NO. 13-592

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM STEPHENS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION,
PETITIONER

v.

NELSON GONGORA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, **NELSON GONGORA,** asks leave to file the attached Reply to Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has had court-appointed counsel under the Criminal Justice Act, since the Federal action was filed in the District Court and before the Fifth Circuit Court of Appeals. A copy of the Order of the Honorable Judge John McBryde appointing counsel is attached to this Motion.

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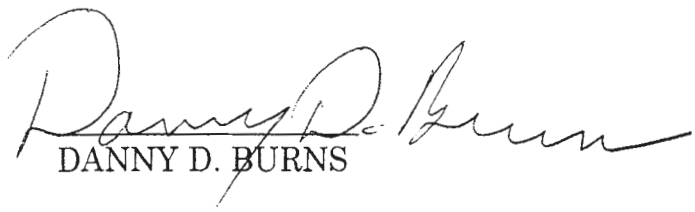
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Leave To Proceed In Forma Pauperis has been mailed postage prepaid to the Honorable **James P. Sullivan**, Assistant Solicitor General, Office of the Attorney General, P.O. Box 12548 (MC059), Austin, Texas 78711-2548 on December 13, 2013.



DANNY D. BURNS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NELSON GONGORA,	§	
	§	
Petitioner,	§	
	§	
VS.	§	NO. 4:06-CV-836-A
	§	
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

O R D E R

On December 14, 2006, came on for telephone conference and hearing the motion of petitioner, Nelson Gongora, for appointment of counsel. Petitioner appeared via telephone. Respondent, Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, also appeared via telephone by and through his counsel, Ellen Stewart-Klein. Jack Strickland, who represented petitioner in the state-habeas proceeding and filed the pending motion on his behalf, also appeared via telephone. Danny Burns ("Burns"), as possible counsel for petitioner in this federal-habeas proceeding, appeared via telephone as well.

The court finds that Burns is qualified pursuant to 18 U.S.C. § 3599(c) to represent petitioner in a habeas-corpus proceeding before the court and that he has agreed to be appointed to represent petitioner.

Further, consistent with the court's rulings during the telephone conference and hearing,

The court ORDERS that:

(1) Petitioner be, and is hereby, granted leave to proceed in forma pauperis;

(2) Petitioner's motion for appointment of counsel be, and is hereby, granted and Burns be, and is hereby, appointed to represent petitioner in this habeas-corpus proceeding;

(3) Petitioner file, by January 30, 2007, his application for writ of habeas corpus, presenting therein only grounds that have been exhausted in the state court, and that respondent file his response[1] to such application within 30 days after the filing of such application;

(4) By December 29, 2006, respondent file with the clerk of this court a true and complete copy of all records of all state court proceedings affecting petitioner organized and filed in the following form:

(a) All items shall be placed and filed in expanding vertical file pockets, each of which shall bear the caption of this action and be

[1]Respondent is cautioned not to file a motion for summary judgment in response to the petition, as such a motion does not fit into the scheme of review of petitions filed under 28 U.S.C. § 2254. The court considers the proceeding to be more in the nature of an appeal; that is, there is a petition and a response. See Rules 2 and 5 of the Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254. Moreover, the rules do not provide for the filing of a reply brief and the court does not ordinarily expect to receive one, unless it so orders.

labeled by file number, starting with the label "File Pocket No. 1" and continuing consecutively thereafter, and have securely affixed to its face a list of the contents of the file pocket, giving a full description of each item contained in the file pocket; and

(b) A master list, which shall be separate from the vertical file pockets, shall be filed, which master list shall list, under file pocket numbers, the contents of each of the file pockets and shall be signed by counsel for respondent.

SIGNED December 14, 2006.

JOHN McBRYDE
United States District Judge

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BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW NELSON GONGORA, and submits the following response to the Petition for Certiorari of the Petitioner William Stephens, Director of the Texas Department of Criminal Justice's Institutional Division and respectfully presents the following arguments as to why certiorari should be denied. This case simply does not warrant a grant of certiorari. 28 U.S.C. §2254(d) provides the limitation on the grant of habeas relief only if the claim was adjudicated on the merits by the State court. The opinion of the Texas Court of Criminal Appeals opinion does not address the Fifth Amendment errors under *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14

