court also held:

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so to they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say, in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he would be willing to consider all the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death, regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out, even if applicable statutory or case law in the relevant jurisdiction would appear to support a narrower ground of exclusion. See NN.5 and 9, Supra.
>
> We repeat, however, that nothing we say today bears on the power of a State to execute a Defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakenly clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt.

391 U.S. at 522, ft.nt.21; 20 L.Ed.2d at 785, ft.nt.21. The Court also stated that "unless a veniremen states unambiguously that he would automatically vote against the imposition of capi-

tal punishment, no matter what the trial might reveal, it simply cannot be assumed that this is his position; 391 U.S. at 515, ft.nt.9; 20 L.Ed.2d at 781, ft.nt.9. The Witherspoon rational has been applied to the Texas Capital Murder Statute, Adams vs. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In Adams, the Court held that the Constitution does not "permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may effect what their honest judgment of the facts will be or what they will deem to be a reasonable doubt." 448 U.S. at 50; 65 L.Ed.2d at 593.

In Graham vs. State, 643 S.W.2d 920 (Tex.Crim.App. 1983), the Court held that to be excusable, a venireman must be so irrevocably opposed to capital punishment as to frustrate the States legitimate efforts to administer its constitutionally valid death penalty scheme. In Fearance vs. State, 620 S.W.2d 577 (Tex.Crim.App. 1981) the Court held that a juror, to be qualified, must be willing to accept that in certain circumstances the death penalty is acceptable.

In Hartfield vs. State, 645 S.W.2d 436 (Tex.Crim.App. 1980) the Court held that a juror may be excluded either because he is not willing to accept that death may be a punishment in certain circumstances, or because he is not willing and able to answer

the statutory questions impartially without conscious distortion or bias. Juror Hlozek in the Hartfield case gave responses very much like those of Juror Boone in the instant case. She stated that she did not "believe in giving death" and hoped she would not have to do so. She first stated she thought she would exclude it in every case and then stated that it would have to be a "real bad case" before she would consider it. See 645 S.W.2d at 438, ft.nt.2. The juror was held to be improperly excluded. In Mead vs. State, 645 S.W.2d 279 (Tex.Crim.App. 1983) the veniremen there, Espindola, also gave initial answers that indicated he would be disqualified. Upon questioning by Defense Counsel, he stated that he would listen to the evidence and answer the special issues and would not do so untruthfully.

> Espindola never indicated or stated that he would not take the oath to render a true verdict, nor did he state that he would consciously distort the evidence so that he would be able to answer at least one special issue or question with a "no" answer.

645 S.W.2d at 283.

Because Veniremen Boone, in the case at bar stated that the death penalty was an appropriate punishment in certain extreme situations, the trial Court erred in excluding Veniremen Boone for cause.

GROUND OF ERROR III.

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S CHALLENGE FOR CAUSE AGAINST VENIREMAN JAMES THOMAS TUCKER.

During the voir dire of James Thomas Tucker, a catholic priest, the venireman expressed deep seated reservations about the death penalty:

> I obviously am very much against personally sentencing anyone, or calling for the death of anyone, and believe that that is primarily in God's domain, but I also recognize and understand society's need to enforce laws, and whether it is war, as in certain cases, or whether it is the death penalty in the criminal justice system, I am not saying I condone the death penalty, but I can certainly understand that it exists, and as I understand it, a juror is not called upon to sentence anybody....

(R-Vol.XVI, pg.2517).

> This seems strange, and may be inconsistent, but I would find it impossible to stand up and say "I sentence you to death."

(R-Vol.XVI, pg.2518).

In response to questions about whether he could answer the Article 37.07(1) V.A.C.C.P., special issues, Venireman Tucker replied:

> I can see were I might..no. This bothers me not being able to be more definite about it. I can see where I could answer both of these questions and still not personally be able to stand up and condemn the person to death, but I know, in effect, I'm doing that.

(R-Vol.XVI, pg.2521). Upon being asked whether, assuming he was chosen as jury foreman, he could sign a verdict form with the two "yes" answers, Tucker stated:

> I have a reasonable - I have a doubt. I might be able to, and I might not. I'm not sure.

(R-Vol.XVI, pg.2522). When asked to give a yes or no answer to the same question, Tucker stated that he "would have to say no." (R-Vol.XVI, pg.2523).

> Q. From my understanding, no matter what the facts of what a person did, your feelings would be the same?
>
> A. No, because the first answer, which you have really said I couldn't use, was the feeling that I have to cross that bridge when I come to it, which was not viable. That is the same reason I went ahead and registered for the draft.
>
> There was a doubt in my mind, a strong doubt that perhaps I could take someone elses life if called upon in the duty of my county, and perhaps I could not. I was not sure, and I still am not.

(R-Vol.XVI, pg.2523-24).

When asked whether he could take the oath required under Article 12.31 (b) V.T.C.A., Penal Code, Tucker answered no. (R-Vol.XVI, pg.2525). When asked whether he might not be as impartial as another individual, Tucker stated:

> Yes, it's a possibility that I might not be as totally objective as another person.

(R-Vol.XVI, pg.2526).

> I would like to think on the facts presented I could be objective, but to be perfectly honest I'm not sure subconciously.

(R-Vol.XVI, pg.2527). When asked again whether he could affirmatively answer this special issue, Tucker stated "I would have to say no." (R-Vol.XVI, pg.2530). When asked his feelings about hypothetical murder case, Tucker stated:

> There is a distinct possibility I could not be totally objective under in that situation. I'm not saying I couldn't under any circumstances say yes, but there is a good possibility I couldn't.

(R-Vol.XVI, pg.2532).

Upon questioning by Defense counsel, Tucker stated that it was conceivable to him that society had the "right to ask for someone's life in some situations" in order to make sure that that person never committed the crime again. (R-Vol.XVI, pg.2533). Tucker stated that he hoped he could answer affirmatively the two special issues if he believed beyond a reasonable doubt they should be so answered. (R-Vol.XVI, pg.2534). Later he stated that he could not give a definite answer to the same question:

> A. I can't give you that. I can give you a..-- I have -- I can say yes, I would have a definite prejudice against a "yes, yes" answer. I would hope that I could in some way be objective and serve society, but I can't give you a definite answer on that.
>
> Q. You have to weigh and hear the evidence and at that time make a decision?
>
> A. Yes. I don't know. This comes from several feelings within me philosophically, and I don't know if you want to hear them or not, they are brief.

Tucker went on to explain his philosophical prejudices against the death penalty. (R-Vol.XVI, pg.2539-40). The Court then overruled the State's challenge for cause. (R-Vol.XVI, pg.2543).

The State proceeded further. After ascertaining that the issue was one of Tuckers personal philosophy and that Tucker could not state whether his philosophy or the facts would prevail, he was asked whether he would refuse to answer the special issues because of his personal philosophy:

> A. I suppose, painful as it would be for me, I would have to choose not to answer somehow, because I don't think I would -- I don't know I could insult society, the rules of society, or flout them enough to sit there and personally answer them, no, even though I think "yes" on the facts.
>
> Q. I understand.
>
> A. And I think I would have to refuse to answer, no matter what the cost on that.
>
> ....
>
> Q. And in your own words again, I guess if you would just tell us whether or not you feel that you could be fair and impartial to the State, where the State is actively seeking the death penalty in regard to judging the facts and the evidence, that leans solely on the facts and evidence and nothing else.
>
> A. There is a good chance I might not be fair to the State, yes, and as painful as that is -- because I can appreciate the family of Officer Harris, etc., and just as sick at heart about that judgment that took place, however it took place -- but still, I am afraid I would not be fair to the State. (R-Vol.XVI, pg.2549-50).

The State's challenge was sustained. Id.

ARGUMENT AND AUTHORITIES

The Appellant would respectfully incorporate the Argument & Authorities set forth in Ground of Error II in support of this Ground of Error. Because Juror Tucker never stated unequivacally, that he would automatically vote against the Article 37.07 (1), V.A.C.C.P., special issues because of his feelings about the death penalty, nor did he state that his feelings on the death penalty would frustrate the State's legitimate efforts to administer its death penalty scheme, the trial Court erred in excluding Veniremen Tucker for cause.

GROUND OF ERROR IV.

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S CHALLENGE FOR CAUSE AGAINST VENIREMAN CAROLYN SANDERS.

During the voir dire examination of Venireman Carolyn Sanders, Ms. Sanders expressed her reluctance to assess the death penalty. (R-Vol.XV, pg.2154). She stated, however, that her feelings were not so strong as to preclude a finding of guilt (R-Vol.XV, pg.2157) and that she would never answer the Article 37.07 (1), V.A.C.C.P., special issues "no" so as to assure a life sentence. (R-Vol.XV, pg.2158; Vol.XV, pg.2160).

The State then examined venireman Sanders on the Defendant's right not to testify. She first stated that she felt a Defendant may be "hiding something..., for fear he may say the wrong thing...." (R-Vol.XV, pg.2172). She stated that if the Defendant did commit a crime he probably would not want to talk. (R-Vol.XV, pg.2173). The State challenged her for cause for her consideration of the Defendant's failure to testify as evidence against him. (R-Vol.XV, pg.2175).

Upon examination by Defense counsel, Ms. Sanders stated that the Defendant would never have to prove his innocence to her (R-Vol.XV, pg.2177), that she understood the States burden of proof and agreed with it (id), and that she would not hold the Defendants failure to testify against him (R-Vol.XV, pg.2178). She felt that it was in the Defendants best interest to testify. (R-Vol.XV, pg.2178-79).

The State examined Ms. Sanders further and she stated that the Defendant's failure to testify would make it easier for the State to prove its case. (R-Vol.XV, pg.2180). After some confusion, Ms. Sanders stated that in a close case, the Defendant's failure to testify would "help [her] to go to say he did it." (R-Vol.XV, pg.2190). The State's challenge for cause was sustained. The Defendant ultimately testified.

ARGUMENT AND AUTHORITIES

Article 35.16 (b), V.A.C.C.P. sets forth the grounds for which the State alone may move to challenge a venireman for cause. Among them is the bias or prejudice of the venireman against "any phase of the law upon which the State is entitled to rely for a conviction or punishment." Article 35.16, (b) 3, V.A.C.C.P. The same statute permits a Defendant to challenge for cause any venireman biased against the law upon which he may rely either as a defense to the offense, it mitigation or punishment. Article 35.16, (c) 2, V.A.C.C.P. In a special commentary to Article 35.16, V.A.C.C.P. this distinction is recognized:

> This Article has been separated into causes for which either the State or Defendant may challenge (§a); for which only the State may challenge (§b); and for which only the Defendant may challenge (§c).

Appellant contends that the State is not entitled to rely on the law set forth in Article 38.08, V.A.C.C.P. relating the to effect of the Defendant's failure to testify. The right of a Defendant to protect his privilege against self incrimination is one unique only to the Defendant. Article 1.05, V.A.C.C.P. sets forth the rights of the accused in a criminal proceeding:

> In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself, or counsel, or both....

Article 1, §10 of the Texas Constitution provides the basis for this statute as well as the Fifth Amendment to the United States Constitution. In Olson vs. State, 484 S.W.2d 756, (Tex.Crim.App. 1972), the Court held that the privilege against self incrimination is one unique to a criminal Defendant. "No adverse inference can be drawn from a Defendant's failure to testify and comment on that failure is forbidden." In Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1965), the Supreme Court held that the prohibition against commenting on a Defendants failure to testify and urging an inference of guilt from that failure is an integral part of the Defendants right against self incrimination. Thus it is clear that Article 38.08, V.A.C.C.P. is an embodiment of both Article 1, §10 of the Texas Constitution and the Fifth Amendment to the United States Constitution and thus becomes a right unique to the Defendant.

It is clear that the prosecution cannot rely upon the Defendant's failure to testify in any phase of its case. In Barber vs. State, 628 S.W.2d 104 (Tex.App. - San Antonio, 1982) the Court held:

> It is fundamental law that the failure of the accused to testify may not be the subject of a comment by the prosecution. Such a comment violates both the privileges against self incrimination contained in the Texas Constitution, Article 1, §10 and the specific mandate of Tex.Code Crim.Pro.& Article 38.08, (Vernon -1979).
>
> ....
>
> Such a comment has been also held violative of the Fifth Amendment which has been made applicable to the States by virtue of the Fourteenth Amendment (citations omitted).

628 S.W.2d at 111. See also Martinez vs. State, 644 S.W.2d 104 (Tex.App. - San Antonio 1982). In Vickers vs. State, 154 S.W. 578(Tex.Crim.App. 1913), the Court stated the limitations on the right of the State to utilize the Defendants silence:

> Prosecuting officer should not seek to indirectly call the attention of the jury to the fact that a Defendant has not testified in the case. This is a right given [the Defendant] in law, but he is not bound to avail himself of that privilege; and if he is willing to rest his case on the weakness of the States case he has a right to do so.

See also Garrett vs. State, 623 S.W.2d 350 (Tex.Crim.App. 1982).

Further, even a jury's discussion of the Defendant's failure to testify that effects the verdict of that jury is grounds for a new trial. Chandless vs. State, 180 S.W.2d 929

(Tex.Crim.App. 1944); Whetheritt vs. State, 89 S.W.2d 212 (Tex.Crim.App. 1935). That new trial can only be granted to a Defendant (Article 40.02, V.A.C.C.P.) and only in those circumstances where, from the jury's misconduct the Defendant has not received a fair and impartial trial. Article 40.03, (a) V.A.C.C.P. Thus, it is clear that the issue of an inference of guilt from the Defendants failure to testify is one that inures to the benefit of a Defendant. The State is not even permitted to rely on the Defendants failure to testify in matters of jury misconduct.

It is clear from an examination of the above authorities that the State is not permitted to rely in any phase of the case, either at guilt/innocence or at punishment upon the Defendant's failure to testify. This right exists only for the benefit of the accused. Thus, the State should not have been allowed to challenge for cause the venireman because she might consider the Defendant's failure to testify.

GROUND OF ERROR V.

THE TRIAL COURT ERRED IN LIMITING THE VOIR DIRE EXAMINATION OF DEFENSE COUNSEL.

During the voir dire examination of veniremen, Steven Busby, the following exchange took place:

Q. Let me ask you this: Say for example, if an illegal alien, which they will be here to testify to the facts, and a police officer gets up there and testifies as to the facts, you would not say that you would give a police officer more credibility because he's a police officer, hypothetically speaking.

MR. MOEN: I object to the question. He is staking him out as to how he would place the testimony of a police officer as opposed to an illegal alien.

THE COURT: Sustained.

Q. All right. Any class of citizen coming in or any citizen that would testify, be it a doctor, secretary, a manager of a pizza place, a police officer, would you give that police officer more credibility than any other citizen testifying to the same facts?

MR. MOEN: I object to the same question again, as to how he would judge a police officer's testimony versus other peoples in other occupations.

I think he has answered the question, that he would judge the police officers credibility and training and what he is doing. He has also said he would not...

I object to the question along those lines, Judge.

THE COURT: Sustained as to the form.

(R-Vol.XVI, pg.2936).

ARGUMENT AND AUTHORITIES

In Mathis vs. State, 576 S.W.2d 835, (Tex.Crim.App. 1979), the Court of Criminal Appeals set forth the perameters of the right of individual voir dire:

> The right to be represented by Counsel, guaranteed by Article 1, §10 of the Texas Constitution, encompasses the rights of counsel to question the members of the jury panel in order to intelligently exercise his preemptory challenges. (citations omitted). The trial Court, in its sound discretion, can and should control the voir dire examination of the venire; however, the permissible areas of questioning the panel in order to exercise preemptory challenges are broad and cannot be unnecessarily limited. (citation omitted).
>
> ....
>
> However, when the question is asked for the purpose of exercising preemptory challenges, the test for injury is entirely different. If the question is proper, an answer denied prevents intelligent use of the preemptory challenge and harm is shown.(citation omitted)....."It is immaterial how the jurors would have answered the question, for, whatever their answers, the Appellant was entitled to know their answers in order to enable him to exercise his preemptory challenges.

Quoting from Plair vs. State, 279 S.W. at 269, (Tex.Crim.App. 1926), the Court stated:

> The right to appear by counsel carries with it the right of counsel to interrogate each juror individually, to the end that he may form his own conclusions with his personal contact with the juror as to whether, in counsel's judgment, he would be acceptable to him, or whether, on the other hand, he should exercise a preemptory challenge to keep him off the jury.

576 S.W.2d at 576-77. See also Smith vs. State, 513 S.W.2d 823, (Tex.Crim.App. 1974); De La Rosa vs. State, 414 S.W.2d 668, (Tex.Crim.App. 1967).

In Triveno vs. State, 572 S.W.2d 336, (Tex.Crim.App. 1978), Defense counsel was prevented from asking the veniremen whether he would "give more weight" to a policeman's testimony than that of a lay person's.

> In the instant case, four police officers were witnesses and their testimony was an important part of the State's case. Under the circumstances, knowing whether or not each of the prospective jurors would give greater weight to the testimony of the police officers, merely because they were police officers, than to the testimony of non-officers would have enabled Appellant's counsel to exercise more intelligently his preemptory challenges. The questions propounded by Appellant's counsel did not exceed the proper scope of voir dire, (citation omitted) and because this restriction of Appellant's voir dire examination extended to the entire jury panel, injury to the Appellant is clearly shown. (citation omitted).

572 S.W.2d at 337. See also Florio vs. State, 568 S.W.2d 132, (Tex.Crim.App. 1978); Hernandez vs. State, 508 S.W.2d 853, (Tex.Crim.App. 1973).

Because defense counsel was not permitted to ask of the juror his opinion of the inherent credibility of a police officer as opposed to a lay person, Appellant was denied the right to be represented by counsel as guaranteed by Article 1, §10 of the Texas Constitution and the right to intelligently exercise his preemptory challenges.

GROUND OF ERROR VI.

THE TRIAL COURT ERRED IN LIMITING THE VOIR DIRE EXAMINATION OF VENIREMAN, THOMAS ALLEN MOCK.

Venireman Thomas Allen Mock stated that he could think of no case other than the death of a family member, where he could participate as a juror in a capital murder trial. (R-Vol.X, pg.1329). Defense counsel, in an effort to rehabilitate the venireman, suggested a hypothetical fact situation and asked venireman Mock if he could affirmatively answer the second §37.071, V.A.C.C.P., Special Issue. The State's objection, on the basis that the Defense Counsel should not proceed with a hypothetical question, was sustained. (R-Vol.X, pg.1336-37). Venireman Mock was challenged by the State on the basis of Whitherspoon and that challenge was sustained. (R-Vol.X, pg.1337).

ARGUMENT AND AUTHORITIES

In Burns vs. State, 556 S.W.2d 270, (Tex.Crim.App. 1977) the Court held that it was error to refuse to allow defense counsel to examine challenged jurors after the State had made a challenge. In Burns the error was held to be harmless because of the unequivocal answer of the venireman and because the State had only exercised a portion of its preemptory challenges. In

Huffman vs. State, 450 S.W.2d 858, (Tex.Crim.App. 1970) the Court also held that the trial Court should have granted defense counsel the request to examine challenged jurors. In view of the States exercising less than half of its preemptory challenges, the failure of the Court to permit defense counsel's further voir dire was not reversible error. See also Pittman vs. State, 434 S.W.2d 352, (Tex.Crim.App. 1969).

In the case at bar, the State exercised all of its preemptory challenges. (R-Vol.XX, pg.3435). See also (R-Vol.I, pg.107). Further, use of hypothetical questions to rehabilitate jurors are forbidden only where the facts questioned about are those peculiar to the case on trial. Such an inappropriate use of hypothetical questions is, in effect, an attempt to bind a juror to a verdict before any evidence is introduced at trial. Here, the use of the hypothetical question was merely to ascertain whether Juror Mock could conceive or could consider fairly the issue of the death penalty in a given case. See White vs. State, 629 S.W.2d 71, (Tex.Crim.App. 1981). Juror Mock's responses to questions were not definitive as in Burns vs. State, Supra and Huffman vs. State, Supra. Venireman Mock expressed a certain amount of confusion concerning his ability to affirmatively answer the Article 37.071, V.A.C.C.P., Special Issues. See (R-Vol.X, pg.1332-34). Thus defense counsel should have been permitted to proceed with hypothetical examples in order to ascertain the impact of Venireman Mock's objection to the death penalty on his potential service as a juror.

GROUND OF ERROR VII.

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S VOIR DIRE EXAMINATION OF VENIREMAN THERMAN HOWARD MATTHEWS.

During the voir dire examination of Venireman Therman Howard Matthews, the following exchange occurred:

Q. In the second part, the punishment stage, you have to answer the first question, what I'm trying to get at is, would you automatically answer that first question "yes" just because you already have found him guilty of intentionally and knowingly killing a police officer?

A. No.

Q. Why is that?

.....

THE COURT: Mr. Bax, do you have an objection?

MR. BAX: Judge, I believe he has answered the question, whether he would automatically answer a "yes" which is the qualification question and he goes into a thought process, and we are spinning his wheels here.

THE COURT: I think I agree with that. I sustain the objection.

(R-Vol.VIII, pg.1018).

ARGUMENT AND AUTHORITIES

Appellant would respectfully incorporate by reference the Argument and Authorities set forth in support of Ground of Error # V. if fully set forth herein.

This Court has held on several occasions, that a Defendant may not voir dire jurors upon their definitions of "deliberately" and "criminal acts of violence". See Chambers vs. State, 568 S.W.2d 313, (Tex.Crim.App. 1978); Esquivel vs. State, 595 S.W.2d 516, (Tex.Crim.App. 1980). Nevertheless it has been held that a Defendant may voir dire on punishment issues as well as on any other area of the law upon which he is entitled to rely. Martinez vs. State, 588 S.W.2d 954, (Tex.Crim.App. 1979). Further, a Defendant is to be permitted to voir dire each juror on their attitude and philosophies concerningpunishment. Powell vs. State, 631 S.W.2d 169, (Tex.Crim.App. 1982).

For the trial Court to have limited the Defendant's voir dire in this area was to have denied the Defendant the intelligent use of his preemptory challenges.

GROUND OF ERROR VIII.

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S VOIR DIRE EXAMINATION.

During the voir dire examination of Doris Lewis Zadroga, by defense counsel, counsel questioned the juror on her attitudes toward the Special Issues of Article 37.071, V.A.C.C.P.:

Q. The simple fact if a person carries a gun, like that example of the 7-Eleven, would that effect your deliberations?

MR. BAX: I object to that. Certainly that is evidence that could effect a jury one way or the other, and I object to him trying to find out whether that would effect her. Certainly that should, if that were part of the evidence.

MR. ELIZONDO: All I want is a yes or no.

THE COURT: Restate your question please, sir.

Q. (By Mr. Elizondo) In hypothetical example -- we talked about Joe and I walking into a 7-Eleven and I've got a .45 and he's got a .45, let's say, and he killed the cashier and I just ran out. I haven't aided, encouraged, or abetted in any way. It's Joe's little robbery and I'm being tried for robbery now -- robbery/murder.

Based upon the limited facts, do you think I should be found guilty?

MR. BAX: Judge, that is not -- I am objecting to the form of the question. Of course, the witness would have to judge the credibility of the person saying, "I didn't have anything to do with it" and it is asking to much of the juror.

THE COURT: On that basis, I sustain the objection.

(R-Vol.VI, pg.535).

ARGUMENT AND AUTHORITIES

Appellant respectfully incorporates by reference the Argument & Authorities set forth in support of Grounds of Error V. and VI. in support of this Ground of Error, as if fully set forth herein.

GROUND OF ERROR IX.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO BOLSTER ITS WITNESS, JOSE ARMIJO, JR., THROUGH THE TESTIMONY OF OFFICER EDWARD CAVOSOS.

Jose Armijo, Jr., testified that he saw the Defendant shoot a police officer (R-Vol.XXIII, pg.284) and then shoot his father (R-Vol.XXIII, pg.286-87). He stated that he attended a line up but could not identify anyone at the line up "because I was scared he might come out and get me." (R-Vol.XXIII, pg.290). On cross-examination, Armijo admitted that he gave a sworn statement on July 13th, 1982, the day of the murder, that he did not know what the killers looked like because he hadn't seen them very well. (R-Vol.XXIII, pg.295). He was never questioned about his fear of Appellant on cross-examination. At the conclusion of the cross-examination, there was a loud outburst from a woman in the courtroom.

Officer Edward Cavosos was re-called by the State in its case in chief and testified that he talked with Armijo prior to the boy's testimony at the request of the State. Over objection by defense counsel, Cavosos testified that Armijo was very nervous and asked if any police officers would be present in Court. (R-Vol.XXV, pg.616-20).

Q. Did he tell you why he was afraid to come into the Courtroom?

A. Right. He asked if the suspect was going to be in the Courtroom.

Q. And what did you tell him?

A. I told him that he was.

Q. And what assurances, if any, did you give him concerning the suspect being in the Courtroom, being there testifying before the jury.

A. I stated that I would be outside the Courtroom, and also that there would be other officers in the Courtroom.

Q. And throughout the conversation that you had with Jose, again at any time, did you try to talk him into identifying anyone in the Courtroom as the person.

A. No sir.

(R-Vol.XXV, pg.619-20). The State's profer of the evidence at trial was, austensively to rebut the defensive inference that Armijo had changed his testimony after conferring with police officers in the District Attorney's Office. (R-Vol.XXV, pg.618).

ARGUMENT AND AUTHORITIES

In Farris vs. State, 643 S.W.2d 694, (Tex.Crim.App. 1983) the victims of sexual abuse testified with no impeachment and very mild cross-examination. The State called a psychiatrist to testify that the children were incapable of fantasizing the type of sado-masicistic activity involved in the case.

> It is a well settled rule in this and other jurisdictions that the State may not bolster or support its own witnesses unless they have been impeached on cross-examination. (citations omitted).
> ....
> The bolstering testimony must be related to the impeachment to be admissable. See O'Brian vs. State, 591 S.W.2d n 464, 476, (Tex.Crim.App. 1979). "The rehabilitating facts must meet a particular method of impeachment with relative directness. The wall, attacked at one point, may not be fortified at another indistinct point." McCormick on Evidence, Supra, at 103. (emphasis added).