L.Ed.2d 106 (1965). The Petitioner Stephens reliance on *Harrington v. Richter*, 562 U.S. ___, 131 S.Ct. 770 (2012) is, therefore, misplaced. The holding by the Fifth Circuit in Respondent Gongora's case is totally consistent with the decision in *Harrington v. Richter*, supra. *Harrington* involved an ineffective assistance of counsel claim wherein there was no treatment of the claim by the State court opinion denying relief. The Ninth Circuit was in error in deciding the federal issue de novo rather than deciding if the application of *Strickland* was an unreasonable application of federal law by the State court because the state court opinions relied upon followed the federal standard and the state court properly applied the correct standard, unlike in Respondent Gongora's case. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) This Honorable Court noted in *Harrington*, that the presumption that the State court decided the federal issue on the merits can be overcome "when there is reason to think some other explanation of the state court's decision is more likely." citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) This Court recently extended *Harrington v. Richter*, 562 U.S. ___, 131 S.Ct. 770 (2012) to cases involving state court opinions where the issue was addressed in an opinion either directly or because state court precedent which was addressed was the same as the federal standard. in *Johnson v. Williams*, 568 U.S. ___ (No. 11-465, decided 2/20/2013). In *Johnson*, the Court held that when the federal issue is presented in the state court brief under both federal and state law, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law

procedural principles to the contrary. *Johnson v. Williams*, 568 U.S. ___, at page 7, 133 S.Ct. 1088 at 1093, 185 L.Ed.2d 105 (2013). In Respondent Gongora's case, the second half of the standard of review was never addressed. In *Johnson* the state court had referred to *United States v. Wood,* 299 U.S. 123, 143-146, showing that the state court was well aware that the juror's questioning and dismissal implicated federal law. *Johnson v. Williams*, 568 U.S. ___, at page 5, 6, 133 S.Ct. 1088 at 1092-1093, 185 L.Ed.2d 105 (2013) This Honorable Court found that the Ninth Circuit relitigated the Sixth Amendment issue regarding the dismissal of the juror rather than making a proper determination that the adjudication on the merits was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court under §2254(d)(1) or that the adjudication was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). *Johnson v. Williams*, 568 U.S. ___, at page 1,2, 6, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). In Respondent Gongora's case the Fifth Circuit found there was no adjudication on the merits, and even if there was an adjudication on the merits, both exceptions apply. The presumption in *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) was rebutted in Respondent Gongora's case because had the state court properly applied the standard of review, the federal error was clear, plain, and not attributable to the reasoning of the state court. The presumption that a State court proceeding adjudicated the issue on the merits is strong but rebuttable. *Johnson v. Williams*, 568 U.S. ___, at page 10, 133 S.Ct. 1088

at 1093, 185 L.Ed.2d 105 (2013). This Court held that when making this determination, per se rules should not be applied. *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088 at 1093, 185 L.Ed.2d 105 (2013).

In Respondent Gongora's case, the Texas Court of Criminal Appeals did not apply clearly established law as determined by Supreme Court precedent. The Texas Court stated the rule correctly but refused to apply the standard of review to the error. This is one of those rare cases where a showing can be made that the federal law was not decided "on the merits" by the Texas Court. The Court of Criminal Appeals never addressed the Fifth Amendment error in reviewing the comments on the defendant's silence at trial by the full standard of review. First, the Texas Court of Criminal Appeals noted that "A prosecutor's comment amounts to a comment on a defendant's failure to testify only if the prosecutor manifestly intends the comment to be, or the comment is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Wead v. State*, 129 S.W.3d 126, 130 (Tex.Crim.App. 2004)" The State court next, instead of applying the standard of review, decided the comments were proper argument. (*Gongora v. State*, AP-74636, unpublished opinion decided 2/1/06, p. 7) The Court of Criminal Appeals never addressed whether the comments were of such character that a typical jury would naturally and necessarily take it to be, a comment on Respondent Gongora's failure to testify. The State prosecutor was attempting to convince the jury that Gongora was the shooter. The prosecutor called him by name "Nelson Gongora, the shooter." During his prohibited comments, the prosecutor did not refer to who was in the vehicle

nor who else the jury "wanted to hear from", stating "Who should we go ahead and present to you? Should we talk to the shooter?". As the learned habeas jurist, Judge John McBryde, found, the prosecutor was intending to comment on the failure to testify of "Nelson Gongora, the shooter." The majority opinion of the panel in this case sets out the comments and shows their prejudicial effect clearly and concisely. There is nothing in this case that justifies a grant of certiorari.

Justice Alito noted in *Johnson v. Williams*, 568 U.S. ___, p. 11, 133 S.Ct. 1088, 1091, 185 L.Ed.2d 105, 111 (2013) that "Because the requirements of §2254(d) are difficult to meet, it is important whether a federal claim was "adjudicated on the merits in State Court." If the federal claim is not adjudicated on the merits in the State Court then the federal courts may address the issue *de novo*. Even under the deferential architecture, the "AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent. See *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)" *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1091, 185 L.Ed.2d 105, 111 (2013) Further in *Johnson,* Justice Alito observed that:

> "If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter. JUSTICE SCALIA is surely correct that such claims have been adjudicated and present federal questions we may review, *post,* at 3–4, but it does not follow that they have been adjudicated "on the merits." By

having us nevertheless apply AEDPA's deferential standard of review in such cases, petitioner's argument would improperly excise §2254(d)'s on-the-merits requirement.

Nor does petitioner's preferred approach [that an irrebuttable presumption that state courts always adjudicate federal claims on the merits] follow inexorably from AEDPA's deferential architecture. Even while leaving "primary responsibility" for adjudicating federal claims to the States, *Woodford* v. *Visciotti*, 537 U. S. 19, 27 (2002) (*per curiam*), AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is "contrary to" clearly established Supreme Court precedent, see *Panetti v. Quarterman, 551 U.S. 930, 953 (2007)*. When the evidence leads *very* clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge."

The Court of Criminal Appeals stated the proper rule for review and then ignored that rule. When the state court started to excuse the misconduct, the Court had "inadvertently" overlooked the federal claim by not deciding whether the jury would take the argument as a comment on the defendant's silence at trial. The Court avoided addressing the federal claim involving the use of Nelson Gongora's silence during his trial as evidence to convict him of capital murder. Petitioner Stephens argues that Nelson Gongora was guilty as a party. As the state prosecutor knew, the

state could not kill Nelson Gongora for robbery. The prosecutor needed to convince the jury that Nelson Gongora was the shooter. He accomplished this task despite the ubiquitous evidence of his innocence as detailed in Justice Higginbotham's statement regarding the denial of rehearing. The panel opinion is correct. The prosecutor kept referring to Gongora's silence during trial to implicate him as the shooter. The Supreme Court has condemned this practice starting in *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) when the Supreme Court first held that state court's were bound by the Fifth Amendment protection against using silence as evidence of guilt. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) held the rule of California which allowed instructions to jury's that they could consider silence as evidence of guilt in limited circumstances was unconstitutional. The Supreme Court in *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) held the prosecution could not use post-arrest, post-Miranda silence to rebut a plea and evidence of insanity with a showing the defendant was sane enough to invoke his rights to remain silence three times and, therefore, according to the prosecution, he was not insane. The jury agreed but the Supreme Court reversed the conviction and sentence holding that *Doyle v. Ohio*, 426 U.S. 610 was controlling.

Since the Texas Court of Criminal Appeals "inadvertently" overlooked the federal claim, as the opinion of the Court of Criminal Appeals fully indicates, Nelson Gongora is entitled to de novo review. Since the Texas Court of Criminal Appeals failed to address the federal claim on the merits, Nelson Gongora is again entitled to more relief than he received.

Respondent Nelson Gongora submits first that the Federal Constitutional issue involved in this case, the Fifth Amendment right to remain silent at a defendant's trial and not have it used as evidence against him was not adjudicated on the merits in the State court proceedings; second, any adjudication by the Texas Court of Criminal Appeals on the Fifth Amendment violations failed to apply the second portion of the standard by not evaluating whether the jury would naturally take the comments as a comment on the defendant's failure to testify and, therefore, the State court proceedings resulted in a decision that was contrary to and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; and third that the decision of the Texas Court of Criminal Appeals was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This case is not worthy of certiorari review because all three of the provisions allowing for habeas relief contained in 28 U.S.C. §2254(d) have been met by the Respondent Gongora.

1. THE TEXAS COURT OF CRIMINAL APPEALS FAILED TO ADDRESS THE FEDERAL ISSUE REGARDING RESPONDENT'S RIGHT TO REMAIN SILENT DURING HIS TRIAL.

The constitutional issue of Respondent's right to remain silent during his trial was never addressed by the Texas Court of Criminal Appeals directly, indirectly, nor by implication. The Texas Court of Criminal Appeals found that the argument commenting on Gongora's silence was "PROPER ARGUMENT" and never examined

the argument in light of clearly established Federal law. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) clearly established a defendant's right to remain silent during his trial and not to have that silence commented upon. In *Salinas v. Texas,* 570 U.S. ___, 4-5, 133 S.Ct. 2174 (2013) Justice Alito referred to *Griffin v. California*, 380 U.S. 609, 613-615 (1965) and noted that one exception to a defendant having to invoke his right to remain silent is found in *Griffin v. California*, 380 U.S. 609, 613-615 (1965). "A criminal defendant need not take the stand and assert his privilege at his own trial. This exception reflects the fact that a criminal defendant has an 'absolute right not to testify.'" *Turner v. United States*, 396 U.S. 398, 433 (1970).