See also Watts vs. State, 638 S.W.2d 938, (Tex.App. Dallas - 1982). In Piess vs. State, 576 S.W.2d 83, (Tex.Crim.App. 1979) the Court held that bolstering occurs when one item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party. The rule against bolstering is a long standing rule. In Wilson vs. State, 11 S.W.2d 803, (Tex.Crim.App. 1928) the Court held:

> It is the well settled rule in Texas that, if it has been shown that a witness has made out of Court statements contradictory to those testified to on the trial, it is then permissible to prove that such witness has made other statements out of Court which are consistent with and confirmatory of his testimony on the trial. However, unless it appears that a witness has been impeached by proof of statements contradictory to those given by him in evidence, a consistent and confirmatory statement made to a third party, out of the presence of Appellant is hearsay and inadmissible.

Again, in Newton vs. State, 180 S.W.2d 946, (Tex.Crim.App. 1944), quoting from 18 Tex.Jur.Sec.64, pg.132, the Court held:

> Unless it appears that a witness has been impeached by statements contradictory to those given by him in evidence a consistent and confirmatory statement made to a third person, out of the presence of the accused is hearsay and inadmissible. In other words, a witness cannot cooberate his testimony by proof of having made similar statements in harmony with his testimony on the trial, if the witness has not been attacked by the statements sought to be supported. (emphasis added).

See also Cole vs. State, 611 S.W.2d 79, (Tex.Crim.App. 1981); Davis vs. State, 636 S.W.2d 197, (Tex.Crim.App. 1982). The identical fact situation was found to be error in Acker vs.

State, 421 S.W.2d 398, (Tex.Crim.App. 1967). The complaining witness consistently testified about her fear of the Defendant, her husband. On cross-examined extensively, her testimony of her fear of the Defendant remained consistent. It was, thus, error to bolster her testimony with a divorce petition containing the same allegations. It was, accordingly, error for the trial Court in the case at bar to permit Officer Cavosos to testify about the witness Armijo's fear of the Appellant when that testimony had not been impeached or attempted to be impeached on the cross-examination of the witness Armijo. Further, the testimony concerning the fear of the witness Armijo of the Appellant implied threats by the Appellant to the witness in order to silence his testimony. There was no showing that Appellant made any such threats to the witness: thus his testimony became inadmissible. See White vs. State, 131 S.W.2d 968, (Tex.Crim.App. 1939).

GROUND OF ERROR X.

THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF EDWARD CAVOSOS.

The Appellant would respectfully incorporate by reference the facts set forth in support of Ground of Error Number IX in support of this Ground of Error, as if fully set forth herein.

ARGUMENT AND AUTHORITIES

In Urick vs. State, 662 S.W.2d 348, (Tex.Crim.App. 1983), the State introduced an undercover agent's testimony and then a deputy sheriff's testimony concerning his conversations with the agent.

> The State clearly attempted to bolster the testimony of the undercover officer....thus, the most basic reason for excluding the out of Court statements of third parties was violated. See Barber vs. State, 481 S.W.2d 812, 814. The purpose of the deputy's testimony could serve no other purpose than to bolster the testimony of the undercover officer, the sole witness to the offer. Such testimony was prejudicial and calls for reversal.

This rule of law has found support in treatises on the issue. In 1A, Ray on Evidence, §785, in is stated:

> The hearsay rule applies even to evidence of previous statements made by the witness himself....It is clear then in the absence of an attempt to impeach the witness, he may not be asked to recount any statement he has made before trial as evidence of the facts stated therein.

In Hawkins vs. State, 183 S.W.2d 980, (Tex.Crim.App. 1944) the Court held as inadmissible hearsay a sheriff's testimony that the prosecuting witness told him that he had purchased the whiskey on the day and at the place testified to by the prosecuting witness. Because the trial Court permitted Officer Cavosos to testify on the fear of the witness Armijo concerning Appellant, when that subject was unimpeached on the cross-examination of the witness Armijo, said evidence amounted to the admission of inadmissible hearsay.

Q = Did X of Jose Jr. really insinuate Fabrication?

GROUND OF ERROR XI

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF MARIE ESTELLE ARMIJO IN VIOLATION OF THE RULE.

Marie Estel Armijo was called as a witness by the State. She testified, over strenuous objection by defense counsel (R-Vol.XXV, pg.621-27), that her son, Jose Armijo, Jr., the day after the murder, told her that he had seen the murder and was ableto identify the person in a line up but had not done so. (R-Vol.XXV, pg.633). She stated that he was afraid of the person who shot his father, because he was afraid "that person may do something to him also." (R-Vol.XXV, pg.636).

During defense counsel's objection to Ms. Armijo's testimony the State informed the Court that the rule was inapplicable because all of the proceedings concerning her son's testimony were in english while Ms. Armijo spoke only Spanish. (R-Vol.XXV, pg.623). Upon redirect examination by the State, however, the following exchange occurred:

> Q. Just a few questions, if I might. Ms. Armijo, when Jose was testifying here yesterday, was your sister translating in the audience there?
>
> A. For myself or for the child?
>
> Q. For yourself.
>
> A. Yes.
>
> Q. And were you able to - did she tell you some of the questions that Mr. Elizondo was asking of your son?
>
> A. How is that?

Q. Did your sister-in-law interpret the questions that Mr. Elizondo was asking of Jose?

A. Well, yes.

(R-Vol.XXV, pg.642).

Finally it was established that it was Mrs. Armijo who created an outburst at the close of Jose Armijo, Jr.'s testimony. (R-Vol.XXV, pg.623).

Prior to the commencement of testimony in the case, the rule was invoked. (R-Vol.XXII, pg.5,6).

ARGUMENT AND AUTHORITIES

The rule for sequestration of witnesses, commonly known as "the rule" is embodied by statute in Texas in Article 36.06, V.A.C.C.P.:

> At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the Courtroom to someplace where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule.

The effect of the rule as set forth, also in statute, in Article 36.05, V.A.C.C.P.:

> Witness under rule shall be attended by an officer and all their reasonable wants provided for, unless the Court, in its discretion, directs that they be allowed to go at large; but in no case where the witness are under rule shall they be allowed to hear any testimony of the case. (emphasis added).

The effect of a violation of the rule has been dealt with extensively. In Murphy vs. State, 496 S.W.2d 608, (Tex.Crim.App. 1973), the Court stated the Appellate considerations to be given to violations of the rule:

> A violation of the rule is not in itself reversible error. (citation omitted). It has long been the rule in Texas that a violation of the rule may not be relied upon as ground for reversal unless an abusive discretion is shown and until the contrary has been made to appear, it will be presumed on appeal that discretion was properly exercised. (citation omitted). Simply stated, it becomes a test of whether or not, in permitting the witness in violation of the rule to testify, injury is done to the Defendant.

498 S.W.2d at 610. See also Haas vs. State, 498 S.W.2d 206, (Tex.Crim.App. 1973). In Brown vs. State, 523 S.W.2d 238, (Tex.Crim.App. 1975), it was held that it "is well established that the object to be attained by placing witnesses under the rule is to prevent one witness from being influenced by the testimony of another...." 523 S.W.2d at 241.

Further, the enforcement of the rule is discretionary where an individual, not known to be a witness at the commencement of a trial, is later determined by either party to be a material witness. In Shield vs. State, 38 S.W.2d 76, (Tex.Crim.App. 1931) the Court held that :

> Where a witness has been in Court while other witnesses testify, or by some omission has not been placed under the rule, ordinarily the trial Court may permit him to testify where the other witnesses did not testify on the same point to which he is called to testify.

The issue becomes whether the State knew or should have known that the witness to whom the rule was not invoked would be called upon to testify during the course of the trial. In Downs vs. State, 104 S.W.2d 503, (Tex.Crim.App. 1937) the Court was confronted with a witness who was not sworn as such and placed under the rule at the commencement of the trial, but testified on rebuttal and denied the Defendant's defense:

> In the present instance, we think Appellant's motion to exclude the testimony of the witness should have been sustained. Manifestly, counsel for the State was aware that witnesses for the State would testify that Appellant had stated to them that he had acquired the stolen animal from Booth. Under the circumstances, the witness should have been placed under the rule, as with the other witnesses at the beginning of the trial. However, he remained in the Courtroom and heard the State's witnesses testify concerning Appellant's affirmative defense. His testimony concerned the main facts around which the controversy turned. That his testimony was calculated to injure Appellant was manifest. Under the circumstances, we are of the opinion that the procedure was not conducive to a fair trial.

104 S.W.2d 504. In his dissenting opinion, Judge Latimore stated that to reverse the case, "we must assume that Booth heard the witness testify on some point in regard to which he was called to testify, there being an utter absence of such showing."

In the instant case, it is clear that the State knew that the witness Jose Armijo, Jr., had given inconsistent testimony. It was clear that he told the police officers at the inception of the investigation of this case, that he could not identify the people who had killed his father and Officer Harris. The reasons for this statement and the fact of its

making were listed by the State in the direct examination of Jose Armijo, Jr. (R-Vol.XXIII, pg.290). Thus the State cannot be permitted to claim that it did not know the substance of Marie Estelle Armijo's testimony or that prior consistent testimony would be needed to bolster the testimony of Jose Armijo, Jr.

The issue then becomes the extent of harm to be shown by the Appellant to justify a reversal for violation of the rule. In Tinker vs. State, 253 S.W. 531, (Tex.Crim.App. 1923); quoting from Heath vs. State, 7 (Tex.App. - 464):

> While the law invests a large discretion in trial judges as to the examination of witnesses and the enforcement of the rule, when the same has been requested by either party, yet this discretion is not arbitrary, nor is the statute giving the right merely discretionary and to be disregarded at pleasure....the right to enforce the rule is a right given by law, and it should neither be denied nor substantially abridged at the arbitrary discretion of the presiding judge. Being a right guaranteed by law, a Defendant should not, after a request for its enforcement, be deprived of its benefit, unless it should clearly appear that no possible injury could result to him from its relaxation. (emphasis added).

Further, in Bishop vs. State, 194 S.W. 389, 391, (Tex.Crim.App. 1917) the Court held, in a case where the Defendant received the death penalty, that the record must show "clearly...that no injury could have resulted."

Because the trial Court permitted Marie Estelle Armijo to testify on her sons fear of the Appellant after she had listened to her sons testimony throughout the trial, a clear violation of the rule has been shown by Appellant. Because that testimony concerned her son's fear of Appellant, implying threats of violence by Appellant, it cannot be said that the Appellant was not injured, when he received the death penalty.

GROUND OF ERROR XII.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF MARIE ESTELLE ARMIJO AS INADMISSIBLE HEARSAY.

The Appellant would respectfully incorporate by reference the facts set forth in support of Ground of Error XI, in support of this Ground of Error.

ARGUMENT AND AUTHORITIES

The Appellant would respectfully incorporate by reference the Argument and Authorities set forth in support of Ground of Error X in support of this Ground of Error, as if fully incorporated and set forth at length.

GROUND OF ERROR XIII.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF MARIE ESTELLE ARMIJO FOR ITS IMPROPER BOLSTERING.

The Appellant would respectfully incorporate by reference the facts set forth in support of Ground of Error XI in support of this Ground of Error.

ARGUMENT AND AUTHORITIES

The Appellant would respectfully incorporate by reference the Argument and Authorities set forth in support of Ground of Error IX in support of this Ground of Error.

GROUND OF ERROR XIV.

THE EVIDENCE IS INSSUFFICIENT TO SUSTAIN THE ALLEGATION THAT OFFICER HARRIS WAS IN THE LAWFUL DISCHARGE OF AN OFFICIAL DUTY.

Elena Gonzales Hoglan testified that the first notice she had of the shooting on July 13th, 1982 was when she saw the Defendant driving a car with the passenger about ten (10) minutes before the shooting. (R-Vol.XXIII, pg.229-30). At that point, they were driving the car very fast and spinning tires "burning rubber." (R-Vol.XXIII, pg.230-31). She later saw the same black car parked next to, apparently, Officer Harris's patrol car. (R-Vol.XXIII, pg.230-31). She was not sure if it was the same car as that driven by the Defendant, although it was the same color. (R-Vol.XXIII, pg.231). She did not hear the gun shots until some minutes after she saw the Defendant driving the car. (R-Vol.XXIII, pg.231-32).

Jose Armijo, Jr., testified, at first, that he saw on the night of the murder, "a black car sitting and the police car stopped them." (R-Vol.XXIII, pg.281). Later, he testified that the black car was blocking the street with the police car behind it. (R-Vol.XXIII, pg.282). He saw the police officer standing outside his car with two men standing by the car with their hands on the hood. (R-Vol.XXIII, pg.283).

Patricia Diaz testified that she saw a black car with a red top blocking the street with a police car behind it. (R-Vol.XXIII, pg.310). She stated that she was within three to four feet of the black car; she heard someone yelling "stop, stop." which she assumed was a policeman. (R-Vol.XXIII, pg.311-12).

George Lee Brown testified that he saw a black 1977 Cutlass with a burgandy vinyl top approach him as he was walking his dog. He saw the Cutlass accellerate from twenty miles per hour (20 m.p.h.) to forty miles per hour (40 m.p.h.) and swerve over as if trying to run over his dog. The car turned onto an intersecting street. Approximately ten seconds later, a police officer drove up and Brown related the incident to him. The police officer "followed the same route the car did," (R-Vol.XXIV, pg.384), at a normal speed. Less than a minute later, Brown heard gun shots. (R-Vol.XXIV, pg.376-95). He went to the location of the shots and found both the police car and the Cutlass "at a dead stop." (R-Vol.XXIV, pg.387).

Herlinda Garcia testified that she saw the black Cutlass come to a stop and two men get out of the car. (R-Vol.XXIV, pg.445). They needed a "boost" for their car. (R-Vol.XXIV, pg.446). The police officer then pulled up, "put his headlights on him," and told the two men to "hold it." (R-Vol.XXIV, pg.448). The two men, including the Appellant, approached the police officer, but Ms. Garcia did not hear the police officer say anything else. The police officer was then shot.

(R-Vol.XXIV, pg.449). On cross-examination, she stated that the policeman did not have any red lights on. (R-Vol.XXIV, pg.475-76).

Vera Flores testified that she noticed the Cutlass stop and someone get out. (R-Vol.XXIV, pg.507). The man asked her if she had any cables to give him a boost. A minute and a half later, the police car pulled up and Flores heard the policeman say "stop." (R-Vol.XXIV, pg.508-09). The police officer was out of his car and just standing there. (R-Vol.XXIV, pg.510). The two men in the Cutlass walked to the police car and Flores then heard gun shots. (R-Vol.XXIV, pg.511-12). She later testified that the Cutlass was "going pretty fast." and then the car "just died on them." (R-Vol.XXIV, pg.521). The car was going straight on Walker Street before coming to a stop. On cross-examination, she stated she saw both occupants of the Cutlass with their hands on the hood of the police car after the policeman called to them. (R-Vol.XXIV, pg.529-30).

Hilma Galvan testified that she saw the Cutlass turn the corner at Lenox and Walker "real fast" almost hitting her. (R-Vol.XXIV, pg.551). She then saw the police officer talking to George Brown. (R-Vol.XXIV, pg.553). She did not see the cars again until she saw them parked next to another one on Walker. (R-Vol.XXIV, pg.554). She saw the police car pull up behind the Cutlass. (R-Vol.XXIV, pg.555). Both cars were blocking the intersection. After the police car pulled up:

> He got out of the car. He just stepped out of the car and he yelled at the man that was by the sidewalk and he told him "come here" and he kept

> on walking and he told him "come here," and he kept on walking, and he told him again, "hey, you come back," and then he turned around and came towards the police officer. (R-Vol.XXIV, pg.557).

The witness then heard two shots. (R-Vol.XXIV, pg.559). See also (R-Vol.XXIV, pg.579-85).

The Appellant testified that he was driving the car the night Officer Harris was killed. He had been driving fast and spinning his tires when the car stopped. (R-Vol.XXVI, pg.843-44). He tried to re-start the car and, when it wouldn't start, asked two girls for jumper cables. (R-Vol.XXVI, pg.844-45). When the police car arrived he heard the police officer say "come on." (R-Vol.XXVI, pg.846). He went over to the police car and put both hands on the hood of the patrol car. (id). The police officer had his gun pointed at both the Appellant and the passenger. (R-Vol.XXVI, pg.847). The Appellant then heard shots and saw the policeman fall to the ground. (id).

ARGUMENT AND AUTHORITIES

Section 19.03, (c) (1), V.T.C.A., Penal Code defines the capital offense of murder of a police officer as the commission of a murder of a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman. Though no cases have defined what constitutes the lawful discharge of an official duty within the context of §19.03 (a) (1), V.T.C.A. Penal Code, other statutes

within the Penal Code use the same phrase. Section 22.02, V.T.C.A. Penal Code, defines aggravated assault as an assault on a peace officer lawfully discharging his official duty. See §22.02 (a)(2)(A), V.T.C.A. Penal Code. Further, §22.03 V.T.C.A. Penal Code defines the offense of deadly assault on a law enforcement officer and also requires that that officer be acting in the lawful discharge of an official duty. See §22.03 (a)(1)(A), V.T.C.A. Penal Code. Finally, §38.04, V.T.C.A. Penal Code, defining the offense of evading arrest, excepts from the application of that section an unlawful arrest. Finally, prior statues enacted before the enactment of the 1973 Penal Code also had as their requirement a police officers lawful discharge of an official duty. See e.g., Arts.1147(1); 1160a, V.A.P.C. (1925). Thus, cases construing the lawful discharge of official duty under these other statutes are persuasive authority for interpretation of the same phrase within the context of the capital murder statute.

The duties of a peace officer are defined by statute:

> It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose he shall use all lawful means. He shall in every case where he is authorized by the provisions of this code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any Magistrate or Court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or Court and be tried. (emphasis added.)

Article 2.13, V.A.C.C.P. It is clear from the examination of this statute that a police officer may interfere to prevent or suppresscrime or make warrantless arrests only when authorized by the Code of Criminal Procedure. See Honeycutt vs. State, 499 S.W.2d 662, (Tex.Crim.App. 1973). As to the prevention or suppressionof offenses, Articles 6.05, 6.06, V.A.C.C.P. permit peace officers to prevent the commission of criminal activity when they have either been informed that an individual has made a threat to do an injury to himself or to the person or property of another or when an individual is about to commit an offense against the property or person of another. In only those circumstances is a police officer permitted to intervene for the purpose of prevention or suppression of crime.

Additionally, a peace officer is permitted to make warrantless arrests only under those circumstances authorized by chapter 14 of the Code of Criminal Procedure. See Honeycutt vs. State, Supra. A person is deemed to be arrested under the Code of Criminal Procedure when he has actually been placed under restraint or been taken into custody by a peace officer. See Article 15.22, V.A.C.C.P. A warrantless arrest is permitted in those circumstances where an offense is committed within the presence or view of a peace officer (Article 14.01, V.A.C.C.P.); where an offense is committed in the presence or within the view of a magistrate and the magistrate verbally orders the offender's arrested (see Article 14.02, V.A.C.C.P.); where a person is found in suspicious places and under circumstances

which would show that he has been guilty of a felony or breach of the peace or is about to commit some offense against the law or where the peace officer has probable cause to believe that the person has committed an assault resulting in bodily injury to another person and that same peace officer has probable cause to believe that there is immediate danger of further bodily injury that person (Article 14.03, V.A.C.C.P.); and where it is shown by satisfactory proof to the police officer upon representation by a credible individual that a felony has been committed and that the offender is about to escape. (Article 14.04, V.A.C.C.P.). It is only under these circumstances that a warrantless arrest is permitted in Texas.

It is clear that none of the circumstances enumerated in chapter 14 of the Code of Criminal Procedure applied to the case at bar. There was no showing that the Appellant was committing an offense in the presence of a police officer. The evidence showed that the Appellant's car had stalled at the time Officer Harris drove up on the scene; thus, Appellant was not committing an offense within Officer Harris's presence or view. No suspicious circumstances were shown that Appellant was guilty of committing a felony or breach of the peace or about to commit an offense against the laws. There was no showing that Officer Harris had probable cause to believe that Appellant was committing assault resulting in bodily injury to another person and that there was immediate danger of further bodily injury to that person. There was no showing that any credible individual

had made representations to Officer Harris that a felony had been committed and that the offender was about to escape. The most that can be shown was that Appellant was seen to have been speeding through the neighborhood by George Lee Brown and that Appellant was seen ten minutes prior to the shooting spinning his tires and "burning rubber" by Elena Gonzales Hoglan.Further, there was no showing that Appellant had made any threats to do any injury to himself or to anyone else or to the property of another nor was there any showing that in the presence of Officer Harris, shown to be committing an offense against the personal property of another; thus, Officer Harris was not, under the terms of chapter 6 of the Code of Criminal Procedure, to prevent the commission of an offense.

It cannot be said that Appellant's speeding or spinning his tires constitutes a breach of the peace in order to justify a warrantless arrest under Articles 14.01, and 14.03, V.A.C.C.P. The term, breach of the peace was defined in Woods vs. State, 213 S.W.2d 685, (Tex.Crim.App. 1948):

> The term "breach of the peace," is generic, and includes all violations of the public peace or order or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or intending to provoke or excite others to break the peace; a disturbance of

> public order by an act of violence, or by act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. By peace, as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace is a common-law offense. It has been said that it is not a specific offense, yet it may be, and at times, recognized as such by statute or otherwise; and only when so regarded will it be considered in this Article.
>
> The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quite, of an invasion of the security and protection which the law affords to every citizen, or if such acts such as tend to incite violent resentment or to provoke or excite others to break the peace. Actual or threatened violence is an essential element of a breach of the peace. Either one is sufficient to constitute the offense. Accordingly, where means which cause disquiet and disorder, and which threaten danger and disaster to the community, are used, it amounts to the breach of the peace, although no actual personal violence is employed. Where the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrong doer must be of such a character to induce such a condition in a person of ordinary firmness.

See 213 S.W.2d at 687. It has been held that an offense against the public peace must be one as defined under §42.01, V.T.C.A. Penal Code, see e.g., Heith vs. Boyd, 175 S.W.2d 214, (Tex. -1943). Thus it cannot be said that having a stalled car on a public street, speeding, spinning ones tires, or burning rubber constitutes offenses against the public peace; They involve no actual or threatened violence. Further, they did not occur within the view or presence of Office Harris. See Satterwhite vs. State, Infra.

The arrest cannot be justified as an offense committed within the view of the police officer merely because of Appellant's car may have been blocking the street. Under §42.03 V.T.C.A. Penal Code, a person commits an offense of obstruction of a street only when that obstruction renders the street impassable or passage unreasonably convenient or hazardous. See §42.03, (b) V.T.C.A. Penal Code. There was no such showing in the case at bar, thus no showing that the Appellant was committing an offense within the view of Officer Harris.

In cases involving assaults on police officers, the Court has held that it is necessary for the arrest to be legal in order to constitute the lawful discharge of an official duty. Hackett vs. State, 357 S.W.2d 391, (Tex.Crim.App. 1962). In Crowe vs. State, 216 S.W.2d 201, (Tex.Crim.App. 1948) the Court held that there was no evidence to show that the sheriff in that case was in the lawful discharge of an official duty. The Court held that in order to constitute a lawful discharge of an official duty, the peace officer, if arresting someone, must be engaging in a legal arrest. Though Crowe has been overruled by Cook vs. State, 238 S.W.2d 200, (Tex.Crim.App. 1951, it has been overruled only to the extent that public intoxication did not constitute a breach of the public peace. In Crowe, the police officer's justification for the arrest was public intoxication, which the Court held was not a breach of the public peace. That element of the Crowe holding was overruled by Cook vs. State, Supra.

In Mesden vs. State, 244 S.W.2d 228, (Tex.Crim.App. 1951) two police officers received a call from a victim of assault who told them that the Defendant had assaulted them and that he lived in a certain room of a motel. Without a warrant they entered the Defendant's hotel room and arrested him.

> It may be seen from the testimony of the officers that they acted upon the information that a misdemeanor had been committed, and upon this and nothing more they invaded the home of Appellant and arrested him. This was an illegal arrest and justified Appellant in attempting to extricate himself from such custody.

In Rodriguez vs. State, 172 S.W.2d 502, (Tex.Crim.App. 1943) the police were stopped by a man on the street who engaged in some sort of conversation with police officers. As a result of that conversation, the policemen went to a certain cafe and upon entering the cafe and noticing the Defendant sitting in the corner, arrested him without a warrant. They had not been informed that he had committed a felony, nor was the Defendant committing a breach of the peace within their presence. As they were leaving the cafe, the Defendant stabbed one of the police officers. The Court concluded that it was obvious the arrest was illegal. "An officer who acts without proper authority, and the person doing the same act who is not an officer, stand on the same footing...." 172 S.W.2d at 503. Quoting from Satterwhite vs. State, 17 S.W.2d 826, (Tex.Crim.App. 1929):

> It is essential to justify such an arrest, that the offense committed shall amount to a breach of the peace, that such offense shall be actually committed or attempted in the presence of the person making the arrest, and the arrest be made at the time when the offense was committed....it has been held that the right to

make an arrest in cases of breaches of the peace is confined to the time of the commission of the offense.

See also King vs. State, 99 S.W.2d 932, (Tex.Crim.App. 1936); Miers vs. State, 29 S.W. 1074, (Tex.Crim.App. 1895). In Williams vs. State, 142 S.W. 899, (Tex.Crim.App. 1912), the Defendant was accused by a woman of assaulting her; the Defendant attempted to flee upon being confronted by the policeman. While pursuing the Defendant, the policeman was assaulted by the Defendant. The Court held that the law authorized warrantless arrests only for felonies or breaches of the peace committed within the view of a peace officer. To detain a Defendant for the purpose of investigating the crime, was not authorized by the statute; thus, the policeman was not in the lawful discharge of his duties. 142 S.W. at 900.

Because the record fails to disclose that the police officer was lawfully arresting the Defendant pursuant to Chapter 14 of the Code of Criminal Procedure, the evidence is insufficient to sustain the allegation that the Appellant murdered a police officer in the lawful discharge of his duties.

GROUND OF ERROR XV.

THE EVIDENCE IS INSUFFICIENT TO SHOW THAT OFFICER HARRIS WAS IN THE LAWFUL DISCHARGE OF AN OFFICIAL DUTY.

The Appellant would respectfully incorporate the facts set forth in Ground of Error Number XIII in support of this Ground of Error.

ARGUMENT AND AUTHORITIES

In Gaines vs. State, 132 S.W. 352, (Tex.Crim.App. 1910) the Court held that two of the elements of assault on a police officer included (1) that he was a police officer in the discharge of his duties and (2) that the assault was an interruption of his official duties. In Gaines, the policeman was on his way to pick up prisoners when he stopped to converse with the Defendant and friends. A fight insued between the Defendant and police officer. The Court held that there was no showing that the police officer was in the discharge of an official duty. See also Curlin vs. State, 209 S.W. 666, (Tex.Crim.App. 1919). In Morris vs. State, 523 S.W.2d 417, (Tex.Crim.App. 1975) the Defendant was convicted of assault with intent to murder a police officer. The policeman, not in uniform, was confronted by the Defendant in a parking lot over a minor car accident. The police officer identified himself as a police officer and told the Defendant to stop bothering him. He

then started to write down the Defendant's license number. The Defendant got angry and proceeded to shoot the policeman five times. It was clear that the dispute grew out of a private disagreement. The State contended that the recording of a license number was an official police function. Citing Geanes vs. State, Supra and Curlin vs. State, Supra, the Court held that there was no evidence that the policeman was discharging an official responsibility. The Court stated that there was not distinction between an on duty and an off duty police officer; both can be engaged in the lawful discharge of their duties. Further, there was clearly cause for the police officer in Morris to exercise his official responsibilities; "the record, however, is practically devoid of any mention of such performance of his official duty." 523 S.W.2d at 418. Though a policeman be on duty twenty-four hours a day, "surely this statement does not abrogate the requirement of Article 1160a, that the officer be in the 'performance of his official duty' at the time of the assault." (id). "Otherwise, all attacks on a policeman would come within the statute and the quoted language would have no meaning at all."

Because the case at bar reflects no evidence as to the nature of the Officer Harris official duty, the evidence is insufficient to sustain the conviction.

GROUND OF ERROR XVI.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JURY'S ANSWER TO THE SPECIAL ISSUE OF ARTICLE 37.071, V.A.C.C.P., IN THAT THE EVIDENCE IS INSUFFICIENT TO SHOW THAT THE DEFENDANT'S CONDUCT WAS COMMITTED DELIBERATELY AND WITH THE EXPECTATION THAT DEATH WOULD RESULT.

The Appellant contends that the evidence is insufficient toshow that the murder he was accused of committing was done deliberately and with the expectation that death would result. None of the witnesses to the crime testified on the circumstances of its commission. Elena Gonzalez Hoglen testified that she did not see the crime committed; she first heard four shots and then later three more shots. (R-Vol.XXIII, pg.232). She also stated that the policeman was shot in the face. (R-Vol.XXIII, pg.235). Patricia Diaz testified that she heard someone that she thought was a police officer yelling "stop, stop." (R-Vol.XXIII, pg.312). She saw the Appellant pointing at the police car. She then ducked and heard shots. She was unable to determine what the Appellant had in his hand, if anything. (R-Vol.XXIII, pg.313-14). On cross-examination, she admitted that she did not know who yelled "stop, stop." (R-Vol.XXIII, pg.324). Further, she did not see the actual exchange of gun fire. (R-Vol.XXIII, pg.330).

Jose Armijo, Jr., testified that he saw the Appellant and another person with their hands on the hood of a police car. (R-Vol.XXIII, pg.283). He saw the Appellant acting like he was

scratching his back; he then saw the Appellant take out a gun and shoot the policeman. (R-Vol.XXIII, pg.284). Herlinda Garcia testified that she saw the policeman get out of his car, with none of the red warning lights flashing. She saw someone, first described as having blonde hair, brown shirt and brown pants, (R-Vol.XXIV, pg.477) and then later identified as the Appellant, (R-Vol.XXIV, pg.450), approach the police officer and pull something out of his pants. She assumed it was a pistol. (R-Vol.XXIV, pg.450). She then ran and only heard the gun shots. (R-Vol.XXIV, pg.479). On cross-examination, she stated that she saw the Appellant pull something out of his pants, get close to Officer Harris, and then "The policeman was down on the floor." (R-Vol.XXIV, pg.481).

Vera Flores testified that she was saw a police officer get out of his car and say "stop." (R-Vol.XXIV, pg.508). She saw two men exit from a black and red car immediately in front of the police car and go toward the car. (R-Vol.XXIV, pg.511). She heard someone yell "no, no." (R-Vol.XXIV, pg.512). She then heard gunshots. (Id). Although she did not see the shots fired, she surmised it was the driver of the red and black car who fired the shots because she saw him running down the street firing the gun after the police officer was killed. (R-Vol.XXIV, pg.512-13). She later identified Appellant as the driver. (R-Vol.XXIV, pg.517).

Hilma Galvan testified that she heard the police officer call out to the Appellant twice "Hey you, come here." After the second call, Appellant turned around and started toward the

police officer. She then heard two shots and saw the policeman fall. (R-Vol.XXIV, pg.559). She also testified that he was shooting at two other women, Herlinda Garcia and Vera Flores. (R-Vol.XXIV, pg.562). On cross-examination, she stated that she saw the police officer pull up behind the Appellant's car, step out, and yell at the Appellant. (R-Vol.XXIV, pg.582). She could not remember weather his headlights were on. (R-Vol.XXIV, pg.582-83). She saw the Appellant walk back to the police car, (R-Vol.XXIV, pg.583), where he was grabbed by the officer and pushed against the police car. (R-Vol.XXIV, pg.584). The shots were fired "Right there and then." (R-Vol.XXIV, pg.585).

ARGUMENT AND AUTHORITIES

It goes without saying that the evidence is sufficient to show that the Appellant acted intentionally as that term is defined in §6.03, V.A.P.C. Thus, the evidence is sufficient to show that the Appellant acted as a result of a conscious objective or desire to engage in the conduct or cause the result of the death of Officer Harris and thus to sustain the allegation under §19.03, V.A.P.C. The issue before this Court is whether the conduct of the Appellant that caused the death of Officer Harris "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result..." See Article 37.071, V.A.C.C.P. Though there

exists no legislative definition of the conceptof "deliberately", this Court has held that "deliberately" involves a thought process that "embraces more than will to engage in conduct and activates the intentional conduct." See Fearance vs. State, 620 S.W.2d 577, 584 (Tex.Crim.App. 1982). In Fearance, the Court held that "The person who engages in certain conduct deliberately, has upon consideration said 'Let's do it." 620 S.W.2d at 584, ft.nt.6. In Williams vs. State, _____ S.W.2d _____, (Cause #68,952, handed down on July 11th, 1984). The Court held that a plurality of its members had defined deliberately as "A manner of doing an act characterized by or resulting from careful considerations;... more than mere willto be engaged in the conduct."

In Green vs. State, _____ S.W.2d _____, (Cause #60,133, handed down on July 11th, 1984), the Court found the evidence of deliberateness sufficient where (1) the Defendant entered the house armed and struggled with the complaining witness and calling the co-defendant to shoot the complaining witness thus leading to the complaining witness's death; (2) The Defendant told the co-defendants to kill the other members of the complaining witness's family. In Smith vs. State, _____ S.W.2d _____, (64,412) July the 11th, 1984, the evidence was sufficient to show the deliberate conduct where the Defendant and a co-defendant secured weapons from a third party for the express purpose of robbery. They sat in their car loading guns and waiting until the crowd diminished in order to execute the

robbery. Further, the State introduced evidence of four prior convictions for robbery, thus showing the Defendant to be an experienced robber rather than an amateur.

The evidence in the case at bar shows no rational or planned attempt to kill Officer Harris. The evidence did not show that the Appellant and his compatriot/passenger were armed with the intent to kill a police officer. The evidence shows no circumstances indicating premeditation or any thought process indicating careful consideration of the consequences. The evidence shows nothing more than an intent to kill Officer Harris, formed in the few seconds available before the actual shooting. The evidence is thus insufficient to sustain the jury's answer to the first special issue of Article 37.071, V.A.C.C.P.

GROUND OF ERROR XVII.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DURING THE PUNISHMENT PHASE, AN EXTRANEOUS OFFENSE FOR WHICH A FINAL CONVICTION HAD NOT BEEN OBTAINED AND FOR WHICH NO FORMAL NOTICE HAD BEEN PROVIDED.

At the punishment phase, Defense Counsel re-urged it's motion in limine to prevent the State from introducing any offense that had not resulted in a final conviction "as being a violation of equal protection under the law, denial of due process, and a violation of 37.07-3 of the Texas Code of Criminal Procedure." (R-Vol.XXVIII, pg.3). That motion was overruled. The State then contended, in response to a request for a Wade-Gilbert Hearing, that the test for admitting the extraneous offense was "not whether we can prove extraneous offenses beyond a reasonable doubt, but whether or not this evidence we are going to tender or offer will be relevant or material to the jury to answer those two questions..." (R-Vol.XXVIII, pg.6). Defense Counsel then asked for a running objection to any extraneous offense that the State intended to introduce at the punishment phase. That was also overruled. (R-Vol.XXVIII, pg.8).

The State introduced testimony of an aggravated robbery of a gun store in which the Appellant participated. (R-Vol.XXVIII, pg.50-157). Defense re-itterated his objections. (R-Vol.XXVIII, pg.75); (R-Vol.XXVIII, pg.101); (R-Vol.XXVIII, pg.126). The Appellant's participation was shown to have been that of a party to the offense in that Appellant was shown to have held a gun on the victims of the aggravated robbery while another individual led the robbery.

ARGUMENT AND AUTHORITIES

Appellant contends that the unindicted extraneous offense never should have been used at the punishment phase of the trial, absent some means of formal notice to him of the nature of the charge to be proven. Appellant contends that the requirement of notice is an essential element of due process of law. In Presnall vs. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207, (1978), the Court held that it "is as much a violation of due process to send an accused to prison following conviction of a charge on which he was tried, as it would be to convict him of a charge that was never made..." (Quoting from Cole vs. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948). The Court also held that the "Fundamental principals of procedural fairness apply with no less force at the penalty

phase of a trial in a capital case, than they do in the guilt/determining phase of any criminal trial." 439 U.S. at 16, 15 L.Ed.2d at 211.

In Morrissey vs. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, (1972), the Court held that a parole revocation was sufficiently a protectable interest as to require certain due process procedural protections, including notice to the parolee of the charges he was facing.

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer a grievious loss." (citations omitted). The question is not merely the "weight" of the individuals interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. (citation omitted). Once it is determined that due process applies, the same question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved, as well as the private interest that has been effected by governmental action. (citation omitted). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

408 U.S. at 481; 33 L.Ed.2d at 494. The Court when on to hold that a parolee's liberty was such that its loss inflicted such a "grievious loss on the parolee and others as to require 'some orderly process, however informal." 408 U.S. at 482; 33 L.Ed.2d

at 495. The minimum due process requirements ordered by the Court included, among others, "written notice of the claimed violations of parole...." 408 U.S. at 489; 33 L.Ed.2d at 499. See also Gagnon vs. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, (1973).

In Goss vs. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the Court reviewed and listed numerous situations where the due process clause of the Fifth Amendment required procedural protections, including notice: State employees, Connell vs. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418, (1978); welfare recipients with statutory welfare entitlements, Goldberg vs. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, (1970); prisoners and their good time credits, Wolf vs. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935, (1974).

> The due process clause also forbids arbitrary deprovations of liberty. "When a persons good name, reputation, honor, or integrity is at steak, because of what the government is doing to him," the minimal requirements of the clause must be satisfied....The Court's view has been that as long as property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause.

419 U.S. at 574 - 76; 42 L.Ed.2d at 735.

The Court has held that procedural due process requirements, including notice, apply in numerous proceedings including criminal contempt proceedings, Taylor vs. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897, (1974); Greenholtz vs. Nebraska Penal Inmates, 442 U.S. 1, 91 S.Ct. 2100, 60 L.Ed.2d

668, (1979), Prison inmates with expectancies of parole. Vitek vs. Jones, 445 U.S. 480, 63 L.Ed.2d 552, 100 S.Ct. 1254, (1980) held that a State prisoner is entitled to notice and a hearing upon involuntary transfer from the prison to the State mental hospital. Appellant is aware that this Court has held on several occasions that extraneous offenses, at the punishment phase of a capital trial need not have resulted in conviction. See Hammett vs. State, 578 S.W.2d 699, 709 (Tex.Crim.App. 1979). Nevertheless, the admission of an extraneous offense for which no conviction has resulted and without formal notice to the accused of its use violates simple standards of due process. An adjudicated offense bears no such unreliability because it is presumed all procedural requisites of a criminal conviction have been satisfied. The burden thus shifts to the Defendant in a trial to raise constitutional defects in such prior conviction. See Hill vs. State, 633 S.W.2d 520, (Tex.Crim.App. 1981); Ex Parte White, 659 S.W.2d 434, (Tex.Crim.App. 1983). Though extraneous offenses not resulting in final convictions are admissable during the trial of any criminal case to show identity, intent, motive, or system; Cameron vs. State, 530 S.W.2d 841, 843-844 (Tex.Crim.App. 1975), such offenses are admitted with the limiting instruction regarding their effect. See Johnson vs. State, 509 S.W.2d 639, 640, (Tex.Crim.App. 1974). No such limiting instruction is available to the Defendant at the punishment phase of a capital trial.

The admission of the unadjudicated offense of aggravated robbery, at the punishment phase of the trial in the case at bar, violated the requirements of the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution. Because of the admission of said offense, this case should be reversed and remanded for a new trial.

GROUND OF ERROR XVIII.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JURY'S ANSWER TO THE SECOND SPECIAL ISSUE IN THAT THE EVIDENCE IS INSUFFICIENT TO SHOW THAT THERE IS A PROBABILITY THAT THE APPELLANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY.

The Appellant would respectfully incorporate by reference the facts set forth in Grounds of Error XVI and XVII in support of this Ground of Error.

ARGUMENT AND AUTHORITIES

Appellant contends that the evidence is insufficient to show that there is a probability that he will commit future acts of violence and constitute a continuing threat to society. In Wallace vs. State, 618 S.W.2d 67, (Tex.Crim.App. 1981) the Defendant was given the death penalty where the co-defendant killed an attorney during the course of a robbery. The Defendant admitted discussing other robberies with the co-defendant. The confession of the case admitted that he participated in a thwarted robbery. There was no evidence of any prior convictions, no prior acts of violence, no character evidence of any kind, and no psychiatric evidence. The Court held that the

facts of the case were not sufficient to justify the affirmative response of the jury to the second special issue of Article 37.071, V.A.C.C.P.

In Ronney vs. State, 632 S.W.2d 598, (Tex.Crim.App. 1982) the Court held that although the crime was a senseless murder, "That fact is true of every murder in the course of a robbery." The facts of the offense, standing alone, do not carry the marks of a 'calculated and cold blooded crime." See O'Bryan vs. State, 591 S.W.2d 464. To support a "yes" answer to the second punishment issue, the evidence must show beyond a reasonable doubt that there is a probability that the Appellant will commit criminal acts of violence that would constitute a continuing threat to society. The Court stated that to hold the facts of the offense in Ronney, standing along, would support such a verdict, would mean that virtually every murder in the course of a robbery would warrant the death penalty. The Court held that such a construction would destroy the purpose of the punishment stage in capital murder cases. Such a stage is to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition. Further, the Defendant's attitude in Ronney toward the crime would make "No significant contribution toward discharge of the State's burden." Though he called other persons' attention to the crime and laughed about it, he also repeatedly claimed self defense and appeared distraught and agitated. Although there was an extraneous offense introduced in

the Rooney trial and it was not characterized by an absence of physical violence, it was committed only a few minutes prior to the indicted offense. It was considered part of a one night crime spree. "It does not show a repetition of criminal conduct so much as a single criminal purpose with two successive targets. It does not exhibit the kind of repeated criminal conduct shown in Brooks vs. State, 599 S.W.2d 312, 323 and Russell vs. State, 598 S.W.2d 238, 254." The State's evidentuary factors were considered weak against the Defendant's youthful age, lack of a prior record of arrest, absence of psychiatric testimony. The State simply did not show the probability of future acts of violence.

In Cass vs. State, _____ S.W.2d _____, (Tex.Crim.App.-Cause #68,488 - Delivered on July 18th, 1984) the shocking circumstances of the case, including a very premeditated and cold blooded execution style murder evidenced a "most dangerous aberration of character." The evidence of that crime was sufficient to satisfy the jury's affirmative answer to the second special issue of Article 37.071, V.A.C.C.P. In O'Bryan vs. State, 591 S.W.2d 464, (Tex.Crim.App. 1979) the crime took months of premeditation and planning. The jury could have concluded that the Defendant in O'Bryan had a wanton and calloused disregard for human life. See also Bodde vs. State, 568 S.W.2d 344, (Tex.Crim.App. 1978); Earvin vs. State, 582 S.W.2d 794, (Tex.Crim.App. 1979); and Starvaggi vs. State, 593 S.W.2d 323, (Tex.Crim.App. 1979).

Given the youthful age of the Appellant in the case at bar, his lack of prior criminal convictions, the absence of psychiatric testimony, and the absence of any evidence showing that the crime was committed indicating a callous and wanton disregard for human life, the evidence is insufficient to sustain the jury's answer to the second special issue of Article 37.071, V.A.C.C.P.

CONCLUSION

The Appellant would respectfully request that this Court reverse this case and either remand it for a new trial or render a judgment of acquittal.

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing APPELLATE BRIEF, has been hand delivered to the Harris County District Attorney's Office, Appellate Division, 201 Fannin, Suite 200, Houston, Texas 77002, on this the 15th day of August, 1984.

Michael B. Charlton

F. A16

F. Aldape Guerra
Appeal
cc: Ferguson (S2)
Bernard (S3)
Schnattmeier
(S4)

No. 88-5237

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

RICARDO ALDAPE GUERRA,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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LOU MCCREARY
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

*Counsel of Record

QUESTIONS PRESENTED

I. WERE THE PETITIONER'S DUE PROCESS RIGHTS VIOLATED WHEN THE TRIAL COURT ALLOWED A WITNESS TO TESTIFY WHO WAS IN THE COURTROOM DURING ANOTHER WITNESS' TESTIMONY, EVEN THOUGH THE THE RULE FOR SEQUESTERING WITNESSES HAD BEEN INVOKED?

II. DOES THE FAILURE OF THE STATE COURTS TO ADOPT A DEFINITION OF THE TERM "DELIBERATELY," AS USED IN THE FIRST SPECIAL PUNISHMENT ISSUE, RESULT IN THE DEATH PENALTY BEING IMPOSED IN AN ARBITRARY MANNER, IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT?

III. DOES THE STATE RULE ALLOWING THE USE OF EVIDENCE OF UNADJUDICATED OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS?

IV. DOES THE STATE RULE ALLOWING THE USE OF EVIDENCE OF UNADJUDICATED OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL BUT NOT IN A NONCAPITAL TRIAL VIOLATE A CAPITAL DEFENDANT'S RIGHT TO EQUAL PROTECTION?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein,[1] by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Guerra's conviction and sentence is not yet reported. A copy is attached to the Petition as Appendix A.

JURISDICTION

Guerra seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

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[1] For purposes of clarity, Respondent will be referred to as "the state," and Petitioner will be referred to as "Guerra."

CONSTITUTIONAL PROVISIONS INVOLVED

Guerra bases his claims upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Also involved are Articles 36.03, 36.04, 36.05, 37.07, and 37.071 of the Texas Code of Criminal Procedure, and Section 19.03 of the Texas Penal Code.

STATEMENT OF THE CASE

Guerra was indicted on July 23, 1982 for the murder of James D. Harris, a peace officer in the lawful discharge of his duties, a capital offense. Guerra pleaded not guilty to the indictment and was tried by a jury. Trial began on October 4, 1982, and on October 12, 1982, the jury found Guerra guilty as charged. After hearing additional evidence on the question of punishment, the jury, on October 14, 1982, returned affirmative answers to the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988). The trial court assessed Guerra's punishment at death by lethal injection, as required by law. The Texas Court of Criminal Appeals affirmed Guerra's conviction and sentence on direct appeal. Guerra v. State, ___ S.W.2d ___, No. 69.081 (Tex. Crim. App., May 4, 1988). The court denied rehearing on June 8, 1988. On or about August 6, 1988, Guerra filed a pro se petition for writ of certiorari, and on or about August 8, 1988, his attorney on appeal filed an additional certiorari petition.

STATEMENT OF FACTS

The facts of the offense are not necessary to dispose of the petition. The facts are accurately set forth in the opinion of the Court of Criminal Appeals. Guerra v. State, slip op. 1-8.

SUMMARY OF ARGUMENT

Guerra's complaint in the court below that the trial court's decision to allow a witness to testify in violation of the rule for sequestering witnesses was not on the same grounds as those urged before this Court. Therefore, the issue is not not properly before the Court for review.

The failure of the Texas courts to adopt a definition of the term "deliberately," as used in the first special punishment issue, does not deprive a defendant of due process. The word has been recognized as having a common meaning that juries can readily appreciate. In addition, the Court of Criminal Appeals has determined that "deliberately" has a different and narrower meaning than "intentional," the culpable mental state for capital murder. Thus, the terms are not identical and the jury is not required to answer the first punishment issue affirmatively merely because it has found the defendant guilty of capital murder. Further, even if the terms are identical, the second special issue by itself is sufficient to allow the defendant to introduce whatever mitigating evidence he wants to put before the jury and, so, prevent the arbitrary and capricious imposition of the death penalty. Finally, the Court has already determined that, because Texas limits the class of persons eligible for the death penalty by the way in which it defines capital murder, there is no constitutional violation if the element that makes the crime a capital offense is duplicated as an aggravating element at the punishment phase.

The state's introduction of evidence of unadjudicated offenses at the punishment phase of a capital murder trial does not violate a defendant's right to due process. The evidence is used only at the punishment phase, so there is no danger that the jury will use it to convict the defendant of the crime merely on the basis of his past record. In addition, the evidence serves the purpose of putting before the jury all of the evidence of the defendant's character that is necessary for it to determine punishment. By requiring that the jury be convinced beyond a reasonable doubt before returning affirmative answers to the punishment issues, the statute assures that the evidence of unadjudicated offenses will not result in a death sentence being imposed arbitrarily and capriciously.

Similarly, the use of evidence of unadjudicated offenses in capital trials but not in noncapital trials does not offend the Equal Protection Clause. Capital murder defendants are not a suspect class, so that the state's differential classification of them is judged by the rational basis standard. The state's determination that evidence of unadjudicated offenses is relevant to the jury's punishment decision is clearly rational, in light of the fact that the jury must have before it evidence of the defendant's background, character, and the circumstances of the offense.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Guerra has advanced no special or important reason in this case, and none exists.

II.

THE CLAIM RAISED IN THE PRO SE PETITION THAT TESTIMONY OF A WITNESS IN VIOLATION OF THE WITNESS SEQUESTRATION RULE VIOLATED GUERRA'S DUE PROCESS RIGHTS WAS NOT RAISED IN THE COURT BELOW AND IS NOT PROPERLY BEFORE THE COURT.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. E.g., Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1985); Illinois v. Gates, 462 U.S. 213, 218-222 (1983); Bacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with

Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

In his pro se petition, Guerra contends that the trial court violated his right to due process by allowing a witness, Marie Armijo, to testify for the state, even though the rule for sequestering witnesses had been invoked and the witness in question had been present in the courtroom during another witness' testimony. He also contends that the analysis employed by the Court of Criminal Appeals to determine whether the trial court had erred deprived him of his substantive and procedural rights to due process. On direct appeal, however, Guerra argued that allowing the witness to testify was simply a violation of the state procedural rule. Accordingly, the court below confined its treatment of the ground of error to whether the trial court had abused its discretion in allowing the witness to testify. Guerra's constitutional basis was not before the court below and was not addressed by it. Consequently, his claim is not properly before this Court.[2]

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[2] In his pro se motion for rehearing, Guerra complained of the analysis employed by the Court of Criminal Appeals in determining whether a violation of the rule was an abuse of discretion, stating that he adopted the dissenting opinion's remarks on the issue in support of his position. The dissent, however, did not address the issue on the constitutional grounds now raised by Guerra.

III.

THE FAILURE OF THE TEXAS COURTS TO DEFINE THE TERM "DELIBERATELY" DOES NOT VIOLATE THE EIGHTH AMENDMENT.

In the petition filed by his attorney, Guerra asserts in two related grounds that the failure of the Court of Criminal Appeals to adopt a definition of the term "deliberately," as used in the first special punishment issue, resulted in his death sentence being imposed in an arbitrary and capricious manner, in violation of the Eighth Amendment. He first contends that the term "deliberate" is indistinguishable in meaning from "intentional," the mental state necessary to convict a defendant of capital murder. Thus, he concludes, by not including a definition of "deliberate," the Texas capital sentencing statute has been rendered meaningless and unconstitutional. Second, he contends that the statute as applied in his case violated the Eighth Amendment because the evidence relied upon to prove deliberateness showed nothing about his state of mind in committing the crime and, at best, proved that he had committed only murder.

These claims are flawed for several reasons. First, the Texas Legislature has determined that the term "deliberate" does not need definition, and the Court of Criminal Appeals has concluded that the term in its common meaning is sufficiently clear that no special definition is required. King v. State, 553 S.W.2d 105, 107 (Tex.Crim.App. 1977), cert. denied, 434 U.S. 1088 (1978); see also Thompson v. Lynaugh, 821 F.2d 1054, 1060 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 5 (1987). In addition, the term is not the linguistic equivalent of "intentional," but has a narrower focus. Fearance v. State, 620 S.W.2d 577, 584 and n.6 (Tex.Crim.App. 1981). Moreover, the claims ignore the manner in which this Court has found the Texas capital sentencing procedures to meet Eighth Amendment requirements. By defining the offense of capital murder to include at least one aggravating circumstance, Texas has sufficiently narrowed the class of persons eligible for a death sentence. Jurek v. Texas,

E. Aldredge Pledge

cc: Ferguson (52)
Bernard (53)
Schattmeier (54)

No. [illegible]

IN THE

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v.

THE STATE OF TEXAS,

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JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

JOHN HUBENAK
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

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*Counsel of Record

428 U.S. 262 (1976). Further, the second special issue on punishment, whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society, see Tex. Code Crim. Proc. Ann. art. 37.071(b)(2) (Vernon Supp. 1988), has been construed to allow a defendant to present whatever evidence in mitigation of punishment he can muster, thus ensuring that a death sentence is not "wantonly or freakishly" imposed. Jurek v. Texas, 428 U.S. at 276. Guerra has failed to demonstrate that the second special punishment issue, by itself, is insufficient to prevent arbitrary and capricious imposition of his death sentence, nor has he demonstrated that the first special issue at punishment precluded him from presenting any evidence in mitigation.

Finally, even if it can be assumed that the first special issue is duplicative of the capital murder element of intent, Guerra would not be entitled to relief. In Lowenfield v. Phelps, ___ U.S. ___, 108 S.Ct. 546 (1988), the Court held that a Louisiana statutory scheme that required at the punishment phase of trial the finding of an aggravating factor that duplicated an element of the offense of first degree murder did not violate the Eighth Amendment. As in Lowenfield, the duplicative nature of the first special issue, if it exists, does not render Guerra's death sentence constitutionally infirm.

IV.

THE STATE'S INTRODUCTION AT THE PUNISHMENT PHASE OF THE TRIAL OF EXTRANEOUS UNADJUDICATED OFFENSES COMMITTED BY GUERRA DID NOT VIOLATE HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

Guerra also contends in his pro se petition that he was denied due process and equal protection by the state's use of evidence of unadjudicated extraneous offenses at the punishment phase of his trial. He asserts that such evidence is unreliable because there has been no final determination of his guilt, and because the jury might be inclined to return an affirmative

answer to the second special punishment issue without finding beyond a reasonable doubt that he was guilty of the extraneous offenses. He further claims that the Texas practice of allowing such evidence to be used in capital murder trials violates the Equal Protection Clause because evidence of unadjudicated extraneous offenses is excluded in noncapital cases.

Under the Texas capital sentencing statute, all evidence relevant to sentencing is admissible during the punishment phase of a capital murder trial. Tex. Code Crim. Proc. Ann. art. 37.071(a) (Vernon Supp. 1988).[3] This was one aspect of the Texas statute that met with the Court's approval when it noted in Jurek that the Texas scheme insures that the jury will have before it "all possible relevant information about the individual defendant whose fate it must decide." Jurek v. Texas, 428 U.S. at 276. As Justice Stevens has stated:

> [T]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating circumstances or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime.

Barclay v. Florida, 463 U.S. 939, 967 (1983) (Stevens, J., joined by Powell, J., concurring in the judgment).

Evidence of other crimes committed by the defendant is highly relevant to the question of whether he will continue to commit acts of violence in the future, which is addressed by the second special issue. Any concern that the defendant's punishment will be assessed on the basis of crimes of which he has not been convicted is eliminated by requiring the jury to be convinced beyond a reasonable doubt before it can answer the punishment issues affirmatively. Guerra's allegation of a due process

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[3]The evidence is ordinarily not admissible at the guilt-innocence phase of the trial, when the risk exists that a jury might convict a defendant for being a criminal generally, rather than for the specific act for which he is on trial.

violation in the use of unadjudicated extraneous offenses at his trial is without merit.

Guerra also asserts that the use of unadjudicated crimes evidence at the punishment phase of a capital murder trial violates the defendant's right to equal protection because Texas does not allow the same kind of evidence to be introduced in noncapital trials. The first inquiry to be undertaken in deciding an equal protection claim is the level of scrutiny to be employed. Courts normally give wide latitude to legislative classifications of criminal activity. Patterson v. New York, 432 U.S. 197, 201 (1977). Deference to a legislature's decision to make the death penalty a possible punishment for certain crimes, unless that decision is "clearly wrong," was expressly upheld in Gregg v. Georgia, 428 U.S. 153, 174-76, 187-88 (1976),[4] and Texas' capital punishment scheme, limiting the death penalty as a possible punishment to a limited class of murders, was approved by the Court in Jurek v. Texas, 428 U.S. 262 (1976). Thus, capital punishment defendants are not a suspect class, and Guerra's claim should be analyzed under the rational basis standard.

A state may classify different groups within society differently as long as the classification promotes a legitimate governmental objective. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Texas permits the introduction of unadjudicated offenses at the punishment phase of capital murder trials to assist the jury in deciding the defendant's probable future danger to society. In so doing, Texas focuses the jury's attention on the character of the individual defendant before it. See Jurek v. Texas, 428 U.S. at 273. Because of the unique nature of the death penalty, Texas

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[4]Although the Court analyzed Gregg under the Eighth Amendment's cruel and unusual punishment clause, the same result is proper in the context of an equal protection argument. See Gray v. Lucas, 677 F.2d 1086, 1104 (5th Cir. 1984), cert. denied, 461 U.S. 910 (1983).

has a strong interest in assuring that the jury has all of the evidence relevant to punishment available to it. Consequently, the state's decision to treat capital murder defendants differently than noncapital defendants is a rational one. The rule allowing use of unadjudicated offenses in capital cases does not offend the Equal Protection Clause.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

William C. Zapalac

WILLIAM C. ZAPALAC*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

*Attorney of Record

the second robbery because he believed that Sauls was going to be a lookout for the gang in order to warn them in the event that the police approached the gang's vehicle when they were committing the second robbery. Sauls himself testified that if a police car had approached the gang's vehicle he would have warned the others. Unfortunately for the second victim, the police never appeared on the scene when the second robbery that turned into a murder occurred.

Sauls testified that what he had witnessed "shocked" him.

The gang soon fled from Corpus back to San Antonio.

Notwithstanding that Sauls was "shocked" by what he had witnessed, he nevertheless remained with the gang. In fact, Sauls accompanied the gang the next day on another pleasure trip that the gang took, this time to Canyon Lake where the members of the gang spent proceeds that came from the last robbery. Sauls was a beneficiary of what was purchased, some more acid and alcohol, and the record clearly reflects that he knew that the money that was used to make the purchases came from the second robbery.

Several weeks later, when the police were zeroing in on Sauls, who had moved from San Antonio to Austin, he responded to the police's attempts to contact him, and gave them an exculpatory statement concerning his involvement in the murder. The record reflects that no charges were ever filed against Sauls, and Sauls denied that he had made any deals with the police or the prosecution in exchange for his testimony against the appellant.

Conspiracy is usually defined as an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means. Thus, the offense of conspiracy is complete as soon as the criminal agreement is entered into. *Dill v. State*, 35 Tex.Cr. 240, 33 S.W. 126 (Tex.Cr.App.1895); *Witt v. State*, 146 Tex.Cr.R. 627, 177 S.W.2d 781 (Tex.Cr.App. 1944). In order to agree to an object of a conspiracy, the conspirator must have knowledge of that objective, but such knowledge may be inferred from the circumstances. See *United States v. Gallishaw*, 428 F.2d 760, 763 (2nd Cir.1970). Once the existence of a conspiracy has been established, only "slight evidence" is necessary to support a jury verdict that an individual was a member of the conspiracy. *United States v. Weber*, 437 F.2d 327 (3rd Cir.1970).

The existence of a conspiracy is usually proved in one or more of three ways: by circumstantial evidence, by the testimony of a coconspirator who has turned State's evidence, or by evidence of the out-of-court declarations or acts of a coconspirator or of the defendant himself. The gist of the conspiracy is the agreement, and most conspiracy convictions rest on inferences from circumstantial evidence. Thus, a conspiracy may be established by circumstantial evidence. *Rice v. State*, 121 Tex.Cr.R. 68, 51 S.W.2d 364 (1932). Also see 72 *Harvard Law Review* 920.

However, a defendant may not be guilty as a co-conspirator "by reason of mere association." *Nassif v. United States*, 370 F.2d 147, 153 (8th Cir.1966).

In this instance, the jury was not instructed on the law governing conspiracy, or on the fact that Sauls might have been a coconspirator, or that a conspirator can be an accomplice.

Although close, given the facts and circumstances of this case, I would find that a rational trier of fact could find that Sauls entered into an agreement with the other members of the gang of five to commit the second robbery and that the murder of the second victim was a foreseeable result of the agreement to rob. *Thompson v. State*, 514 S.W.2d 275, 276 (Tex.Cr.App.1974); Section 7.01, supra.

In *Fantroy v. State*, 474 S.W.2d 490 (Tex.Cr.App.1972), this Court, in discussing several of its past decisions, pointed out that the mere fact that one was seen with the actual hijackers, even though he did not actually participate in the hijacking, was sufficient to support that person's conviction as a principal to the commission of the crime. It was also pointed out that fleeing from the scene of the crime with the actual

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gunman was sufficient to make one a principal to the crime. The Court then stated: "In the present case, the testimony of the appellant and co-defendants show that they knew each other in California. Appellant was not merely present with Wright in the store. They ran out of the store together, fled the scene together in an automobile and were arrested together. The sack containing the same amount of money taken in the robbery bore appellant's thumb print. We hold that the evidence was sufficient for the jury to conclude that appellant was a participant and a principal in the robbery." (492).

A recipient of proceeds from a robbery, who was present when the robbery was planned and executed, and fled with the actual hijackers, has been held by this Court to be an accomplice witness as a matter of law. See *Colunga v. State*, 481 S.W.2d 866, 869 (Tex.Cr.App.1972).

As easily observed, see supra, the incriminating direct and circumstantial facts in this cause are far more impressive than those adduced in *Fantroy*, supra, or *Colunga*, supra. Also see and compare *Drakes v. State*, 505 S.W.2d 892 (Tex.Cr. App.1974). And yet, the majority opinion holds that the circumstantial evidence that was presented in this cause is insufficient to make Sauls an accomplice witness as a matter of law. I disagree.

Given the facts and circumstances of this cause, I find that Sauls nicely fits within the following long established rule of this Court: "Where several persons are acting together in pursuit of an unlawful act, each one is liable for collateral crimes, even though unplanned and unintended and committed by other principals, if those crimes are the foreseeable, ordinary and probable consequences of the preparation or execution of the unlawful act. (Citations omitted.)" *Thompson v. State*, 514 S.W.2d 275, 276 (Tex.Cr.App.1974).

Assuming arguendo that Sauls was not an accomplice witness as a matter of law under the law of parties, the majority opinion is still erroneous in holding that "there was no evidence raising the *possibility* that Sauls conspired with the others to rob the deceased...." (My emphasis.)

To the contrary, as I believe I have demonstrated, there is an abundance of evidence to establish this fact. One need only look at Sauls' own testimony and the testimony of Stanley, supra. This evidence, standing alone, would have been sufficient to permit the jury to find that Sauls entered into an agreement with the others to commit the second robbery, if not also the first robbery. The jury, however, was not instructed on this phase of the law, but was only instructed pursuant to the provisions of Section 7.02(a)(2). The appellant's complaints going to the jury charge go to his assertion that the jury should have been instructed that even though it found that Sauls did not do any affirmative act in the commission of the second robbery, nevertheless, if it also found that Sauls was a coconspirator to the robbery, then they could find that he was an accomplice witness to the capital murder that was committed, therefore necessitating that Sauls' testimony be corroborated before a conviction could be obtained based upon his testimony. See V.T.C.A., Penal Code, Section 7.02(b). The jury, however, was never given this option. I would hold that the trial court erred in refusing to so instruct the jury, and would further hold that this omission harmed the appellant.

For the above and foregoing reasons, I respectfully dissent.

Ricardo Aldape GUERRA, Appellant,

v.

The STATE of Texas, Appellee.

No. 69081.

Court of Criminal Appeals of Texas, En Banc.

May 4, 1988.

Certiorari Denied July 3, 1989.
See 109 S.Ct. 3260.

Defendant was convicted in the 248th Judicial District Court, Harris County,

Henry K. Oncken, J., of capital murder, and defendant appealed. The Court of Criminal Appeals, McCormick, J., held that: (1) evidence was sufficient to support jury's affirmative answer to first and second special issues in sentencing phase; (2) granting of State's challenges for cause was proper; (3) court did not impermissibly restrict defendant's voir dire examination; and (4) admission of testimony concerning child witness' prior inconsistent statement and fear of testifying was proper.

Affirmed.

Clinton, J., dissented and filed opinion, in which Teague, J., joined.

1. Homicide ⇐253(1)

Defendant's conviction for capital murder of police officer was sustained by evidence showing that officer was engaged in his official duty when he was killed by defendant; evidence did not have to show that officer was engaged in making valid arrest at time of his death for defendant to commit capital murder. V.T.C.A., Penal Code § 19.03(a)(1).

2. Homicide ⇐358(1)

Admission of unadjudicated extraneous robbery offense without giving formal notice to defendant was proper in sentencing phase of capital murder prosecution; defendant did not make claim that he was surprised by introduction of evidence, and defendant's attorney had access to entire State's file.

3. Homicide ⇐358(1)

Evidence was sufficient to support jury's affirmative answer to first special issue in sentencing phase of capital murder prosecution regarding defendants deliberateness; evidence showed that defendant, after he was stopped by police officer, made conscious decision to pull gun and proceed to assassinate officer by shooting him three times in head, and then rather than rendering aid to officer defendant ran down street and shot man in car. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1).

4. Homicide ⇐358(1)

Evidence supported jury's affirmative answer to second special issue in sentencing phase of capital murder prosecution as to whether there was probability that defendant would commit criminal acts of violence that would constitute continuing threat to society; evidence showed that defendant and his companion armed themselves with pistols on day of offense, without provocation defendant murdered officer by shooting him three times in head and then shot at various bystanders, and defendants' earlier robbery of gun store showed intent to obtain firearms for use in criminal acts involving violence. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1).

5. Criminal Law ⇐1166.18

Any error which may have been committed by court in failing to excuse venireman in capital murder prosecution when venireman was challenged for cause by defendant on basis that venireman evinced bias against defendant as member of class of illegal aliens was cured when court granted defense additional strike to be used in lieu of one that was used on challenged venireman. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 9.

6. Jury ⇐108

Grant of State's challenge for cause against venireman in capital murder prosecution was proper; throughout voir dire examination it was apparent that idea of death penalty would affect juror in all stages of decision-making process.

7. Jury ⇐108

Law does not require absolute unequivocal answer from juror before he can be disqualified for bias against law pertaining to death penalty.

8. Jury ⇐108

Grant of State's challenge for cause of venireman was proper in capital murder prosecution; it was clear that venireman's personal beliefs as to death penalty would so interfere with his duties as juror that he would be substantially impaired in following his instructions and his oath.

9. Jury ⇐107

Grant of State's challenge for cause of venireman, who stated that where State proved that accused had committed capital murder but not by proof beyond reasonable doubt, fact that accused had not testified would sway venireman into finding accused guilty, was proper in capital murder prosecution; mere fact that bias, which venireman voiced, did not harm State did not mean that State could not challenge prospective juror because of inability to follow law. Vernon's Ann.Texas C.C.P. arts. 35.16(b), par. 3, 38.08.

10. Criminal Law ⇐641.3(4)

Defendant's constitutional right to counsel includes right of his counsel to question members of jury panel in order to intelligently exercise peremptory challenges. Vernon's Ann.Texas Const. Art. 1, § 10.

11. Jury ⇐131(2)

Trial court has authority to impose reasonable restrictions in exercise of voir dire examination, although court should give defendant great latitude in questioning jury panel during voir dire.

12. Jury ⇐131(4)

During voir dire, court may restrict repetitious or duplicitous questioning, set reasonable time limits, restrict questions asked in improper form, and refuse to permit further questioning if prospective juror states his position clearly, unequivocally, and without reservation.

13. Jury ⇐131(8)

To show abuse of discretion in court's restriction of voir dire examination, defendant must demonstrate that question he sought to ask was proper, and if question was proper and defendant was prevented from asking it harm is presumed; "proper question" seeks to discover juror's views on issue applicable to case.

See publication Words and Phrases for other judicial constructions and definitions.

14. Jury ⇐131(17)

Court did unduly restrict defendant's voir dire examination in capital murder prosecution and did not deprive him of information needed for intelligent exercise of his peremptory challenges when court refused to allow defendant to ask venireman his opinion of inherent credibility of police officer as opposed to lay person; court did not order counsel to stop all questioning in this area, court in no way intimated that defendant could not ask properly worded question regarding prospective juror's views on credibility of police officers, defense counsel had been allowed to fully explore area of police credibility with no restrictions before objection, and court was acting within its bounds in excluding improper and repetitious questions.

15. Jury ⇐131(17)

Court did not improperly restrict defendant's voir dire examination in capital murder prosecution when court refused to allow defendant to ask venireman another hypothetical concerning sentencing phase's second special issue of whether defendant would commit crimes of violence that would constitute continuing threat to society; when venireman made it clear that he would have to answer either first special issue or second issue negatively to avoid death penalty, defendant had nothing to gain by questioning venireman with another vague hypothetical pertaining to second special issue. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1).

16. Jury ⇐131(8)

Court did not improperly limit defendant's voir dire examination of venireman in capital murder prosecution by preventing defendant from asking venireman question regarding his definition of "deliberately;" from questioning that had already been allowed to both State and defense, defendant could glean that venireman considered deliberately to have different meaning than intentionally.

17. Jury ⇐131(15)

Court did not impermissibly limit defendant's voir dire examination in capital murder prosecution by sustaining prosecution's objection to form of question defendant asked venireman; court never instructed defendant's counsel that it would

prohibit him from posing properly formed question, and defense counsel had earlier been allowed to examine venireman along same lines as objected to question.

18. Witnesses ⇐318

"Bolstering" occurs when item of evidence is improperly used by party to add credence or weight to some earlier unimpeached piece of evidence offered by same party.

See publication Words and Phrases for other judicial constructions and definitions.

19. Witnesses ⇐318

Officer's testimony that child witness was afraid to testify at capital murder prosecution was not impermissible bolstering of child witness by prosecution since defendant's cross-examination of child witness was attempt to impeach rationale child gave on direct examination for his failure to identify defendant immediately after shooting and to impeach his identification of defendant at trial; impeachment by defendant suggested recent fabrication permitting corroboration by officer of child witness' testimony.

20. Criminal Law ⇐419(4)

Officer's testimony that child witness, who told officers shortly after murders that he could not identify defendant but who later identified defendant at trial, had asked officer if there would be police officers in courtroom when he testified was not hearsay in capital murder prosecution; officer's testimony was not directed toward proving truth of what child witness was asking officer, but rather testimony was directed to establishing that child witness had in fact asked those questions of officer.

21. Criminal Law ⇐1168(2)

In situation in which objectionable witness has heard testimony of one or more witnesses prior to his own testimony, if witness' testimony contradicts testimony of witness he actually heard from opposing side or corroborates testimony of another witness he actually heard from same side on issue of fact bearing upon issue of guilt or innocence, consequential injury or prejudice will flow from objectionable witness' testimony.

22. Criminal Law ⇐665(2), 1168(2)

In situations in which objectionable witness has heard testimony of one or more witnesses prior to his own testimony, and if witness was one who had no connection with either State's case in chief or defendant's case in chief and who, because of lack of personal knowledge regarding offense, was not likely to be called as witness, there will be no abuse of discretion in allowing witness to testify; however, if witness was one who had personal knowledge of offense and was one whom party clearly anticipated calling to stand, then reviewing court should ask whether witness' testimony contradicted testimony of witness he actually heard from opposing side or corroborated testimony of another witness he actually heard from same side on issue of fact bearing upon issue of guilt or innocence.

23. Criminal Law ⇐665(4)

Admission of testimony of child witness' mother that child told her he knew who had committed shooting and had seen man in lineup but was afraid of man and had not told police was proper in capital murder prosecution, although mother had been in attendance during most of trial; mother had no personal knowledge of offense although her husband and children were directly involved, and it was only after child's identification of defendant was impeached by prior inconsistent statement that it was necessary for State to put mother on stand. Vernon's Ann.Texas C.C.P. art. 36.05.

24. Witnesses ⇐414(2)

Admission of mother's testimony that child witness had told her that he knew who had committed shooting and had seen man in lineup but was afraid to tell police did not constitute inadmissible hearsay in capital murder prosecution; testimony was admissible as rebuttal to defense suggestion that child witness' story was recently fabricated, testimony was not improper bolstering but rather served to rehabilitate testimony of child after attack by defense, and testimony was not offered to prove truth of fact asserted but to show that child witness had made prior consistent statement.

Michael B. Charlton, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., and William J. Delmore, III and Robert Moen, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

McCORMICK, Judge.

Appellant was convicted of the capital murder of Houston police officer James Harris. Punishment was assessed at death.

The evidence at trial showed that on the evening of July 13, 1982, Officer Harris was patrolling in a lower middle class Mexican-American neighborhood in Houston. At approximately 10:00 p.m., he was informed by a pedestrian, George Brown, that a black car had only moments before attempted to run over Brown and his dog. Harris, acting on Brown's tip, tried to find the black car. Less than a minute later, Harris came upon a black Buick with a red vinyl top stalled at the intersection of Edgewood and Walker. Harris stepped out of his vehicle, leaving the door open, and spoke to the occupants of the Buick. Appellant, who was the driver, and his companion, Roberto Flores, approached Harris. One of the two then shot Harris three times, the bullets entering the left side of his face and exiting on the right. Three spent nine millimeter cartridges were subsequently found beside Harris' vehicle, and three bullets fired from a Browning nine millimeter pistol were recovered from a house in the direction in which the slugs that killed Harris would have traveled. Harris died from his wounds. Appellant and Flores then fled on foot in an easterly direction down Walker, with one man on the north side of the street firing his weapon and the other man on the south side of the street firing his weapon.

At this time of this incident Jose Armijo and his two children, ten year old Jose, Jr., and two year old Lupita, were driving west on Walker. As they came upon the black Buick and the patrol car blocking the intersection Jose, Sr. stopped the car. When the shots rang out which killed Officer Harris, Jose, Sr. attempted to back the car up and escape from appellant and Flores who were running in the direction of the Armijo vehicle. Unfortunately, before Jose, Sr. could back the car up far enough to turn around, a shot was fired into his car from the north side of the street and he also was fatally wounded. Evidence showed that Jose, Sr. was killed by a bullet from a Browning nine millimeter pistol. Two nine millimeter cartridges were found on the north side of the street. On the south side of the street, officers found two cartridges from a .45 caliber pistol.

About an hour and a half later, at 11:30 p.m., Officer Larry Trepagnier and Officer Mike Edwards were searching for the suspects several blocks away from the scene of the previous shootings. As they shined their flashlights into an open garage, gunfire erupted from the garage. Officer Trepagnier, although wounded five times, returned fire and attempted to pursue the shooter who ran around the side of a house. Other officers, hearing the shooting, quickly ran to Trepagnier's aid and killed Flores. Appellant was discovered nearby hiding under a trailer. Under Flores' body was found a Browning nine millimeter pistol. Testing showed that this weapon killed Jose, Sr. It could not be positively shown that this was the weapon that had killed Harris. Also found on Flores were a magazine containing 20 additional nine millimeter rounds. Inside Flores right front pants pocket were eleven more loose rounds of nine millimeter ammunition. Tucked inside the waistband of Flores' pants was Harris' service revolver. Appellant was not armed when found; however, some two feet from where appellant was lying officers found a red bandana wrapped around a .45 caliber pistol. Ballistics tests showed that this pistol had fired

the .45 cartridge casings found on the south side of Walker.

Authorities learned that the Browning nine millimeter pistol had been purchased by an individual by the name of Alfredo Montalbano from a store on June 19, 1982. Montalbano told authorities that Roberto Flores had approached him inside the store, gave him $550.00 and asked him to buy the gun. According to Montalbano he bought the gun and two boxes of nine millimeter ammunition and gave them to Flores.

The contested issue at trial was who had actually shot Officer Harris—appellant or Flores. Several people witnessed the events surrounding the shooting but their versions contradicted each other as to who actually fired the gun at Harris. One of the most damaging witness as to appellant was ten year old Jose Armijo, Jr. Jose Jr. testified that he was riding in the car with his father and sister. When his father turned down Walker and discovered that the street was blocked by the Buick and the patrol car, he stopped the car. Jose testified that the Buick was between his father's car and the police car. Officer Harris was beside the open door on the patrol car. Appellant and Flores both had their hands on the hood of the patrol car, with appellant standing closest to Harris. Jose, Jr. testified that as he watched, he saw appellant make a motion as if to scratch his back. Appellant then took out a gun and shot Officer Harris. Jose testified that he saw one of the men get the officer's gun. At that point Jose, Sr. began backing up his car. Both men began running down opposite sides of the street. Appellant ran down the north side of the street, next to Jose, Jr.'s side of the car. As appellant ran by their car, he aimed his gun into the car and shot Jose, Sr.

On direct examination, Jose, Jr. testified that he went to a lineup several hours after the shooting. Although he recognized appellant as the fourth man in the lineup, he did not tell the police because he was afraid that appellant might harm him if he told the truth. Jose, Jr. also testified that prior to the shootings he had seen appellant driving the Buick around the neighborhood. On cross-examination, Jose, Jr. admitted that he had given a sworn statement the night of the shooting in which he said that he did not know what the killer looked like. On redirect, Jose, Jr. testified that he was afraid to tell the truth immediately after the killings but he was telling the truth now when he identified appellant as the killer.

Patricia Diaz testified that she was driving her car down Walker the night of the shootings when she came upon the patrol car and the Buick blocking the intersection. She stopped some three feet behind the Buick. On direct, she testified that she noticed only one man standing besides the driver's side of the Buick pointing towards the police car. As she was pulling up she thought she heard the police officer yelling "Stop, stop." Diaz testified that at that point she became scared and looked down. Four shots immediately rang out. The next time she looked up she saw people from the neighborhood running towards the police car. She testified that appellant was the man she saw pointing towards the police car. On cross, Diaz testified that she did not see appellant actually shoot a gun, she just saw his stance immediately prior to the shots.

Fifteen year old Herlinda Garcia testified that she was walking down Walker with her baby and her sister Vera when they saw the Buick stop in the middle of the street. Appellant who was driving told the girls his car needed a boost and asked if they had any cables. At that point the police car pulled up behind the Buick. Officer Harris put a spot light on appellant, got out of his car and told the men to "Hold it." Appellant and his passenger got out of the Buick. Garcia testified that she then saw appellant pull something out of his pants and shoot the policeman. When she saw the policeman fall to the ground she started running down the south side of Walker. She saw appellant running down the north side of Walker. As she was running, she heard more gunshots behind her as if one of the men was chasing her. She ran until she reached her house. A few hours later, she also viewed a lineup at the Houston police department at which

time she picked appellant as the man she had seen shoot Officer Harris. On cross-examination, Garcia testified that at the time of the shooting, Officer Harris was somewhere between the patrol car and the Buick. Roberto Flores had his hands on the top of the Buick and appellant had his hands on the hood of the patrol car. Appellant then reached into his pants and pulled something out of his pants and began shooting.

The testimony of Vera Flores, sister of Herlinda Garcia, was similar to that of her sister's. Vera testified that the man in the car asked if they had any cables. She told him no. She then began walking. Suddenly she heard someone say, "Stop." Thinking someone was talking to her, she looked back and saw Officer Harris standing beside his patrol car. The two men from the Buick went up to the police car. Suddenly, she heard a scared voice saying, "No, no," and then gunshots. Although she did not see a gun, she testified that appellant who had been the driver of the Buick fired the fatal shots. When quizzed by the prosecutor as to how she knew the driver had shot Officer Harris, she replied because she saw him start running down the street and fire additional shots. Vera related she then took cover behind a parked car. Vera related that she also viewed a lineup shortly after the shootings. Even though she recognized the fourth person in the lineup as appellant who had been the driver of the Buick, she did not tell the police because she was afraid. However, approximately a week after the incident, she told the prosecutors that she could identify appellant. On cross-examination, she too admitted that she had made a false sworn statement when she initially told the authorities that she could not identify anyone. She further testified on cross-examination that after she heard the officer tell the men to stop, she saw both appellant and his passenger walk to the police car and put their hands on the hood of the police car, with the passenger standing closest to the police officer. Although she heard the gunshots, she could not say whether appellant or his passenger shot Officer Harris. Finally on redirect, Vera testified that her original statement made to police immediately after the shooting that she saw the driver of the Buick pull something from the front of his pants and shoot the police officer was correct. However, on recross when defense counsel asked if she saw the driver actually shoot Officer Harris, Vera testified that she did not remember.

Hilma S. Galvan testified that she also saw the Buick and the police car stopped in the middle of the intersection. She stood in front of her house as the appellant got out of the Buick. When Officer Harris pulled his patrol car to a stop, he got out of the car and told appellant to come to him. However the appellant kept walking. Harris again called for appellant to come back. At that point, the appellant turned around and began walking towards the officer. Galvan testified that all of a sudden she heard gunshots and saw the officer fall. Although she did not see appellant holding a gun, she did see the flash from the gun as the weapon was fired. Galvan testified that she hurried into her house where she stayed until Jose Jr. knocked on her door and asked her to go help his father who had been mortally wounded. Galvan also testified that when she saw appellant at the time of the shootings, she recognized him as having been a customer in a convenience store where she formerly worked. She also picked appellant out of the lineup as the man who had shot Officer Harris. On cross-examination Galvan testified in accordance with her written statement that she did see Officer Harris try to approach appellant and grab hold of him immediately before the shooting. Immediately after he shot Officer Harris, appellant then turned his gun on Herlinda Garcia and her baby. Then appellant began running down the north side of Walker Street.

After the State rested, the defense introduced the testimony of two teenage boys, Jacinto Vega and Jose Heredia. Both boys testified that they saw the passenger shoot Officer Harris. Vega testified that he could not recognize either the passenger or the driver. Heredia testified that he saw Roberto Flores shoot Officer Harris. On cross-examination, the State attempted to

impeach the testimony of both witnesses through their prior inconsistent statements and the fact that they were acquaintances of appellant and that they were afraid of appellant.

Jose Manuel Esparza testified that he was appellant's housemate. Esparza testified that on the night of the offense he and Jose Luis Torres Luna were at their house drinking beer when they heard shots ring out nearby. A few minutes later, Roberto Flores came running into the house and announced that he had just shot a policeman. Flores was carrying his nine millimeter gun and had the policeman's gun stuck in the waistband of his pants. Esparza testified that he ran outside and appellant also came running up but did not say anything. Esparza testified that he made the two men leave the house. Shortly thereafter police came and searched the house. Right after they left the house, the second gun battle erupted in which Flores was killed.

Jose Luis Torres Luna's testimony was identical to Esparza's testimony with the exception that Luna testified that appellant told him that Flores had killed the policeman.

The defense closed their portion of the case with the testimony of appellant. Appellant related how the car he was driving stalled and how the police car pulled up behind them. When Officer Harris called to them, appellant related that he went over to the police car and placed his hands on the hood. He could not see Flores because he was standing behind him. According to appellant, Officer Harris had his gun pulled out and was telling Flores to come over to the police car when appellant heard shots close to his ears. Then he saw Officer Harris fall to the ground. Flores went over to the officer and picked up his gun. Appellant then testified that he and Flores then took off running. Appellant related that he ran down the south side of the street and while running, took out his .45 caliber pistol and fired two shots into the air because he thought someone was chasing him. He could not see Flores. When he reached his house, Flores was already there. Flores told appellant that he had shot into the Armijo vehicle. Because he was scared, appellant ran out the back door of the house and hid behind the horse trailer until he was found by the police.

In rebuttal, the State called Houston police officer Jerry Robinette to the stand. Robinette said that after Flores had been killed and Officer Trepagnier had been shot, he was interviewing all of the witnesses in the area when he saw Jose Manuel Esparza and Jose Luis Torres Luna walking up to the house with several other men. Robinette interviewed Esparza and Luna who told him that they had been at the house when appellant and Flores left in the Buick but then they had left the house and had not been back all evening. Robinette testified that neither man said anything about seeing the appellant and Flores after the shooting of Officer Harris.

V.T.C.A., Penal Code, Section 19.03(a)(1), provides that a person commits capital murder when:

> "the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;"

In two points of error, appellant complains that the evidence is insufficient to show that Officer Harris was in the lawful discharge of an official duty. In point of error fourteen, appellant argues that the evidence fails to show that the officer was making a valid Chapter 14 warrantless arrest. Therefore he was not acting in the lawful discharge of an official duty.

[1] The recent case of *Montoya v. State*, 744 S.W.2d 15 (Tex.Cr.App.1987), also concerned the capital murder of a police officer. Montoya argued that because the evidence showed that the police officer was not making a lawful arrest, the officer was not acting in the lawful discharge of his official duty. Thus, Montoya argued, if he was guilty, he was not guilty of capital murder but rather of the lesser included offense of murder and the jury should have been so instructed. This Court disagreed and held that the requirement of a lawful

arrest was not required to demonstrate that the officer was acting within the lawful discharge of his official duties. The Court found that as long as the officer was acting within his capacity as a peace officer, he was acting within the lawful discharge of his official duties. Applying this reasoning to the instant case, we find that since the determination of whether the officer was engaged in making a valid arrest at the time of his death is not necessary to the resolution of whether the officer was acting within the lawful discharge of his official duties, we are compelled to overrule this point of error.

In point of error fifteen, appellant argues that the evidence does not show the nature of Officer Harris' official duty. The uncontradicted record shows that Officer Harris was assigned to a K–9 patrol unit of the Houston Police Department. At the time of his murder, he was on duty, in uniform, driving a marked patrol car and accompanied by his K–9 partner. Additionally the uncontradicted evidence shows that immediately before Officer Harris encountered appellant and Roberto Flores, he had been stopped by a citizen who informed him that the vehicle driven by appellant had almost run over the citizen. Everything in the record before us points to the fact that Officer Harris was clearly engaged in his "official duty" and a rational trier of fact could have so found. *Moreno v. State*, 721 S.W.2d 295 (Tex.Cr.App.1986); *Selvage v. State*, 680 S.W.2d 17 (Tex.Cr. App.1984). Appellant's fifteenth point of error is overruled.

We now turn to the points of error dealing with the punishment phase of the trial. During the hearing on punishment, in addition to the evidence introduced at the guilt-innocence phase of the trial, evidence was introduced to show that appellant, Roberto Flores and one of the defense witnesses at guilt-innocence, Enrico Luna Torres, committed a robbery at a gun store only five days before the instant offense. Witnesses testified that Roberto Flores entered the store, pulled a pistol and instructed the two customers and two employees of the store not to move. Appellant and Torres then appeared. The customers and employees were herded into a back storeroom of the store and made to lie face down on the floor. The robbers then bound the victims hands behind their backs with adhesive tape. After everyone was bound, the robbers proceeded to steal guns and ammunition worth $15,807.31. Taken in the robbery were twenty-two pistols, a MAC 10 .45 caliber submachine gun which is capable of firing 1180 rounds of .45 caliber ammunition a minute, a Thompson submachine gun which is capable of firing 550 to 600 rounds of ammunition a minute, an Inland .30 caliber Paratrooper model which is capable of firing 850 rounds of .30 caliber carbine ammunition a minute, a Remington 870 pump 12 gauge shotgun, 500 rounds of nine millimeter ammunition, 400 rounds of Winchester .357 ammunition, 1000 rounds of .45 ammunition and twelve boxes of 12 gauge ammunition. The robbers made no attempt to take the wallets or jewelry of their victims and nothing was taken from the store's cash register.

In his seventeenth point of error, appellant argues that the trial court erred in admitting into evidence the unadjudicated extraneous robbery without giving formal notice to the defense. He argues that this lack of notice denied him due process.

[2] This Court has previously held that, absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the punishment stage of a capital case is admissible. *Hogue v. State*, 711 S.W.2d 9 (Tex.Cr.App.1986); *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App.1981); *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App.1979). Appellant does not now make a claim that he was surprised by the introduction of this evidence, nor did he make such a claim at trial. In fact the record shows that appellant filed a pretrial motion asking that he be given a specific description of any extraneous offense which the prosecution was going to use at the punishment phase of the trial. This motion was granted by the trial court. Indeed at the pretrial hearing appellant's attorney noted for the record that the State was giving him access to the entire State's file. We overrule appellant's seventeenth point of error.

Appellant also argues that the evidence is insufficient to support the jury's affirmative answer to the first special issue, the issue of appellant's deliberateness. Article 37.071(b)(1), V.A.C.C.P. Appellant argues that since there is no evidence that the killing of Officer Harris was premeditated or planned, the jury should have answered the first special issue in the negative. We disagree. In the recent case of *Carter v. State*, 717 S.W.2d 60 (Tex.Cr.App.1986), we wrote that in proving deliberateness, it is not necessary for the State to "prove that the defendant carefully weighed or considered or carefully studied the situation immediately prior to killing the deceased in order for the jury to answer the first special issue" affirmatively.

[3] The evidence shows that immediately prior to the shooting, appellant was leaning over the officer's car with his hands on the hood of the car. Rather than wait for the situation to resolve itself in a normal and peaceful fashion, appellant made a conscious decision to pull a gun and proceed to assassinate the officer by shooting him, not once, but three times, in the side of the head. Then, rather than render aid to the dying officer, appellant ran down the street, pointed his gun into the open window of a car in which a man and his two young children were sitting and murdered the man by shooting him in the head. Viewing the evidence in the light most favorable to the verdict, we find the evidence sufficient to support the jury's affirmative answer to special issue number one. *Santana v. State*, 714 S.W.2d 1 (Tex.Cr.App. 1986); *Selvage v. State*, 680 S.W.2d 17 (Tex.Cr.App.1984); *Milton v. State*, 599 S.W.2d 824 (Tex.Cr.App.1980). Appellant's sixteenth point of error is overruled.

Appellant also contends that the evidence is insufficient to support the jury's affirmative answer to the second special issue. This Court has repeatedly held that the facts of a given crime may alone be sufficient to justify an affirmative answer to the second special issue. *Santana v. State*, supra; *Holloway v. State*, 691 S.W.2d 608 (Tex.Cr.App.1984); *O'Bryan v. State*, 591 S.W.2d 464 (Tex.Cr.App.1979). We believe that this is such a case.

[4] The evidence shows that appellant and his companion armed themselves with pistols on the day of the offense. Without provocation, appellant cold-bloodedly shot Officer Harris three times in the head and then began shooting at various bystanders, including Herlinda Garcia and Vera Flores. While effecting his escape, appellant also killed Jose Armijo, Sr. who was innocently sitting in his car with his two small children. Clearly the facts of this brutal and heinous offense are sufficient in and of themselves to justify the jury's affirmative answer to the second special issue. Furthermore, the only other evidence introduced at the punishment hearing, that dealing with the robbery at the gun store, reinforces the evidence as to future dangerousness. The fact that no money was taken in the robbery and that the robbers were only after firearms and ammunition, we believe shows an intent to obtain firearms for use in criminal acts involving violence. We find the evidence clearly supports the jury's affirmative answer. *Santana v. State*, supra. Appellant's eighteenth point of error is overruled.

[5] In his first point of error, appellant contends that the trial court erred in not sustaining his challenge for cause against venireman Charles Deckert. Appellant argues that Deckert evinced a bias against him "as a member of the class of illegal aliens," and was therefore biased "as a matter of law." Article 35.16(a)(9), V.A.C.C.P. We need not address the merits of appellant's claims because our review of the record shows that just after appellant exercised his fifteenth and last peremptory challenge, the following occurred:

"THE COURT: For the record now, based on having reconsidered objections previously made to a juror, Charles A. Deckert, the Court is going to, out of an abundance of caution, grant the Defense an additional strike to be used in lieu of the one that was used on Charles A. Deckert."

Any error which may have been committed by the trial court in failing to excuse Deckert when he was challenged was thus cured. *Williams v. State*, 682 S.W.2d 538 (Tex.Cr.App.1984); *Payton v. State*, 572 S.W.2d 677 (Tex.Cr.App.1978). The first point of error is overruled.

In his second point of error, appellant argues that the trial court erred in sustaining the State's challenge for cause against venireman Thomas Foster Boone in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Boone initially testified that he was philosophically opposed to the death penalty. Asked by the State whether he could imagine himself answering the special issues in the affirmative, knowing that appellant would thereby be assessed the death penalty, Boone replied that he could not. The State challenged Boone for cause. Thereupon defense counsel posed a hypothetical situation for Boone in which an individual kidnapped a bus load of thirty school children, a million dollar ransom was paid and the individual then machine gunned the children to death. Counsel then asked Boone whether, under such a scenario, he could affirmatively answer the special issues:

"Q. ... Now, could you in that kind of situation—

"A. I think in an extreme set of circumstances like that, I could favor the death penalty, yes.

"Q. So you are not automatically opposed against the death penalty, are you?

"A. I guess not, if you include extreme situations.

"Q. There are all kinds of circumstances in this world. We see all kinds in the courtroom, and that is why I gave you that example. There are others, so then you can answer those two questions yes if the evidence called for it and if you believed it beyond a reasonable doubt?

"A. In a situation such as you have described, yes."

The State then questioned Boone further:

"Q. Do you feel like you could be a juror on a capital murder case with the feelings that you have concerning the death penalty? Do you feel like it would be a violation of your feelings and beliefs to serve on such a jury, or do you feel like you could do it? I am not talking about the most extreme set of facts you can think about in your mind, but do you feel like your feelings or beliefs—or to follow the law would be a violation of your feelings or beliefs if you were to serve on such a jury?

"A. I feel I could serve, but I feel my judgment would be affected by my personal objection to the death penalty.

. . . . . .

"Q. If you were on a jury, imagine the hypothetical situation with me, imagine you are on a capital murder case and it comes down to the time to answer both of these questions yes. Do you feel like you could answer both of these questions yes knowing if you did so, the man would receive the death sentence?

"MR. ELIZONDO: If the death sentence were called for.

"Q. (By the Prosecutor) Or do you feel you could answer both these questions yes knowing if you do that, the man would receive the death penalty? That is basically the test.

"A. I don't think I could.

"Q. I appreciate it when you say, 'I don't think I could.' When someone hits me in the face with a proverbial cream puff, I am like that type of person who says, 'I don't believe so,' or 'I don't think so,' but I need to find out if you're telling me you could not?

"A. I could not.

"Q. I am not going to try to change your mind, and I'm not going to give you hypotheticals or throw hypotheticals at you. Is that the honest way you feel?

"A. Yes."

The State renewed its challenge and the trial court excused the venireman, over appellant's objection that *Witherspoon* was thereby violated.

Appellant now argues that because the venireman was shown to be willing to accept death as an appropriate punishment under "certain circumstances," he was not "automatically" opposed to imposition of the death penalty, and thus his exclusion was improper.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Supreme Court recently clarified the standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. The Court disavowed the *Witherspoon* standard and endorsed the standard previously announced in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The *Adams* test provided that a prospective juror could be excluded for cause when the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589.

In *Wainwright*, the Court explained why it preferred the *Adams* test over the *Witherspoon* test:

> "There is good reason why the *Adams* test is preferable for determining juror exclusion. First, although given *Witherspoon's* facts a court applying the general principles of *Adams* could have arrived at the 'automatically' language of *Witherspoon's* footnote 21, we do not believe that language can be squared with the duties of present-day capital sentencing juries. In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to 'follow the law and abide by his oath' in choosing the 'proper' sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.
>
> "After our decisions in *Furman v. Georgia*, 408 U.S. 238, [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972), and *Gregg v. Georgia*, 428 U.S. 153, [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976), however, sentencing juries could no longer be invested with such discretion. As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not 'automatically' vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially." 469 U.S. at 421–422, 105 S.Ct. at 851, 83 L.Ed.2d at 850. (emphasis in original)

[6] The Supreme Court also noted that reviewing courts must pay close attention to the findings of the trial court:

> ... "We note that, in addition to dispensing with *Witherspoon's* reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror." 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851 (footnotes omitted).

Clearly the portion of the voir dire examination set out above reveals that Boone testified that under certain severe circumstances, he would be able to vote in such a way that a death sentence would be handed out. However, throughout the entire voir dire examination, it is apparent that the idea of the death penalty would affect the juror in all stages of the decision making process. In *Adams v. Texas*, supra, the Supreme Court wrote:

> "If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the Witherspoon doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality." 448 U.S. at 46, 100 S.Ct. at 2527, 65 L.Ed.2d at 590.

After according due deference to the ruling of the trial judge who saw and heard the juror, we are unable to say that the trial judge abused his discretion in granting the State's challenge. *Bell v. State*, 724 S.W.2d 780 (Tex.Cr.App.1986); *Carter v. State*, supra. We overruled appellant's second point of error.

In his third point of error, appellant argues that the trial court erred in excusing venireman James Thomas Tucker upon the State's challenge for cause. Appellant contends that by his answers Tucker never indicated, "unequivocally, that he would automatically vote against the Article 37.07(1), V.A.C.C.P., special issues because of his feelings about the death penalty, nor did he state that his feelings on the death penalty would frustrate the State's legitimate efforts to administer its death penalty scheme ..."

[7] As we noted above in the previous point of error, no longer does the law require an absolute unequivocal answer from a juror before he can be disqualified for a bias against the law pertaining to the death penalty. *Wainwright v. Witt*, supra. Instead, a juror may be removed for cause if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589.

Tucker was an Episcopal priest, who, though he could "understand society's right" under certain circumstances to take a life, harbored substantial doubts whether he could personally participate in the process. Throughout the voir dire it is apparent that Tucker was torn between his own personal beliefs and his duty to society. During questioning by defense counsel the following occurred:

> "Q. Could you consider the death penalty in a proper case in your own mind if it is proven to you beyond a reasonable doubt that the answers to those two questions should be yes and it is proven to your satisfaction beyond a reasonable doubt, and, of course, it will be—
>
> "A. Well, I think I have almost made it clear that it doesn't really hinge on the facts, even though I have tried to say my problems are not philosophical, not factual, and I have tried to say my satisfaction and cooperation with the legal systems of this country are based upon an understanding that this is what we have to support society and that God certainly works through that, but philosophically, I believe I would have serious problems with it personally.
>
> . . . . . .
>
> "Q. Sure. All we are asking is: If it is proven to you beyond a reasonable doubt that the answer to those questions should be yes, can you answer them yes?
>
> "A. Could I—do you want a definitive answer here?
>
> "Q. Yes.
>
> "A. I can't give you that. I can give you a—I have—I can say yes, I would

have a definite prejudice against a 'yes, yes' answer. I would hope that I could in some way be objective and serve society, but I can't give you a definite answer on that."

During questioning by the State, the following occurred:

"Q. ... Both sides have the right to a fair and impartial jury ... who is not predisposed to putting everything out of their mind and basing their decision solely on the facts, and (sic) they come from the witness stand.

"A. I think I am afraid I cannot be such a juror.

"Q. I think you are telling us your personal feelings and religious beliefs and philosophy would influence your decision as to 'yes, yes' or 'no, no,' or whatever the facts would be.

"A. I am very much deeply committed personally. I choose not to choose for society. It is difficult for me to decide and to say what society should be. That is very difficult. I am a lot of individual things and deal with other people individually, and yet am a priest of God. I cannot make judgments for society, but make them for myself. I could for myself.

. . . . . .

"Q. Can you tell me unequivocally, if all the evidence were presented and the answers to those questions should be yes, you could answer them yes, or are you telling us, as you did earlier, you don't know what you would do in that situation until you were placed in it?

"A. The latter I have to say because as a good citizen, I—you could present me case after case, and I could as long as I was not personally called upon to stand up and give the sentence. I could say I see the point of society here, but when I am called upon to be the judge, that is when my ability to make a decision ceases.

"Q. And do you feel that in this situation answering these questions yes, you would, in effect, be the one pronouncing the sentence?

"A. Surely.

"Q. Although you would like to be able to follow society's rule and the law, and if the evidence required "yes" answers to those, you can't tell us right now that you would answer those yes?

"A. No, I can't.

. . . . . .

"Q. And if ultimately those feelings did win out, you would either refuse to answer the question or answer it no to prevent the death penalty from being imposed, in guaranteeing a life sentence that would, in other words, take you out of the sentencing portion of it?

"A. I suppose, painful as it would be for me, I would have to choose not to answer somehow, because I don't think I would—I don't know I could insult society, the rules of society, or flout them enough to sit there and purposefully answer them no, even though I think 'yes' on the facts.... And I think I would have to refuse to answer, no matter the cost on that."

. . . . . .

"Q. And in your own words again, I guess if you will just tell us whether or not you feel that you could be fair and impartial to the State, where the State is actively seeking the death penalty in regards to judging the facts and evidence, that means solely on the facts and evidence and nothing else.

"A. There is a good chance I might not be fair to the State, yes, and as painful as that is—because I can appreciate the family of Officer Harris, et cetera, and just as sick at heart about that judgment that took place, however it took place—but still, I am afraid I would not be fair to the State."

[8] Clearly Tucker's personal beliefs as to the death penalty would so interfere with his duties as a juror that he would be substantially impaired in following his instructions and his oath. We find that the trial court was correct in granting the State's challenge for cause. This point of error is overruled.

During the voir dire examination of veniremen Carolyn Sanders it was established that in a case where the State had proven that an accused had probably committed capital murder, but not by proof beyond a reasonable doubt, the fact that the accused had not testified, would sway Sanders into finding the accused guilty. The State's challenge for cause on this basis was granted. In his fourth point of error, appellant complains that the trial court erred in sustaining the State's challenge against Sanders in that Article 38.08, V.A.C.C.P., and the constitutional and statutory provisions upon which it is grounded, are not "phase[s] of the law upon which the State is entitled to rely for conviction or punishment." Article 35.16(b)(3), V.A.C.C.P.

[9] Even had error been preserved, we find that appellant's argument is without merit. In *Nethery v. State*, 692 S.W.2d 686 (Tex.Cr.App.1985), the trial court sustained the State's challenge for cause to three veniremen who expressed a bias against the minimum punishment for the lesser included offense of murder. On appeal, Nethery argued that the State should not be permitted to utilize Article 35.16(b)(3) to exclude a venireman when the bias related by the individual is one, such as a bias against the minimum range of punishment, that harms the defendant and not the State. The Court, in reply to Nethery's contention, wrote the following:

"The State's interest is in fair and impartial jurors, in accord with our legal system's basic tenet to insure that every defendant is accorded a fair and impartial trial. The State seeks, or should seek, to uphold the integrity of the jury system. Therefore the State is permitted to challenge a juror who cannot be fair and impartial because he will not consider the full range of punishment. Whether the State later urges the jury to assess the minimum or the maximum is of no moment." 692 S.W.2d at 691

In *Phillips v. State*, 701 S.W.2d 875 (Tex.Cr.App.1985), this Court held that harm to the State is not a prerequisite for the exercise of a challenge for cause by the State based upon a juror's inability to follow the law. We adopt that holding in the instant case. The mere fact that the bias which the venireman voiced did not harm the State does not mean the State could not challenge the prospective juror because of an inability to follow the law. See also *Turner v. State*, 462 S.W.2d 9 (Tex.Cr.App. 1969), *rev'd as to penalty only*, 403 U.S. 947, 91 S.Ct. 2289, 29 L.Ed.2d 858, *aff'd after commutation*, 485 S.W.2d 282 (Tex.Cr.App.1972). The trial court acted properly. Appellant's fourth point of error is overruled.

In several grounds of error, appellant contends that the trial court unduly restricted his voir dire examination and thereby deprived him of information needed for the intelligent exercise of his peremptory challenges. Before we set out the grounds of error, we summarize the law in this area.

[10] A defendant's constitutional right to counsel includes, inherently, under Article 1, Section 10, Texas Constitution, the right of his counsel to question the members of the jury panel in order to exercise intelligently peremptory challenges. *Campbell v. State*, 685 S.W.2d 23 (Tex.Cr.App.1985); *Powell v. State*, 631 S.W.2d 169 (Tex.Cr.App.1982); *Mathis v. State*, 576 S.W.2d 835 (Tex.Cr.App.1979).

[11] Ordinarily, the trial court should give a defendant great latitude in questioning the jury panel during voir dire. However, the trial court does have the authority to impose reasonable restrictions on the exercise of voir dire examination for various reasons, among them to curb the prolixity of what can become the lengthiest part of a criminal proceeding. *Bodde v. State*, 568 S.W.2d 344 (Tex.Cr.App.1978); *Smith v. State*, 513 S.W.2d 823 (Tex.Cr.App.1974).

[12] Thus a court may restrict repetitious or duplicitous questioning. *Patterson v. State*, 598 S.W.2d 265 (Tex.Cr.App. 1980); *McManus v. State*, 591 S.W.2d 505 (Tex.Cr.App.1980); *Adams v. State*, 577 S.W.2d 717 (Tex.Cr.App.1979); *Bodde v. State*, 568 S.W.2d 344 (Tex.Cr.App.1978). A court may set reasonable time limits. *Ratliff v. State*, 690 S.W.2d 597 (Tex.Cr.App.1985); *Whitaker v. State*, 653 S.W.2d

781 (Tex.Cr.App.1983); *Thomas v. State* 658 S.W.2d 175 (Tex.Cr.App.1983). Moreover, if the prospective juror states his or her position clearly, unequivocally, and without reservation, the trial court does not err in refusing to permit further questioning. *Phillips v. State*, 701 S.W.2d 875 (Tex.Cr.App.1985). Finally, a trial court may also restrict questions asked in improper form. *Adams v. State*, supra; *Abron v. State*, 523 S.W.2d 405 (Tex.Cr. App.1975).

[13] To show an abuse of discretion, a defendant must demonstrate that the question he sought to ask was proper. If the question was proper and the defendant was prevented from asking it, harm is presumed. *Smith v. State*, 703 S.W.2d 641 (Tex.Cr.App.1985). A question is proper if it seeks to discover a juror's views on an issue applicable to the case. *Robison v. State*, 720 S.W.2d 808 (Tex.Cr.App.1986); *Campbell v. State*, 685 S.W.2d 23 (Tex.Cr. App.1985); *Powell*, supra; *Clark v. State*, 608 S.W.2d 667 (Tex.Cr.App.1980); *Smith v. State*, 513 S.W.2d 823 (Tex.Cr.App.1974); *Mathis*, supra.

We now turn to appellant's allegations. In his fifth point of error, appellant complains that his voir dire examination was impermissibly restricted when the trial judge refused to allow him to ask venireman Steven Busby his opinion of the inherent credibility of a police officer as opposed to a lay person. He argues that this restriction in his examination denied him the right to be represented by counsel as guaranteed by Article I, Section 10 of the Texas Constitution and the right to intelligently exercise his peremptory challenges. Appellant complains about the following portion of the record:

"Q. Let me ask you this: Say, for example, if an illegal alien, which they will be here to testify as to the facts, and a police officer gets up there and testified to the facts, you are not saying you would give a police officer more credibility simply because he is a police officer, hypothetically speaking?

"MR. MOEN: I object to the question. He is staking him out as to how he would place the testimony of a police officer as opposed to an illegal alien.

"THE COURT: Sustained.

"Q. All right. Any class of citizens coming in or any citizen that would testify, be it a doctor, a secretary, a manager of a pizza place, a police officer, would you give that police officer more credibility than any other citizen testifying as to the same facts?

"MR. MOEN: I object to the same question again, as to how he would judge a police officer's testimony versus other people and other occupations. I think he has answered the question, that he would judge the police officer's credibility and training and what he is doing. He has also said he would not—I object to the question along those lines, Judge.

"THE COURT: Sustained as to the form."

Thereupon defense counsel did not attempt to rephrase his question in this area but began questioning the juror as to the bifurcated trial process. At no further point in the voir dire examination, did defense counsel attempt to question the juror regarding the credibility of police officers versus the credibility of any other witness.

[14] We find no improper restriction of voir dire for two reasons. First of all, the trial court did not order counsel not to continue questioning in this area. In *Powell v. State*, 631 S.W.2d 169 (Tex.Cr.App. 1982), defense counsel attempted to question the prospective jurors regarding what they believed was the purpose of incarceration—rehabilitation, punishment or deterrence. In sustaining the prosecutor's objection, the trial court told Powell's counsel that he would not be permitted to make similar inquiries of the remaining members of the venire. We reversed the case, holding that such questions were proper, especially considering that Powell was pleading guilty and the only issue for the jury to determine was Powell's punishment. Thus we found that the trial court erred in preventing Powell's attorney from asking the question. In *Campbell v. State*, 685 S.W.2d 23 (Tex.Cr.App.1985), the trial court also imposed an absolute limitation on defense counsel's right to question the prospective jurors on their views as to punishment. Once again we held that such an absolute limitation was error.

In the instant case, we have no such absolute limitation of appellant's voir dire. Appellant's questions constituted an improper attempt to require the prospective jurors to commit themselves as to how they would pass upon the credibility of the police witnesses prior to trial. *Hughes v. State*, 562 S.W.2d 857 (Tex.Cr.App.1978). In sustaining the State's objection, the trial court in no way intimated that appellant could not ask a properly worded question regarding the prospective juror's views on the credibility of police officers. Unfortunately defense counsel made no attempt to ask a properly phrased question of this juror.

In *Abron v. State*, 523 S.W.2d 405 (Tex. Cr.App.1975), this Court noted that a trial court may disallow questions during voir dire which have been asked in improper form. We find that this is what occurred in the instant case. The trial court properly restricted appellant from asking an improperly worded question. *Smith v. State*, 703 S.W.2d 641 (Tex.Cr.App.1985); *McCarter v. State*, 478 S.W.2d 524 (Tex.Cr.App. 1972).

Second, the record shows that immediately prior to the exchange set out above, defense counsel was allowed to explore fully this area with no restriction whatsoever.

"Q. Now, there will be police officers coming and testifying. They will be coming in and out. Do you believe that police officers make mistakes?

"A. Yes.

"Q. Would you agree that they are human and subject to human frailities just as much as you or I or anybody else?

"A. Yes.

"Q. So you wouldn't place a police officer—you wouldn't give them more credibility simply because of the mere fact, without even testifying, they are police officers, would you?

"A. Hard question. I believe they are human, but as far as being a police officer, I would give them some sort of credibility.

"Q. Before they testify?

"A. Oh, no; not before they testify. As they are testifying.

"Q. So the mere fact if we have several witnesses or the State has several witnesses and we have several witnesses, you are not saying to me that before a police officer testified that the mere fact that he is a police officer, you would give him more credibility?

"A. No.

"Q. So, let's put it this way: Would you give him more credibility than any witness simply because he is a police officer, while he is testifying?

"A. While he is testifying? Not so much more, but I would give him some credibility.

"Q. How is that?

"A. Well, it's—I can't say him versus some other officer of the court. I don't see why he would have more credibility. He would have more compared to, I guess, the normal citizen getting up there, to me.

"Q. Irregardless of the facts.

"A. Irregardless of the facts. I would have to give it some credibility, because to me a police officer is trained to spot things, you know, and to look at things. I mean, he is more—he is trained to do a job. In other words, the average citizen, being out someplace, might not be recognized like people, say, if you are talking about—

"Q. You are talking about if he presents to you a scientific test or the fact that he noted something at an intersection or whatever, a description of an intersection?

"A. Yes. I mean, he would be more—he would be able to do that better than I would say the average citizen would.

"Q. But you wouldn't automatically give him more benefit simply because he is a police officer, would you?

"A. You mean as a human being?

"Q. Prior to testifying.

"A. Oh, no, no. Expert witness, I guess, is more—"

Clearly defense counsel was not prohibited from questioning the prospective juror in this area. Counsel was allowed extensive voir dire examination in this area and the trial court was acting within its bounds in excluding improper and repetitious questions. *Mays v. State*, 726 S.W.2d 937 (Tex. Cr.App.1986); *Patterson v. State*, supra; *McManus v. State*, supra; *Adams v. State*, supra; *Bodde v. State*, supra. This point of error is overruled.

In his sixth point of error, appellant contends that the trial court erred in limiting his voir dire examination of venireman Thomas Allen Mock. Specifically, he argues that because Mock "expressed a certain amount of confusion concerning his ability to affirmatively answer the Article 37.071, V.A.C.C.P., Special Issues", counsel should have been allowed to proceed with hypothetical examples in order to discern the impact of his objections to the death penalty on the performance of his duties as a juror.

The record reflects that during voir dire examination by the State, Mock stated that he could not answer both of the special issues affirmatively knowing that the death penalty would result, except perhaps in a situation where the victim had been one of his family members. During the defense voir dire examination, counsel posed a hypothetical involving the kidnap and murder of a girl. Mock admitted that under such a scenario he could find the accused guilty of capital murder. After injecting torture and strangulation into the hypothetical, counsel ascertained that Mock could also find, at the punishment phase, that an accused acted deliberately and with the reasonable expectation that death would result. Finally it was hypothesized that the State could prove the accused had previously committed nineteen other such killings. Mock testified that in that event he could answer the second special issue affirmatively. At this point the State objected that "[the question is could he answer the question yes knowing the death penalty would result.]" Counsel then proceeded as follows:

"Q. You would have answered Questions 1 and 2 yes, correct.

"A. Yes.

"Q. At that point in time, you know your answers to the questions is going to make Judge Oncken kill him, give the death penalty. Could you still answer Questions 1 and 2 yes if you believed him guilty beyond a reasonable doubt?

"A. Well, if I was on the jury?

"Q. Uh-huh.

"A. I had been selected?

"Q. You told me a little while ago you could answer Question 1 yes if you believed it beyond a reasonable doubt and you could also answer Question 2 yes if you believed it beyond a reasonable doubt. Now, when you answer those two questions yes, you know that Judge Oncken will then have to sentence him to death.

"A. That is what I am against.

. . . . .

"Q. ... I am trying to figure out if you could answer Question 1 yes if you believed it beyond a reasonable doubt that it should be answered yes?

"A. Knowing the result, I could not answer yes to No. 2 then.

"Q. Okay. No. 2 is asking you to determine if there was a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. In a hypothetical example, they are allowed to bring in other offenses the Defendant may have committed such as, let's say, they bring in a fact situation that he has committed this type of offense before or two or three times before, and if you believed it beyond a reasonable doubt that there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society, could you answer that question yes?

"[PROSECUTOR]: Same objection as before. Rather than asking what he would do on any specific question, I think the proper question to ask the juror in light of his responses already given, is there any case he can think of in his mind he could answer the questions yes, knowing the death penalty would result.

"THE COURT: Sustained.

"Q. [By defense counsel] Can you imagine a hypothetical example in your own mind where you would answer Question 1 yes and Question No. 2 yes knowing that your answers to those two questions would have Judge Oncken sentence him to death?

"A. No."

The State then challenged venireman Mock for cause, and the trial court sustained the challenge over appellant's objection.

[15] A review of the voir dire examination set out above shows that the appellant was allowed to question the venireman by means of hypotheticals. When, in the context of the hypothetical question, it was clarified for Mock that the result of two "yes" answers would be the assessment of death, Mock made clear he would have to answer at least one question "no" in order to avoid that result. We fail to see what further result appellant hoped to gain by questioning Mock with another vague hypothetical pertaining to the second special issue. Thus we hold that the trial court was within its discretion in sustaining the State's objection to this question. Consequently, there was no improper restriction of appellant's voir dire examination. This point of error is overruled.

Appellant next complains that the trial court improperly limited his voir dire examination of venireman Thurman Howard Matthews regarding Matthew's views of the meaning of the word "deliberately." During the State's voir dire, Matthews was questioned regarding the difference between the terms "intentionally" and "deliberately" and acknowledged that he could answer the first punishment issue "no" after finding a defendant guilty of intentionally committing capital murder. Defense counsel picked up this line of questioning during his portion of the voir dire examination and the following occurred:

"Q. ... Now, some people say that the word deliberately means the same thing as the word intentionally. How do you feel about that?

"A. I believe they are different.

"Q. In which way?

"A. Well, I would have to get into my basic version of deliberate and intent, in which deliberate would be a slow measured approach to something.

"Q. Premeditated?

"A. Deliberate or a very reasonable approach to something, and the intent, I don't know exactly how to give you that answer as to how I differentiate between deliberately and intentionally.

"Q. Okay.

"A. I am sorry. I just—

"Q. That is okay. No apology is needed at all. I am not sure if I have in my own mind what the difference is either, but in any event, what I am trying to get at is in the first part, you have found the man guilty of intentionally and knowingly killing a police officer, correct, if you find him guilty?

"A. Correct.

"Q. In the second part, the punishment stage, you have to answer the first question. What I am trying to get at is, would you automatically answer that first question yes just because you already have found him guilty of intentionally and knowingly killing a police officer?

"A. No.

"Q. Why is that? Again, I am trying to get at how you arrived at your position, and I know it's been a long day.

"THE COURT: Mr. Bax, do you have an objection?

"MR. BAX: Judge, I believe he has answered the question, whether he would automatically answer it yes, which is the qualification question, and he goes into the thought process, and we are spinning his wheels here.

"THE COURT: I think I agree with that. I sustain the objection."

[16] We find that the trial court did not abuse its discretion in limiting appellant's voir dire of Matthews. This Court on several occasions has found no abuse of discre-

tion when a trial judge limits a defendant's questioning of a prospective juror as to his understanding of the meaning of the term "deliberately" as used in the first special issue. *Milton v. State*, 599 S.W.2d 824 (Tex.Cr.App.1980); *Esquivel v. State*, 595 S.W.2d 516 (Tex.Cr.App.1980); *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App.1978). Furthermore, we note that from what questioning had already been allowed to both the State and the defense, appellant could glean that the venireman considered "deliberately" to have a different meaning than "intentionally." Thus, even assuming that appellant had an absolute right to question the venireman regarding his definition of "deliberately," the trial court did not abuse its discretion. This point of error is overruled.

In his last point of error pertaining to the limitation of voir dire, appellant directs us to the voir dire examination of Doris Lewis Zadroga. According to appellant his voir dire examination of Zadroga was improperly restricted when the following occurred:

"Q. In a hypothetical example—we talked about Joe and I walking into a Seven-Eleven and I've got a .45 and he's got a .45, let's say, and he killed the cashier and I just ran out. I haven't aided, encouraged, or abetted in any way. It's Joe's little robbery, and I am being tried for robbery now—robbery-murder. Based upon the limited facts, do you think that I should be found guilty?

"MR. BAX: Judge, that is not—I am objecting to the form of that question. Of course, the witness would have to judge the credibility of the person saying, 'I didn't have anything to do with it,' and it is asking too much of the juror.

"THE COURT: On that basis, I will sustain the objection."

[17] As can be said the prosecution was objecting to the form of the question and it was on that particular basis that the State's objection was sustained. The trial court never instructed appellant's counsel that he would prohibit him from posing a properly formed question based on the hypothetical. Conceivably counsel could have asked the question, noting that eyewitness testimony verified the fact that although both actors had guns, only one participated in the shooting of the cashier while the other actor ran out of the building. After the objection was sustained, counsel never attempted to rephrase his question. Therefore, we are unable to say that his voir dire examination was improperly restricted.

Furthermore, a review of counsel's earlier examination of Zadroga shows that he was allowed to question her along these same lines:

"Q. Let me give you a hypothetical example. I don't mean to confuse you or anything, but let's say Mr. Hernandez and I go to a Seven-Eleven and let's say we both have guns and I go in there to buy a loaf of bread. While I am buying the loaf of bread standing next to Mr. Hernandez, he pulls out a gun and kills the cashier and takes the money. I look around to see what is going on and I get scared and I run out with Mr. Hernandez. Do you feel in your own mind that I have committed any—broken any kind of law?

"A. Yes.

"Q. How do you figure that?

"A. It's illegal to carry a weapon into a place like that.

"Q. Besides that, do you feel like I would be guilty of a capital murder in a robbery-murder situation?

"A. Capital murder? No. You didn't pull the trigger. Right?

"Q. No, I just saw what happened and I ran out.

"A. Doesn't the—I don't know that much about the law, but doesn't the law say if you are involved—

"Q. Aid, abet, assist.

"A. Okay. Like I said, I don't know that much about it, but I was under the impression if anyone was killed during a whatever, that they were all equally responsible.

"Q. Even if I didn't know what was going on?

"A. Why would you have a gun if you didn't know what was going on? I don't know.

"Q. I just carried one for some reason. I just carried a gun and I go in there and buy a loaf of bread, and Joe over here just starts shooting away and I look at him and I get scared and I start running out of the store with my loaf of bread and I pay for it. Do you feel I would be guilty of something besides carrying a gun in a liquor-licensed premise, assuming it is a liquor-licensed premise?

"A. I would have to know more about it. I am sorry. That is the best I can do."

As shown above, Zadroga clearly stated that in order to answer the ultimate question concerning her views on the law of parties, she would have to be given more information. When counsel restated the hypothetical, to which the State's objection was sustained, he added no new facts or explication which would in any way help Zadroga clarify her views on the law of parties. After the State's objection was sustained as to the question's form, no other attempt was made to question Zadroga along these lines. Based on the record before us, we are unable to say that the trial court impermissibly restricted appellant's voir dire. Appellant's eighth point of error is overruled.

As stated earlier in this opinion, during the trial ten year old Jose Armijo, Jr. testified that he saw appellant shoot Officer Harris and then shoot his father. During direct examination, Jose, Jr. admitted that when he attended a lineup the night of the shooting, he saw appellant in the lineup. However, because he was afraid that appellant might hurt him, he lied to the police and told them he could not identify anyone. On cross-examination, Jose Jr. testified that when he gave a written statement shortly after the murders, he told the officers that he did not know what the killers looked like because he had not seen them very well. Defense counsel also questioned Jose, Jr. about his failure to identify appellant at the lineup. Finally counsel questioned Jose, Jr. about the fact that he had talked to both the prosecutors and the police in preparation for his trial testimony. Defense counsel concluded his cross-examination with the following:

"Q. So after you have talked to these people, you have changed your complete version of the facts and they are completely different from what you told the police back on the night of the incident; isn't that correct?

"A. Yes."

On redirect the State established that the police told Jose, Jr. to tell the truth when he was testifying. When the prosecutor asked Jose, Jr. if he was afraid to testify and tell the court what really happened, Jose, Jr. answered affirmatively.

Thereafter Sgt. Edward Cavazos was called to the stand by the State. Cavazos testified that at the request of the prosecutors, he talked to Jose, Jr. Cavazos testified that Jose, Jr. was very nervous and asked if there would be police officers present in the courtroom. Cavazos was then asked if Jose, Jr. told him why he was afraid to come into the courtroom. Over appellant's objections of hearsay and bolstering, Cavazos was allowed to answer and the following occurred:

"A. ... He asked if the suspect was going to be in the courtroom.

"Q. And what did you tell him?

"A. I told him that he was.

"Q. And what assurances, if any, did you give him concerning the suspect being the courtroom, being there testifying before the jury.

"A. I stated I would be outside the courtroom, and also that it (sic) would be other officers in the courtroom.

"Q. And throughout this conversation that you had with Jose, again at any time, did you try to talk him into identifying anyone in the courtroom as the person?

"A. No, sir."

Appellant now argues in his ninth point of error that it was error for the trial court to permit Sgt. Cavazos to bolster Jose, Jr.'s testimony about his fear of appellant when

that testimony had not been impeached on cross-examination.

[18, 19] We disagree. "Bolstering" occurs when one item of evidence is improperly used by a party to add credence or weight to some earlier *unimpeached* piece of evidence offered by the same party. *McKay v. State*, 707 S.W.2d 23 (Tex.Cr.App.1985). Clearly, appellant's cross-examination of Jose, Jr. was an attempt to impeach the rationale he gave on direct examination for the discrepancy in his failure to identify appellant immediately after the incident and his identification of appellant at trial. The whole point of appellant's cross-examination of Jose, Jr. was to show that the boy was changing his story about identifying the murderer, not because he had been afraid of appellant at the time of the taking of his sworn statement and the lineup, but because the prosecutors and the police had persuaded him to testify falsely at trial. This impeachment by appellant which suggested recent fabrication permitted corroboration of Jose, Jr.'s testimony by Cavazos. *Williams v. State*, 607 S.W.2d 577 (Tex.Cr.App.1980). This point of error is overruled.

[20] In his tenth point of error, appellant argues that the testimony of Sgt. Cavazos was hearsay and should not have been admitted.

"... 'Hearsay' is defined as an out of court statement offered for the truth of the matter asserted. *Phenix v. State*, 488 S.W.2d 759 (Tex.Cr.App.1972), at 761 citing McCormick, J., *Evidence*, Sec. 225 at 460; and *Salas v. State*, 403 S.W.2d 440 (Tex.Cr.App.1966).

"An out of court statement offered for the purpose of showing what was said rather than the truth of the matter stated therein does not, however, constitute hearsay. *Porter v. State*, 623 S.W.2d 374 (Tex.Cr.App.1981), *cert denied*, 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982). See also *Nixon v. State*, 587 S.W.2d 709 (Tex.Cr.App.1979); *Gholson v. State*, 542 S.W.2d 395 (Tex.Cr.App. 1976), *cert. denied*, 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977)." 707 S.W.2d at 33.

Clearly in the instant case, the questioning of Cavazos was not directed toward proving the truth of what Jose, Jr. was asking Cavazos; rather the questioning was directed to establishing that Jose, Jr. had in fact asked those questions of Cavazos. Thus, Cavazos testimony was not hearsay and thus was admissible.

Immediately after Sgt. Cavazos finished testifying, the State called Marie Estelle Armijo, mother of Jose Armijo, Jr. to the stand. Appellant objected strenuously on the grounds that calling Mrs. Armijo would violate "The Rule," Article 36.05, V.A.C.C.P., in that she had been in attendance during most of the trial. The State responded that they had not realized the necessity of calling her as a witness until the defense attempted to impeach the identification of appellant by Jose, Jr. The State further argued that they were calling Mrs. Armijo for the specific purpose of showing prior consistent statements by Jose, Jr. to rebut the recent fabrication allegations made by the defense. The trial court overruled appellant's objection and Mrs. Armijo was allowed to testify. She testified that immediately after the murders, while she went to the hospital with her husband, Jose, Jr. was taken down to the police station to give a statement and view a lineup. When he returned home, Jose, Jr. told her that he knew who had done the shooting and he had seen the man in the lineup. However because he was afraid of the man, he had not told the police.

In the recent case of *Archer v. State*, 703 S.W.2d 664 (Tex.Cr.App.1986), this Court set out the law applicable to situations where the rule has been violated:

"... [A] violation of the rule is not itself reversible error. *Hass* [*v. State*, 498 S.W.2d 206 (Tex.Cr.App.1973)]; *Murphy v. State*, 496 S.W.2d 608 (Tex.Cr.App. 1973). A violation of the rule may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion in allowing the alleged violative testimony to be elicited at trial. The ultimate test for determining when an abuse of discretion has occurred is whether harm to the defendant has resulted by allowing the violative testimony to be introduced. *Haas*, supra.

"In *Haas*, supra, the Court established two criteria for determining whether the defendant was in fact harmed by the violation of the rule: namely:

(1) Did the witness actually hear the testimony of the other witness, and

(2) Did the witness's testimony contradict the testimony of the witness he actually heard.

"In the instant case, neither *Haas* criteria was met; however, in order to give full effect to Art. 36.03 and the related instruction required by Art. 36.06, these criteria must be expanded to embrace other situations in which the rule has been violated. *Haas*, supra, was correct but the analysis was limited to the situation where a witness hears testimony from the opposition and later takes the stand and contradicts that testimony he actually heard.

"The first *Haas* criteria is too narrow to give full effect to Art. 36.03 and Art. 36.06. A clear reading of these articles makes it evident that not only are witnesses to avoid hearing others' testimony, they are also not to confer among themselves without court permission. Thus, the first *Haas* criteria should be expanded to include a determination of whether the witnesses have conferred. The better question is, did the witness actually hear the testimony or confer with another witness without court permission.

"The second criteria is likewise too restrictive. In the situation where two or more witnesses testifying for the same side in a criminal case have violated the rule, it makes no sense to say that their testimony must conflict in order to show harm. Of course, in most cases the opposite will occur. When two State or defense witnesses confer outside the courtroom on a matter pertinent to the case their testimony is likely to coincide, not conflict. See *Hougham v. State*, 659 S.W.2d 410 (Tex.Cr.App.1983), where Judge Clinton, in a concurring opinion, suggested an alternative to this second *Haas* criteria to encompass this situation." 703 S.W.2d at 666–667.

[21] Of course our opinion in *Archer* was correct. However, we are of the opinion that the test in *Archer* must be further expanded. Thus, we now adopt the suggestion of Judge Clinton made in his concurring opinion in *Hougham v. State*, supra. That is, in situations in which the objectionable witness has heard testimony of one or more witnesses prior to his own testimony, the second prong of the *Haas* test should be expanded to read as follows:

Did the witness's testimony contradict the testimony of a witness he actually heard from the opposing side or corroborate the testimony of another witness he actually heard from the same side on an issue of fact bearing upon the issue of guilt or innocence?

If so, consequential injury or prejudice will flow from that objectionable testimony. That does not end the inquiry however.

In *Green v. State*, 682 S.W.2d 271 (Tex.Cr.App.1984), a capital murder case, the State attempted to connect Green with the offense by virtue of the fact that witnesses testified that one of the actors had spoken with a lisp. During defense testimony, Green's sole witness testified that Green had never had a speech impediment. At that point the State realized that it needed to call witnesses to rebut that assertion. One of the witnesses called by the State in rebuttal was a woman named Peggy Stevens who had been watching the entire trial and had heard Green speak in the courtroom. Over defense objections that her testimony violated "The Rule," Stevens was allowed to testify that she had heard Green speak and that he spoke with some sort of a speech impediment. On appeal, this Court wrote the following:

"Enforcement of 'the rule' is within the discretion of the trial court. *Cooper v. State*, 578 S.W.2d 401 (Tex.Cr.App. 1979). The court's decision will not be reversed unless an abuse of discretion is shown. *Brown v. State*, 523 S.W.2d 238 (Tex.Cr.App.1975). Violations of 'the rule' fall into two main categories: witnesses who have been sworn or listed as

witnesses in the case and either hear testimony or discuss another's testimony; and persons like Stevens, who were not intended to be witnesses and are not connected with the case in chief but who have, due to events during trial, become necessary witnesses. Stevens was apparently not connected with the case in any way and simply heard appellant speak. No abuse of discretion is shown." *Green v. State*, 682 S.W.2d at 271.

Thus, a two-step approach must be taken when initially answering the question of whether a trial judge has abused his discretion in allowing a violation of "The Rule." The appellate court must first determine what kind of witness was involved.

[22] If the witness was one who had no connection with either the State's case-in-chief or the defendant's case-in-chief and who, because of a lack of personal knowledge regarding the offense, was not likely to be called as a witness, no abuse of discretion can be shown. On the other hand, if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand, then the appellate court should then apply the *Haas* test as amended above and in *Archer*.

[23] In the instant case, Mrs. Armijo had no personal knowledge of the offense. Although her husband and children were directly involved, she was not present during the commission of the offense and thus could shed no light on appellant's involvement. Only after her son's identification of appellant was impeached by a prior inconsistent statement was it necessary for the State to put Mrs. Armijo on the stand. Consequently, we find her to be the same type of witness as Peggy Stevens in *Green v. State*, supra. Although not intended to be a witness, because of events which occurred during trial, Mrs. Armijo became a necessary witness. Based on the record before us, we are unable to say that the trial court abused its discretion in allowing Mrs. Armijo to testify. Appellant's eleventh point of error is overruled.

[24] In his twelfth and thirteen points of error, appellant contends that the admission of Mrs. Armijo's testimony was error in that the testimony was inadmissible hearsay and improper bolstering. Prior to the admission into evidence of the testimony a hearing was held out of the presence of the jury at which time the State argued that the testimony was being offered to rebut the insinuation raised during cross examination of Jose, Jr. that his explanation for not identifying appellant at the police lineup was a story concocted by the prosecutors and the police. The State contended, and we think correctly, that the boy's prior consistent statement—that he told his mother the day after the murders that he had seen the killer in the lineup but was afraid to identify him to police—was admissible as rebuttal to the defense suggestion that Jose Jr.'s story was recently fabricated. *Williams v. State*, supra. It has long been the rule that where an attempt is made to impeach a witness by showing he made statements inconsistent with his trial testimony, he may be supported by showing that he made statements consistent with his trial testimony after the offense in question. *Duncantell v. State*, 563 S.W.2d 252 (Tex.Cr.App.1978). Mrs. Armijo's testimony was not improper bolstering. Rather it served to rehabilitate the testimony of her son after the attack by the defense.

Nor do we find that the testimony was inadmissible hearsay. Clearly, Mrs. Armijo's testimony was not offered to prove the truth of the fact asserted therein. Rather, it was admitted to show that Jose, Jr. had indeed made a prior consistent statement. For these reasons, we overrule appellant's twelfth and fourteenth points of error.

Having found no reversible error, we affirm the judgment of the trial court.

ONION, P.J., and MILLER, J., concur.

CLINTON, Judge, dissenting.

Among appellant's eighteen grounds of error are three grounds of error attacking the trial court's decision to allow the witness, Marie Estel Armijo, briefly to testify

over repeated and strenuous objections that her testimony (1) constituted inadmissible hearsay, (2) bolstered the testimony of her son, Jose Armijo, Jr., and (3) was admitted in violation of the rule, Article 36.03, V.A.C.C.P. While I am satisfied that the first two of these contentions present no error, I am deeply troubled by the third, and believe that it amounts to an abuse of the trial court's discretionary authority to enforce the rule. Article 36.04, V.A.C.C.P.[1] To fully address the gravity of the problem it is necessary to set out: first, the undisputed evidence; second, the testimony of the various "eyewitnesses" to the killing; third, the testimony of Jose Armijo, Jr., son of Marie Armijo; and finally, the testimony of Marie Armijo herself.

I.

A.

The following events were established at trial beyond peradventure:

Houston Police Officer James Harris was on "K-9" patrol, his only partner a police dog, on the evening of July 13, 1982, in what was described as a lower middle class Mexican-American neighborhood in Houston. At approximately 10:00 p.m. Harris spoke to a pedestrian, George Brown, who informed him that a black "Cutlass" had only moments before attempted to run over Brown, forcing him into a ditch. Other witnesses had seen this car "driving fast ... spinning tires, burning rubber." Harris gave pursuit.

Less than a minute later Harris came upon a black Buick with red vinyl top stalled at the intersection of Edgewood and Walker. Harris stepped out of his vehicle, leaving the door open, and beckoned to the occupants of the Buick. Appellant, who was the driver, and his companion, Roberto Flores, approached Harris. One of the two then shot Harris three times, the bullets entering the left side of his face and exiting on the right. Three spent nine millimeter cartridges were subsequently found beside Harris' vehicle, and three bullets fired from a Browning nine millimeter pistol were recovered from a house in the direction in which the slugs that killed Harris would have traveled. The shots proved fatal. Appellant and Flores then fled on foot in an easterly direction down Walker.

At this time Jose Armijo and his two children, Jose, Jr., and Lupita, were driving west on Walker. From the passenger side of the car, on the north side of Walker, came a shot from a Browning nine millimeter pistol that killed Armijo, Sr. Two nine millimeter cartridges were found on the north side of the street. Also found, on the south side of Walker, were two cartridges from a .45 caliber pistol.

Approximately an hour later Flores died in a shootout with Houston police, during which an officer was also seriously wounded. The shootout occurred outside the residence next door to which appellant had been living, several blocks from the scene of Harris' killing. Under Flores' body was found a Browning nine millimeter pistol, which he had used in the gun battle with police. It was positively shown this was the weapon that killed Armijo, Sr.; and it is also reasonable to believe, although it could not be proved definitively, that this gun killed Harris. Also found on Flores were a magazine containing 20 nine millimeter rounds, and Harris' service revolver. Police found appellant at the same location, crouching behind a horse trailer. The .45 caliber pistol which had been fired earlier was discovered wrapped in a bandana under the trailer, two feet from where appellant was found.

B.

The sole contested issue at trial was whether Flores, rather than appellant, shot Officer Harris. The State produced five witnesses, including Jose Armijo, Jr., who "saw" the shooting and testified that appellant was the perpetrator. Appellant and two other eyewitnesses testified, in essence, that Flores actually shot Harris.

1. Effective September 1, 1986, these provisions were repealed. See now Tex.R.Cr.Evid., Rule 613. Appellant was tried in 1982.

The State's own witnesses contradicted one another as to which man had run down the north side, which the south, of Walker—a critical question, since whoever fled down the north side shot Armijo with the same weapon used to kill Harris. No witness went unimpeached. Thus we apparently have, in addition to the undisputed testimony as set out in Part A, *ante*, nothing more than a classic "swearing match." Nonetheless, for reasons to be developed, I believe that the testimony of Jose Armijo, Jr., was critical to the State's case. I turn first to examination of the testimony of the State's other eyewitnesses.

Patricia Diaz was in a car coming east on Walker Street when she encountered the Buick blocking the intersection, between her vehicle and Harris'. She heard someone she later assumed was Harris yelling "stop, stop," and saw appellant "standing by his car turned sideways pointing" in the direction of the police car. Diaz demonstrated "how he was pointing," but she could not make out what, if anything, was in appellant's hand. She testified she saw no one else around. She ducked and then heard shots. On crossexamination she stated: "I didn't see him fire. I just saw the way he was standing. That was it." Later she admitted, "I didn't exactly know who shot who."

Herlinda Garcia was fifteen years old at trial. She testified that she was standing with her sister at some point at the intersection of Edgewood and Walker[2] and observed two men get out of a Buick. Appellant, the driver, approached Garcia saying, "something about a boost, something about their car being messed up." Harris then pulled up, "put his headlights on [appellant, and] said 'Hold it.'" The two men got out of the car and approached Harris. She testified that she saw appellant "turn toward the policeman" and pull what "looked like" a gun from his pants. She then *heard* three shots, and, seeing Harris go down, she ran. She seemed to indicate, though the record is murky on this point, that appellant then fled down the *north* side of Walker. She concluded her direct examination by affirming the prosecutor's leading question whether she was certain appellant was the man she "saw" shoot Harris.

On crossexamination the following colloquy ensued:

"A: He pulled something out of his pants.

Q: Did you see what it was?

A: No.

Q: When he pulled that something out of his pants, what did you do?

A: That is when we just ran. I heard gunshots somewhere.

Q: When you heard the gunshots, did you see the officer at all?

A: No.

Q: Did you see the gunshots?

A: No. I told you I was running at the time of the gunshots.

Q: Well, did you see this man here, the [appellant]? Did you see him fire at the police officer?

A: Yes.

Q: You did?

With what?

A: I didn't see with what. He was going towards the policeman.

Q: Okay.

A: And the other one I didn't see.

He was going towards the policeman, and that is when I heard gunshots and that is when I ran.

Q: You are not telling this jury you saw the [appellant] shoot the police officer?

A: Yes.

Q: With something he had in his hands?

A: What else could it have been, if not gunshots?

Q: Did you see the fire come out of the barrel?

A: No, I didn't.

Q: Because when you saw this, you ran, right?

A: Uh-huh."

Asked on redirect why she was telling the jury that "this is the man who shot the police officer," she replied "Because that is who I saw." On recross she again insisted that she never saw Flores. Finally, in apparent exasperation she concluded:

"A. I am trying to explain. In the car there was two men. I didn't see the other one. I didn't pay any attention to him. He just got out of the car. I didn't see him."

Next to testify was Garcia's sixteen year old sister, Vera Flores. According to Vera, she was standing at the intersection with her sister when the Buick stopped, appellant got out and asked them for "cables to get him a boost." She testified that appellant was the "only one [she] was paying any attention to." After about a minute and a half Harris arrived and said, "Stop." Harris stood by the open driver's door of his vehicle as the two men approached. Some unidentified person said, "no, no," and Vera heard three gunshots, but did not see a gun. Then:

"Q: Okay. Could you tell who had fired those shots from where you were at, which one of the three men had fired those shots, you heard?

A: Yes, sir.

Q: Which one was it of the three men who fired those shots?

A: The driver in the black car.[3]

Q: Okay. Could you see the pistol at all from where you were at—

A: No, sir.

Q: —or the type of gun?

A: No, sir.

Q: When you say it was the driver who fired those shots, how do you know it was the driver who fired those shots?

A: Because when he started running, I just seen him shooting down the street."

On crossexamination Vera could not describe the activities of the "other one" except to say that he stood next to the police car with his hands on the hood, closer to Harris than was appellant. Like Garcia, she insisted that she "wasn't really bothering with the other one:"

"Q: And the passenger, where did he—

A: No. I didn't see him.

What I am trying to say, I saw both of them. I did, but I was not paying attention to him. I was paying attention to the driver.

Q: But you said you saw both of them put their hands on the police car hood?

A: I did."

She then testified that after the shooting appellant ran down the *south* side of Walker, firing his weapon.

On redirect the prosecutor reminded Vera that on July 14, in the early morning after the murder, she told police she "saw" appellant pull a pistol from his pants and shoot Harris. Asked if indeed that was what she "saw," Vera answered "yes," and confirmed that she was sure. But on recross she stated: "I seen his hands, and then that is all I seen." Asked again if she had seen appellant shoot Harris, she replied: "Did I see him? I don't remember."

Hilma Galvan testified that she had seen appellant before as a customer in a convenience store where she worked, located in the neighborhood. Galvan was standing on the north side of Walker in front of her house, which was apparently the second or third house down from the intersection, and "maybe fifty feet" from the corner. Her testimony places witnesses Flores and Garcia in front of the Buick, on the south side of Walker. She saw appellant "yelling" at the sisters. From his open car door, Harris ordered appellant to "come here," and when appellant instead began to walk away, Harris told him, "Hey, you come back." Appellant then turned and approached Harris. Galvan repeatedly insisted she saw nobody else. She testified:

"Q: Did you actually see this man who was walking towards the police officer shoot at the police officer?

A: I did.

Q: Okay. Could you tell from your position there by your house what type of gun it was the man had?

2. Deplorably, the record is riddled with instances of witness identification of persons and places which, though they must have been clear to all present at trial, cannot be ascertained from the cold record—instances of unspecified pointing, of identifying "him" with no indication of to whom "him" refers.

3. Vera later identified appellant as the driver.

A: No, sir. I never seen the gun.
Q: You don't know anything about guns anyway, do you?
A: No. Not that much.
Q: But this man who shot the police officer, did you see some type of gun or pistol in his hand?
A: Yes, I seen the—like, you know—
Q: The flash?
A: Yes, I seen the flash coming out, and it sounded real loud."

On crossexamination Galvan was shown a pretrial statement in which she had said Harris "pushed" appellant up against the police car. Galvan agreed that Harris was "touching" appellant, and stated that "[t]he shots were fired right there and then." Still she saw nobody else. Next:

"Q: So then the shooting started?
A: Yes.
Q: And what transpired in that immediate second that you saw if you can remember?
A: If I can remember?
I heard the shots. I seen the officer fall, and I seen the man running towards us, shooting.
Q: Let me stop you right there.
You heard the shots?
A: Yes.
Q: You didn't see the shots?
A: I seen the man that was right in front of him, and a flash was coming out of his gun.
Q: You saw the flash?
A: Yes."

Appellant then ran down Galvan's side of the street, which was the *north* side. Galvan insisted that she never saw Roberto Flores that night, although she admitted she "had seen him before."

When the State rested, appellant put two teenage boys on the stand who viewed the incident from the same vantage as had Galvan. Jacinto Vega testified:

"Q: What did the driver—after he talked to Herlinda and Elvera, the driver, what did the driver do?
A: After that, the cop was behind the black car and called the driver.
Q: And did the driver come over?
A: He did.
Q: And what did he do?
A: He put his hands over the hood.
Q: And the passenger, what was he doing?
A: He was coming behind the driver.
Q: And did you see the passenger do anything unusual?
A: Yes. He was—the police told him something, and he came over to the police, and after that, he was in the back of the driver, and he took something out and he shoot him.
Q: The passenger, right?
A: The passenger."

Vega did not know who the passenger was. He explained the fact that he had identified appellant at the July 14 police lineup in that the police had simply asked him whether he recognized anyone, not whether anyone in the lineup shot Harris.

Jose Heredia testified substantially as did Vega. In addition, he identified the passenger as "Werro," which was shown to be a name by which Flores had been known. Heredia insisted that Flores shot Harris. Both Vega and Heredia admitted being at least acquaintances of appellant.

Finally, appellant testified in his own behalf, through an interpreter, and asserted that the nine millimeter pistol belonged to Flores. According to appellant, he and Flores had both talked to the two sisters about cables. They then returned to the Buick and attempted to start it. Harris arrived and told them to "come on." Appellant put his hands on the hood of the police car and spread his legs, as he thought Harris was instructing him to do. Harris' gun was drawn, and he was telling Flores also to "come on." Appellant was concentrating on Harris' gun when he heard shots in his ear. Flores then took Harris' fallen gun, and both men fled, appellant down the south side of Walker, drawing his .45 caliber pistol for the first time and firing "upwards." He testified he did not know what side of the street Flores ran down.

Were this the only evidence in the case, I would be inclined to hold the evidence insufficient to find appellant guilty of murdering Officer Harris. This is because, to my mind at least, the testimony of the State's witnesses, as set out *ante*, does not exclude the reasonable hypothesis that Flores killed Harris; or, to put it another way, though such testimony does not necessarily support the inference that Flores did, neither does it eliminate that possibility beyond a reasonable doubt. See, e.g., *Carlsen v. State*, 654 S.W.2d 444 (Tex.Cr.App.1983). While I realize that the present case does not *appear* to be based on circumstantial evidence, still, as *Carlsen*, supra, makes clear, the appellate *standard* for determining sufficiency is the same, *viz:* "whether, after viewing [all of] the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1974).

Though all of the State's eyewitnesses, except Diaz, testified that appellant killed Harris, on crossexamination it was revealed that this was a conclusion on the part of each, not necessarily borne out by her particular perceptions of the event. Garcia saw what "looked like" a gun, pulled from appellant's pants, and then she "heard" shots—she herself was running by this time. She definitely "saw" appellant, but seems to have assumed he fired the fatal shots—not a necessarily unreasonable assumption on her part, since she "didn't see" Flores there; but not a particularly reliable one either. Vera Flores also "heard" gunshots but saw no gun. She concluded that appellant fired the shots simply because he subsequently fled, discharging his gun. But the evidence shows unequivocally that both men had guns, and appellant's discharge of his weapon as he fled does not prove he fired the first fatal shots, or even that he ever drew on Harris. Galvan saw appellant approach Harris, saw Harris touch appellant in some manner, "heard" and saw the flash of a gun, and then saw appellant come in her direction. She did not see a gun in appellant's hand. The most remarkable aspect of these witnesses' testimony is that when the killing occurred none had any idea what Flores was doing or even where he was. They simply "did not see him"—indeed, Galvan *never* saw him.

None of this removes the reasonable hypothesis, advanced by appellant's defensive testimony, that as appellant approached the police car, Flores came between the two cars, positioned himself beside and behind appellant, just to Harris' left, and shot Harris. This theory comports with the physical evidence, as reviewed *ante*. Furthermore, it is utterly inconceivable to me that in the time between the killing of Harris and the subsequent gun battle with police, when the murder weapon was discovered on Flores' person, appellant and Flores would have traded weapons!

The trial court gave no charge authorizing the jury to convict appellant as a party to Harris' murder. Thus, in order to convict appellant of murder it was necessary that the jury find beyond a reasonable doubt that appellant himself shot Harris. Absent the testimony of Jose Armijo, Jr., to which I turn next, I am most doubtful any rational jury could have so found.[4]

C.

Armijo, Jr., ten years old at the time of trial, testified before any of the State's other eyewitnesses. Thus he gave the jury its initial impression of the events surrounding the actual shooting of Officer Harris.

Armijo testified that he was coming home from the auto parts store with his father and sister when they noticed "the black car" and Harris' vehicle blocking the intersection ahead. Armijo saw two men with their hands on the hood of the patrol car.

"Q: What did you see?
A: The other one scratched his back.

4. In fact, even *with* Armijo's testimony I *personally* have substantial doubt that appellant was the triggerman here. Of course I recognize this Court has no authority to pass upon the weight and preponderance of the evidence. *Combs v. State*, 643 S.W.2d 709 (Tex.Cr.App.1982); *Gold v. State*, 736 S.W.2d 685, 690 (Tex.Cr.App.1987).

Q: Which one scratched his back?
A: The one that has long hair.
Q: All right. Was the man that had the long hair closer to the police officer when he had his hands on the hood or was he the one farther away from the police officer?
A: Closer.
Q: And what did you see that man do?
A: He shot the police.
Q: Before he shot the police officer, did you see him do anything with his hands?
A: Yes. He acted like he was scratching his back.
Q: When you said—he took his hands from off the police car and acted like he was scratching his back?
A: Yes.
Q: After he did that, what happened then?
A: He took out the gun and shot the police.
Q: Do you know how many times he shot the policeman?
A: No.

* * * * * *

Q: Did you see any fire coming from the gun when he shot the police officer?
A: Yes.
Q: What did you see happen to the policeman after he was shot?
A: He fell down on the ground.
Q: Do you remember what the man was wearing that was standing closer to the police officer, that scratched his back?
A: Yes.
Q: And came out with a gun?
A: Yes.
Q: What was he wearing?
A: A green shirt."

When found, appellant was wearing a green shirt; and indeed, Armijo apparently identified appellant in court as the man who shot Harris; but see n. 2, *ante*. One of the men, Armijo did not know which, then took Harris' gun and "[t]hey started running and shooting all over the place." "The one with the green shirt" ran by the car and shot into it, killing Armijo, Sr.

The State then elicited, still on direct, that at the police lineup early the next morning, Armijo, Jr., told police he could identify no one, but that this had been "a lie." Armijo explained that he had not identified appellant because, as he said, "I was scared he might come out and get me."

On crossexamination Armijo's perceptions of the shooting itself were not tested. Instead defense counsel focused on a statement the boy had given police the night of the shooting in which he had said he did not know what the two men looked like nor what they had worn. Armijo admitted that at the lineup he had been told that the one way mirror would prevent those in the lineup from seeing him. It was further established that, once he heard the first shots, Armijo pushed his sister to the floorboard of the car where they remained until the two men had run well past them.

Then, the following occurred, and with it were engendered appellant's three grounds of error at issue here:

"Q: Has anybody talked to you about this case?
A: Yes.
Q: The Prosecution, the prosecutors, Mr. Bax and Mr. Moen?
A: Yes.
Q: Have the police talked to you?
A: Yes.
Q: Yesterday?
A: Yes.
Q: Did they talk to you any other times?
A: Yes.
Q: Did they talk to you on Saturday?
A: Yes.
Q: Did they talk to you today?
A: Yes.
Q: Who talked to you?
A: I forgot his name.
Q: Mr. Bax?
A: Yes.
Q: And Mr. Moen?
A: Yes.
Q: Any police officers talk to you?
A: Yes.

Q: So after you have talked to these people, you have changed your complete version of the facts and they are completely different from what you told the police back on the night of the incident; isn't that correct?
A: Yes."

At this time there was an outburst "from a woman in the back of the courtroom," later shown to be Marie Armijo, Jose Armijo, Jr.'s, mother. She was escorted out by the bailiff, not to return until she herself testified toward the end of the State's case in chief. Thus she did not hear the bulk of the State's eyewitness testimony. But, though she spoke no English, she did hear her son's testimony, translated to her by her sister-in-law.

D.

After a hearing, and over repeated objections by appellant on the grounds now raised on appeal, Marie Armijo was allowed briefly to take the witness stand and testify through an interpreter. She testified that on the night of the shooting she had gone to the hospital where her husband had been taken, while Jose, Jr., went to the police station to give a statement. She did not see Jose again until 8:30 the following morning. At this time he cryingly told her:

"... that he had seen the person that had done it and he was able to identify the person, but he was very much afraid to tell the police about that and didn't think he should tell them."

Further, she testified that since his father's death, Jose, Jr., had not been the same carefree child as before, and that "[h]e was afraid of the person that had shot his father." It was established that on the Saturday prior to her testifying, Marie Armijo had informed prosecutors that her son could identify the killer. Finally she confirmed that her son had also been afraid to testify at trial.[5]

On crossexamination it was established that Marie Armijo had made the outburst at the end of her son's testimony, which had been translated for her. Then:

"Q: Have you talked to your son since then?
A: Yes, sir.
Q: Did you talk to your son yesterday?
A: Yes, about he was a witness and what was the truth.
Q: Did he talk about the facts in this case?
A: Yes, sir."

Again objection was made that the witness had been allowed to testify in violation of the rule. The objection was overruled.

On redirect Mrs. Armijo was allowed to explain her previous outburst in the courtroom as follows:

"A: Well, it was because I wanted to make certain that it was the truth, what my son was saying, because he told me that that was the truth."

The witness was then excused.

With the foregoing in mind I proceed to discussion of appellant's grounds of error complaining of Marie Armijo's testimony.

II.

A.

The objections to hearsay and bolstering are fairly easily disposed of. Prior to Mrs. Armijo's testimony a short hearing was held out of the presence of the jury. The State argued that Armijo's testimony would be offered to rebut the insinuation raised during crossexamination of Jose, Jr., that his explanation for not identifying appellant at the police lineup, *viz:* that he was afraid, was concocted by prosecutors

5. Just before Ms. Armijo's testimony the court allowed Houston Police Officer Edward Cavazos to testify, over objections of bolstering and hearsay, that the day before Jose Armijo, Jr., had testified, he had indicated to Cavazos that he was uneasy about appellant's presence in the courtroom. Cavazos also testified that he in no manner directed Jose as to how he should testify in court. As with Ms. Armijo's testimony, the State argued this was admissible to counter defensive insinuations that Jose's explanation was implausible. It should be noted that Officer Cavazos' testimony does *not*, however, refute any suggestion of recent fabrication, since he did not describe a *prior* consistent statement. See analysis in Part II A, *post*. In fact, Officer Cavazos' testimony may well have served no rehabilitative function whatsoever, merely bolstering Jose's explanation. See *Sledge v. State*, 686 S.W.2d 127 (Tex.Cr.App.1984).

and by the boy himself.[6] The State contended that the boy's prior consistent statement—that he told his mother as early as the next day that he had seen Harris' killer in the lineup but was afraid to identify him to police—was admissible to refute the defensive insinuation that Jose Armijo, Jr.'s explanation for not identifying appellant at the lineup had been recently fabricated. Indeed, the testimony *was* admissible for this purpose, see 1 R. Ray, Texas Law of Evidence Civil and Criminal § 774 (Texas Practice 3rd ed. 1980), and the trial court so ruled.

Appellant seems to have argued to the court that Mrs. Armijo's testimony improperly bolstered her son's incourt identification of appellant, by confirming that Jose really could have identified appellant at the police lineup. They objected that the fact that Jose told his mother *after* the police lineup that he really could identify the killer was not a "prior consistent statement" capable of rehabilitating his statement to police. But that was not the purpose for which the testimony was offered. At no time in her testimony did Mrs. Armijo indicate that Jose told her that *appellant* had been in the lineup or that Jose could identify *him*. The State very scrupulously directed her responses to the fact that Jose had seen the killer in the lineup, without identifying him, but was afraid to tell police at that time. Thus, her testimony did not "bolster" that of her son, but rehabilitated him. See *Sledge v. State*, 686 S.W.2d 127 (Tex.Cr.App.1984); *Pless v. State*, 576 S.W.2d 83 (Tex.Cr.App.1979). Nor, of course, was it hearsay, as it was not admitted to prove the truth of the fact asserted therein, but only to show that Jose had previously made the statement. These grounds of error are therefore correctly overruled.

B.

Appellant also argued, however, and most vigorously, that admission of Mrs. Armijo's testimony violated the trial court's own order at the beginning of trial that all witnesses be placed under the rule.

Article 36.03, V.A.C.C.P., reads in relevant part:

> "At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule."

The purpose of the rule is "to prevent the testimony of one witness from influencing the testimony of another." *Cook v. State*, 30 Tex.App. 607, 18 S.W. 412 (1892). The genesis of the rule is said to lie in the History of Susanna, a book of the Apocrypha:

> "The story of Susanna is familiar. Her accusers testified in the presence of each other to her guilt. She was about to be condemned when Daniel interposed, saying: 'Put these two aside, one far from another, and I will examine them.' His examination disclosed such discrepancies in their testimony as resulted in the release of Susanna and the condemnation of her accusers. Since then the importance of the separation of witnesses has been regarded as a valuable adjunct to the cross-examination of witnesses and a right accorded whenever demanded in the trial of causes [citations omitted]."

Bishop v. State, 81 Tex.Cr.R. 96, 194 S.W. 389 (1917).

It had long been held under the common law that "[t]he admissibility of witnesses who have violated the rule, or who have not been placed under the rule, is within the sound discretion of the court, and such discretion will be presumed to be correctly exercised until the contrary appears." *Cook v. State*, supra. That holding was essentially codified in art. 645, Vernon's Ann.C.C.P. (1925), now Article 36.04, V.A. C.C.P., which provides, *inter alia*, that

6. The crossexamination set out at p. 482, *ante*, was obviously intended to invite the jury to infer that Jose, in league with police and prosecutors, had made up the story told on direct examination. This suggestion necessarily includes the insinuation that a few days prior to trial Jose's "explanation" for the prior inconsistent statement was also fabricated.

"[t]he enforcement of the rule is in the discretion of the court," see *Wilson v. State*, 158 Tex.Cr.R. 334, 255 S.W.2d 520 (1953), and was most recently reiterated in *Green v. State*, 682 S.W.2d 271 (Tex.Cr. App.1984).

The trial court abuses its discretion when its refusal to enforce the rule works to the injury or prejudice of the accused. *Hougham v. State*, 659 S.W.2d 410 (Tex.Cr.App. 1983); *Haas v. State*, 498 S.W.2d 206 (Tex. Cr.App.1973); *Murphy v. State*, 496 S.W.2d 608 (Tex.Cr.App.1973). Relevant criteria for determining injury are (1) whether the witness actually heard, *either* (2) a defense witness whom he then contradicts, *or* (3) a prosecution witness whose testimony he subsequently corroborates, (4) on an issue of fact bearing upon guilt or innocence. *Hougham v. State*, supra (Clinton, J., concurring); *Day v. State*, 451 S.W.2d 508 (Tex.Cr.App.1970); *Wilson v. State*, supra. *Archer v. State*, 703 S.W.2d 664 (Tex.Cr.App.1986).

The record clearly indicates that Mrs. Armijo actually heard the testimony of her son. Though that testimony had to be translated to her, her outburst and explanation for it indicate that she well understood the testimony which she subsequently corroborated. Furthermore, during the interim between her son's testimony and her own, they discussed the facts and "what was the truth." Thus the only impediment to a finding of abuse of discretion on the part of the trial court in allowing Mrs. Armijo's corroborating testimony is a determination whether what she corroborated was "an issue of fact bearing upon guilt or innocence." It is to this end that I have so painstakingly set out, in Part I of this opinion, the evidence upon which the jury relied to find appellant, not Roberto Flores, killed Officer Harris.

Jose Armijo, Jr., was the only State's witness who saw both appellant and Flores and could testify unambiguously that appellant perpetrated the shooting. His were the only perceptions that went unimpeached. To my mind his testimony is all that stands between appellant and an acquittal for insufficient evidence. See Part IB, *ante*.

The critical factor for the jury in assessing Jose's testimony, in view of his prior inconsistent statements to police, was his credibility as a witness. In anticipation of this, and to soften its inevitable effect upon the jury, the State elicited the prior statement, along with an explanation, during Jose's direct testimony. A great deal depended upon the plausibility of the explanation, and a blow to that could prove critical. Thus, though Marie Armijo did not testify to facts bearing *directly* upon determination of appellant's guilt or innocence, her testimony directly impacted the credibility of the witness whose testimony *most* bore upon appellant's guilt or innocence. Having heard her son's testimony, she was in an ideal position to know precisely how to testify in order to rehabilitate him. It seems to me there is a considerable likelihood her testimony affected the jury's verdict—indeed, it may have sealed the finding of guilt in a case otherwise rife with doubt.

The majority finds the situation in *Green v. State*, supra, analogous to that here, and thus concludes there has been—indeed, there "can be"—no abuse of discretion shown. To my mind *Green* is easily distinguishable. There the witness Stevens had been in attendance the entire trial and had overheard Green speaking informally in the courtroom. Thus she was in a position to dispute defense testimony that Green did not have a speech impediment, which was a critical issue in the case. However, Stevens "was apparently not connected with the case in any way and simply heard [the defendant] speak." The same cannot be said of Marie Armijo. Her husband had been shot to death only moments after the events in issue at appellant's trial, and her son was the State's principal witness. Her emotional investment in the case was clearly manifested by her outburst in the courtroom at the conclusion of Jose, Jr.'s testimony.

The majority derives far more from the somewhat lean analysis in *Green* than will withstand scrutiny. From the language quoted the majority identifies a "two-step

approach" to measuring abuse of discretion in enforcement of the rule. If the witness had no connection with the proponent's case in chief and was not contemplated as a "likely" witness at the outset "because of lack of personal knowledge regarding the offense," "no abuse of discretion can be shown." Only "if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand" will the test as refined in *Archer v. State*, supra, even come into play. In other words, rebuttal or impeachment witnesses are effectively insulated from enforcement of the rule. *Green* did not purport to mandate such a "two-step approach," however. There we merely observed that there are two identifiable classes of witnesses: those who were initially placed under the rule, and those who were not because not originally believed to be necessary either to the State's case in chief or to rebut anticipated defense evidence. There is no suggestion that a prejudice analysis would be inapposite to an appellate determination of whether permitting the testimony of a member of the latter class who has listened to all or portions of the trial was an abuse of discretion. There is only the observation that the witness Stevens was "not connected with the case in any way...." By this I perceive the Court meant it could imagine no respect in which Stevens' having heard the evidence at trial could have influenced the substance of her testimony. While this is at best a questionable application of the prejudice test ultimately adopted in *Archer*, supra, it plainly does not dispense with that test.

Nevertheless, on the dubious authority of *Green*, the majority recasts enforcement of the rule, without other precedent or any foundation in the language of Article 36.03, supra. I do not believe that vindication of the policy considerations underlying enforcement of the rule can in reason be made contingent upon the foresight (or lack of same) of the parties in predicting who their "necessary" witnesses will be.

Meaning to impute no bad faith on the part of the prosecution nor malice in the trial court, nonetheless, and limited to the facts of this particular case, I would hold that allowing Marie Armijo to testify in violation of the rule constituted an abuse of discretion. Because I believe a genuine miscarriage of justice has occurred, I respectfully dissent.

TEAGUE, J., joins.

John FEARANCE, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 69024.

Court of Criminal Appeals of Texas, En Banc.

Dec. 7, 1988.

Rehearing Denied Feb. 15, 1989.

Certiorari Denied July 3, 1989.
See 109 S.Ct. 3266.

Defendant's first conviction of capital murder was reversed by the Court of Criminal Appeals, Tom G. Davis, J. Following denial of defendant's motion for rehearing, 620 S.W.2d 577, in which defendant sought imposition of life sentence in lieu of retrial, defendant was retried before the Criminal District Court, Dallas County, John Mead, J., and was again convicted of capital murder and sentenced to death. He appealed. The Court of Criminal Appeals, White, J., held that: (1) prosecution did not improperly rely on double use of murder to bootstrap offense to capital prosecution; (2) following reversal of his first conviction, trial court had jurisdiction to try defendant, notwithstanding his pending petition for certiorari; (3) no error occurred in jury selection; (4) arresting officer's warrantless arrest of defendant in his residence was proper; (5) reputation witness was properly allowed to testify; (6) hypothetical question posed to expert concerning defendant's propensity to commit future acts of violence was proper; (7) trial court was not required to instruct jury on definition of term "deliberately;" and (8) prosecutor did not commit error during closing argument in penalty phase of trial.

Affirmed.

Duncan, J., concurred in result.

Clinton, J., dissented.

Teague, J., filed dissenting opinion.

1. Homicide ⇐18(1)

Applicability of merger doctrine of felony-murder statute is limited to cases of transferred intent. V.T.C.A., Penal Code § 19.02(a)(3).

2. Homicide ⇐18(3)

Even assuming that merger doctrine of felony-murder statute applied to capital murder prosecution, merger doctrine did not operate to bar defendant from prosecution for capital murder of victim with knife during course of residential burglary where proof showed that defendant was engaged in felony burglary, property offense, at time victim was murdered, and thus there was showing of felonious criminal conduct other than assault which caused death of victim. V.T.C.A., Penal Code §§ 19.02(a)(1, 3), 19.03(a)(2).

3. Constitutional Law ⇐258(3)
Homicide ⇐18(3)

Defendant's right to due process and fair trial were not infringed upon by prosecuting him for capital murder for killing victim with knife during course of residential burglary; Texas capital murder statute sufficiently narrows class of death-eligible murderers. U.S.C.A. Const. Amend. 14.

4. Criminal Law ⇐147

Capital murder is species of murder for which there is no statute of limitations.

5. Federal Courts ⇐501

Trial court had jurisdiction and authority to retry capital murder case after reversal of defendant's first conviction, notwithstanding defendant's pending petition for certiorari to United States Supreme Court at time retrial began, where Supreme Court neither granted defendant's petition nor stayed Court of Criminal Appeals' mandate for retrial or any further proceedings in case.

6. Criminal Law ⇐193

Reversal of defendant's first conviction of capital murder because of *Witherspoon* error in jury selection did not bar retrial on double jeopardy grounds and mandate imposition of life sentence in lieu of captial punishment; even though *Witherspoon* error affected only death penalty, it did not preclude State from again seeking penalty on retrial. U.S.C.A. Const. Amend. 5.

7. Criminal Law ⇐1166.18

Defendant was not prejudiced by trial court's refusal to grant challenges for cause to two veniremen which forced defendant to exercise two of his fifteen peremptory challenges to remove jurors, where he still had three peremptory challenges left at conclusion of jury selection process and thus was not forced to accept juror on panel he would have struck but for trial court's allegedly erroneous decision.

8. Jury ⇐142

Any error in excusing venireman who testified that his strong convictions would cause him automatically to vote against captial punishment or in excusing venireman who said that he could not impose capital punishment because of his religious beliefs was waived by defendant's failure to object to excusal for cause during jury selection process.

9. Jury ⇐108

In determining venireman's capacity to obey oath and follow trial court's instructions, single statement of venireman would not be viewed as controlling on its own, but instead, entire record of venireman's voir dire would be reviewed to determine if his opposition to death penalty would have prevented or substantially impaired performance of his duties.

10. Jury ⇐108

Excusal for cause of venireman whose testimony indicated that his ability to com-

f. [redacted] A16

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Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
1001 FANNIN STREET
SUITE 2300
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
VOICE MAIL (713) 758-4300
FAX (713) 615-5399

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Collins argues that evidence is unnecessary. Bracy argues that if such proof is necessary, their request for discovery should have been granted.

Judicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a habeas corpus petitioner to a new trial. *Brecht v. Abrahamson*, 507 U.S. 619, 53 CrL 2024 (1993). Defined broadly enough, "bias" is a synonym for predisposition, but no one supposes that judges are blank slates. There are prosecution-minded judges and defense-minded judges, and both sorts have predispositions. The existence of such biases does not justify reversal in cases in which no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. Whether the present case even fits that mold may be doubted, but, in any event, for bias to be an automatic ground for the reversal of a criminal conviction, the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased." *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1380 (CA 7 (en banc) 1994).

In rejecting reversal on the basis of a mere appearance of bias, *Del Vecchio* relied in part on a presumption, obviously inapplicable here, that judicial officers perform their duties faithfully. But the fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Judge Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway.

Sometimes—this is the second half of the test that we quoted from *Del Vecchio*—the incentive to engage in biased behavior is so great that inquiry into the actuality of that behavior is pretermitted. But the automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness. Acceptance of Collins' argument would require the invalidating of tens of thousands of civil and criminal judgments, since Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of 18 Illinois judges who have been convicted of accepting bribes. The fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence.

The assumption underlying Collins' argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible, but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that any system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime.

The argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process.

The petitioners also seek discovery, so that they can try to find out whether there was actual bias by Judge Maloney at their trial. Discovery is available in a habeas corpus proceeding not as a matter of course as in an ordinary civil litigation but only if the district judge finds "good cause" to order discovery. Rule 6(a) of the Rules Governing Section 2254 Cases in the U.S. District Courts. The petitioners want to depose "some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in cases where he didn't get bribes," and to get hold of any evidence that the federal government might have obtained in its prosecution of Maloney that he really did lean over backwards in favor of the government in cases in which he was not bribed—perhaps in this very case.

Even if this fishing expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case in which any judge would have ruled in favor of the government in the instances of which the defendants complain.

Without the aid of formal discovery, the petitioners' able counsel could have studied the pattern of Judge Maloney's rulings in cases in which he did and cases in which he did not take bribes, could have inventoried his rulings in the present case to see whether they consistently favored the prosecution, and could have studied the record of Maloney's prosecution by the United States for clues to their theory of bias. If none of these public sources of information has yielded any evidence of bias in our case—and none has—the probability is slight that a program of depositions aimed at crooks and their accomplices and likely to be derailed in any event by real and feigned lapses of memory will yield such evidence. — Posner, C.J.

Dissent: When the trial judge is tainted by a pervasive conflict of interest that cannot be compartmentalized, evidence that the taint had a discernible effect on a given case is unnecessary. Such proof "requires too much and protects too little." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey v. Ohio*, 273 U.S. 510 (1927). The record of Maloney's trial supports the petitioners' claim that he was deliberately tough on defendants who did not bribe him.

On the issue of discovery, I note that cases are fixed not in the courtroom but in bars, bathrooms, and back hallways. The persons with information about the bribery are not likely going to talk without a subpoena, and the petitioners should not be deprived of that instrument. — Rovner, J.

FAILURE TO INQUIRE INTO CONFLICT OF INTEREST CLAIM VIOLATED RIGHT TO COUNSEL, CA 10 SAYS

Habeas petitioner did not have to show prejudice.

A state trial court's refusal to conduct an inquiry into an accused's claim that counsel's joint representation of a co-defendant created a conflict of interest is presumptively prejudicial and warrants federal habeas corpus relief without a showing of an actual conflict, the U.S. Court of Appeals for the Tenth Circuit said April 8. The court went on to say that the facts of the case disclose an actual conflict, arising from the conflicting strategies of the two defendants. (Selsor v. Kaiser, CA 10, No. 94-5223, 4/8/96)

The habeas petitioner and his co-defendant were charged with murder, shooting with intent to kill, and other offenses on the basis of an armed robbery of a store that left one store employee dead and another wounded. Defense counsel repeatedly requested severance of the co-defendants' cases on the ground that their defenses were separate, distinct, and mutually incriminating. The petitioner denied any involvement; in contrast, the co-defendant asserted an insanity defense that required him to admit his conduct, including his participation with the petitioner.

Although the potential conflict of interest was patent, the state trial court did not take adequate steps to determine how the petitioner's defense might be adversely affected, the Tenth Circuit said. Under such circumstances, the Tenth Circuit held, prejudice is presumed. In any event, it added, the record demonstrated that an actual conflict adversely affected the performance of defendant's counsel.

Digest of Opinion: Michael Selsor and Richard Dodson were accused of robbing a store in Tulsa, Okla. During the robbery one of the store employees was shot to death, and the other, Ina Morris, was shot and wounded. Selsor and Dodson were tried together, jointly represented by the same two public defenders from the same office. One attorney conducted both defenses while the other supervised.

At trial, Morris identified Dodson as the man who shot her. She gave no testimony about seeing any other assailant, nor did she testify that she heard any shots other than those from Dodson's gun. Morris' testimony did not implicate Selsor. On the basis of his own and Dodson's statements, Selsor was convicted of armed robbery, shooting with intent to kill, and first-degree murder. Dodson was convicted of shooting with intent to kill but was acquitted of first-degree murder.

In 1991, Selsor filed a pro se petition for federal habeas relief, claiming that he had been denied his Sixth Amendment right to the effective assistance of counsel because of the joint representation. This court held that Selsor's case was controlled by *Holloway v. Arkansas*, 435 U.S. 475 (1978), and directed the district court on remand to "determine whether: (1) Petitioner's objection at trial to the joint representation was timely, and, if so, (2) whether the trial court took 'adequate steps to ascertain whether the risk [of a conflict of interest] was too remote to warrant separate counsel.' " *Selsor v. Kaiser (Selsor I)*, 22 F.3d 1029, 1033–34 (CA 10 1994) (quoting *Holloway*). On remand, the district court held that the state trial court had made an adequate inquiry into the possibility of a conflict of interest.

Whether Selsor received effective assistance of counsel or waived any conflict of interest is a mixed question of fact and law. In *Holloway*, the Supreme Court held that timely objections and accompanying representations by counsel as to the probable risk of conflict due to joint representation, plus a trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain the risk of conflict, amounted to deprivation of the defendants' guarantee of their Sixth Amendment rights.

Here, the state public defender had filed a motion for severance on behalf of Selsor, in which he asserted that the defenses of the two defendants were "separate and distinct," and that co-defendant Dodson "could attempt to implicate [Selsor] in order to try and extricate himself from involvement." Prior to opening statements, the public defender again renewed the motion and then moved for severance three more times during the trial. All those motions were denied.

In making an inquiry into potential conflicts, the trial judge must bear in mind that an "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway*, 435 U.S. at 485. A trial court can require joint representation to continue only if, after a searching inquiry, it is clear that counsel's claim of conflict of interest is "groundless."

The state court below failed to consider the conflicting defenses counsel would present at trial, and instead treated the joint representation problem as internal to the public defender's office. Any adequate consideration of the conflict faced by defense counsel would have revealed the impossibility of going forward with the joint representation, through which Dodson was prepared to assert an insanity defense, requiring admission of his role in the robbery, while Selsor's defense was to deny involvement.

The state next argues that Selsor failed to demonstrate any actual conflict of interest adversely affecting his lawyer's performance. In *Selsor I*, this court concluded that the requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), that an actual conflict be shown presupposes that trial courts conduct an appropriate inquiry when the defendant properly raises the conflict issue. *Holloway*, however, addresses the situation where a trial court fails to make such an inquiry in the face of a defendant's timely objection. In a *Holloway* situation, the defendant need not show actual conflict. Prejudice is therefore presumed with respect to Selsor because the state trial court failed to appoint separate counsel or make an adequate inquiry into the alleged conflict, despite Selsor's timely objection to joint representation.

Moreover, the record demonstrates an actual conflict that adversely affected the performance of Selsor's counsel. Trial transcripts make clear that defense counsel attempted to show that Dodson did not intend to kill Morris but "freaked out" upon hearing Selsor shoot the other store employee, and then simply fired his own gun in Morris' direction. This placed defense counsel into an actual conflict of interest by creating the appearance that Selsor was more culpable than Dodson. That actual conflict adversely affected counsel's performance on behalf of Selsor, and demonstrates violations of Selsor's Sixth and Fourteenth Amendment rights to effective assistance of counsel. — Holloway, J.

CA 9 CLEARS WAY FOR JUSTIFICATION DEFENSE TO CHARGE OF 'FELON IN POSSESSION OF FIREARM'

Threats, government's refusal to provide informer with protection helped make case that he was justified in taking up arms.

An informer whom the government left out in the cold should have been allowed to present evidence in support of a justification defense to an 18 USC 922(g)(1) charge of being a felon in possession of a firearm, the U.S. Court of Appeals for the Ninth Circuit held April 11. The procedural posture of the case required the defendant's version of events be taken as true, but the court pointed out that his "troubling" allegations are supported by the record in many respects. (U.S. v. Gomez, CA 9, No. 94-10520, 4/11/96)

The defendant, without seeking compensation, agreed to assist the government by pretending to accept an international heroin dealer's offer to kill witnesses in a narcotics case against the dealer, in exchange for money or heroin. In its subsequent indictment of the dealer for the murder-for-hire scheme, the government revealed the fact that the defendant was the government's informer. According to the defendant, he soon thereafter began receiving death threats and was forced to go underground when the government refused to make good on a customs agent's promise to provide protection. The defendant was arrested when agents seeking his further assistance discovered that he had armed himself with a shotgun.

Contrary to the district court's conclusion, the threat to the defendant was sufficiently immediate to support a justification defense, the court said. Although the defendant did not have a gun to his head, the drug dealer on whom he had informed had demonstrated his willingness to murder witnesses, and the defendant "was hardly paranoid in fearing that the individual he betrayed to the authorities was out to get him," the court explained. Moreover, unlike other cases, the defendant had not recklessly placed himself in the position of danger and had first sought protection from authorities. In these circumstances, the facts as alleged by the defendant would support a claim that he had no other effective

f. A1b

SHDKT PROCEEDINGS AND ORDERS DATE: [03/15/95]

CASE NBR: [88105237] CSY STATUS: [DECIDED]
SHORT TITLE: [Guerra, Ricardo A.]
VERSUS [Texas] DATE DOCKETED: [080688]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Aug 6 1988	G	Application (A88-114) to continue the stay of mandate pending disposition of petition for writ of certiorari, submitted to Justice White.
2	Aug 6 1988	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Aug 8 1988		Supplemental brief of petitioner Ricardo Aldape Guerra filed.
4	Aug 10 1988		Application (A88-114) granted by Justice White.
7	Sep 12 1988		Order extending time to file response to petition until September 12, 1988.
8	Sep 15 1988		Order further extending time to file response to petition until September 19, 1988.
9	Sep 28 1988		Brief of respondent Texas in opposition filed.
10	Oct 6 1988		DISTRIBUTED. October 28, 1988
11	Jun 23 1989		REDISTRIBUTED. June 29, 1989

*** Related Case - Use VIDE,LS with HF ***

PREVIOUS 1 1 EXIT

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [03/15/95]

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VERSUS [Texas] DATE DOCKETED: [080688]
*** CAPITAL CASE -- No date of execution set *** PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
13	Jul 3 1989		Petition DENIED. Brennan and Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case. **********
14	Jul 18 1989	D	Petition for rehearing filed.
15	Jul 18 1989	G	Application (A89-48) to suspend the effect of the denial of the petition for a writ of certiorari, submitted to Justice White.
16	Jul 20 1989		Application (A89-48) granted by Justice White.
18	Aug 30 1989		Rehearing DENIED.

*** Related Case - Use VIDE,LS with HF ***

PREVIOUS 1 1 EXIT

f. A1b

CCRA NUMBER 69081

PETITIONER

DUE DATE

DOCKET SHEET

Court of Crim Appeals

NAME: Ric.ardo Aldape Guerra

	ATTORNEY:	STATE'S ATTORNEY
DATE FILED: 12-28-82	Michael B. Charlton	John B. Holmes, D. A.
COUNTY: Harris	3934 F. M. 1960 West. Suite 215	Houston 77002
COURT OF APPEALS: N/A	Houston, Tx 77068	
COURT OF APPEALS NUMBER: N/A		
TRIAL COURT: 248th	Ricardo Aldape Guerra #000727	
TRIAL COURT NUMBER: 359,805	Pro Se	
OFFENSE: Capital Murder	Ellis One Unit, H-17	
PUNISHMENT: Death	Huntsville, Texas 77343	
MANDATE ISSUED: 7-6-89 771 11 453		
CONTENTS: Tr & SF 12-12-83, Brief 8-16-84,		

CASE HISTORY

PETITION FOR REVIEW

12-28-82 Motion for extension of time to file SF filed.
12-31-82 Motion granted and time extended to February 25, 1983.
3- 1-83 Motion for extension of time to file Statement of Facts recd. Motion granted and time extended to May 23, 1983.
5-23-83 Motion for extension of time to file Statement of Facts recd. Motion granted and time extended to June 27, 1983.
6-28-83 Motion for extension of time to file Statement of Facts recd. Motion granted and time extended to September 1, 1983.
8-31-83 Motion for extension of time to file Statement of Facts recd. Motion granted and time extended to November 1, 1983.
12-12-83 Transcript & statement of facts filed.
1-3-84 Motion for extension of time to file Apel.Brief recd. Motion granted and time extended to March 2, 1984.
3-6-84 Motion for extension of time to file Apel.Brief recd. Motion granted and time extended to May 2, 1984.
5-2-84 Motion for extension of time to file Apel.Brief recd. Motion granted and time extended to July 2, 1984.
7-3-84 Motion for extension of time to file Apel.Brief recd. Motion granted and time extended to August 16, 1984.NFE.
8-16-84 Motion to file brief in excess of 50 pages filed. Motion granted and brief filed. State's brief due September 17, 1984.
9-17-84 Motion for extension of time to file State's Brief recd. Motion granted and time extended to October 17, 1984.
10-11-84 Motion for extension of time to file State's Brief recd. Motion granted and time extended to November 16, 1984.
11-5-84 STATE'S BRIEF FILED - SET FOR NOVEMBER 28, 1984
11-07-84 RESET FOR DECEMBER 12, 1984
12-12-84 SUBMITTED ON BRIEF & ARGUMENT FOR BOTH

(OVER)

we forgot to copy Cd back 3/13/95