In *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1096, 185 L.Ed.2d 105, 116 (2013), both Justice Alito, who authored the main opinion and Justice Scalia in his concurrence in the judgment, each rejected the proposition that a judgment denying a federal claim is irrebuttably presumed to have been decided on the merits within the meaning of 18 U.S.C. §2254. The majority opinion as written by Justice Alito holds that "If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter." Justice Alito wrote that "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013) Whether

it was inadvertence or simply a decision by the State court not to evaluate the federal claim based upon the intrinsic right and wrong of the matter, the issue of the State's commenting on the defendant's silence was not addressed on the merits.

Even under the more limited circumstances allowing a right to *de novo* review sanctioned by Justice Scalia's concurrence, Respondent Nelson Gongora should receive *de novo* review. In this case, the Texas Court of Criminal Appeals stated the correct standard of review under both the State and Federal Constitutions for determining if a prosecutor's arguments amount to a comment on the defendant's failure to testify but the state court then only addressed the intent of the prosecutor, which in itself was faulty logic. The Texas Court of Criminal Appeals noted that "A prosecutor's comment amounts to a comment on a defendant's failure to testify only if the prosecutor manifestly intends the comment to be, or the comment is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify." The Texas Court of Criminal Appeals never addressed the second standard of whether the comments were of such a character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. This failure to address the Fifth Amendment *Griffin* claim allows *de novo* review. Had the Texas Court of Criminal Appeals addressed the issue under the second standard of review, then the State court would have found the comments on Mr. Gongora's silence during trial constitutionally infirm. The Court of Criminal Appeals then ignored what they just wrote and decided that "When viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on

appellant's failure to produce witnesses other than appellant, which is a permissible area of comment. *Jackson v. State*, 17 S.W.3d 664, 674 (Tex. Crim. App., 2000)" The Court of Criminal Appeals, inadvertently or intentionally, failed to address the federal issue. As Justice Alito noted, "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013) The evidence is obvious that the Court of Criminal Appeals did not apply the proper standard and that the issue raised "has not been evaluated based on the intrinsic right and wrong of the matter." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013). The limitations of 28 U.S.C. §2254(d) do not apply.

2. ANY ADJUDICATION BY THE TEXAS COURT OF CRIMINAL APPEALS ON THE FIFTH AMENDMENT VIOLATIONS FAILED TO APPLY THE STANDARD BY NOT EVALUATING WHETHER THE JURY WOULD NATURALLY TAKE THE COMMENTS AS A COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY AND, THEREFORE, THE STATE COURT PROCEEDINGS RESULTED IN A DECISION THAT WAS CONTRARY TO AND INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES IN *GRIFFIN v. CALIFORNIA, 380 U.S. 609.*

Even if this Honorable Court were to find that the Federal issue was decided on the merits, the two exceptions to the limitation on habeas review found in 28 U.S.C.

§2254(d) each apply and still allow the habeas review and relief *de novo*. As Justice Alito noted, "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013).

The first exception to a limitation on the scope of habeas review is that the State Court opinion "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". Because of the clearly established law as set out in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1224, 14 L.Ed.2d 106 (1965) and the obvious, undeniable references to Mr. Gongora's silence, there cannot be even an inference that the State court decision was a reasonable application of clearly established federal law. Petitioner Stephen's argument to this Court that the Texas Court of Criminal Appeals found that the improper comments were harmless error is not supported by the record in this case because the Texas Court of Criminal Appeals never addressed the full standard of review and their reference to harmless error applies only if the arguments were, as they found, proper arguments. Factually this case was truly a close case on the question of guilt as noted by Fifth Circuit Justice Patrick E. Higginbotham.

On the issue of harm, the statement of Justice Higginbotham on the reasons for denying rehearing en banc sets out the harm in this case. The evidence as the case started out and before any plea agreements to change the co-defendants' testimony to implicate Respondent Nelson Gongora rather than the confessed killer Carlos Almanza

calls into question whether an innocent man has been convicted and sentenced to die. It is significant that Carlos Almanza confessed, without coercion, without payment, without a plea agreement, to his friends and his wife. The evidence as set out in Circuit Judge Higginbotham's opinion respecting the denial of rehearing en banc points to the probability that Respondent Nelson Gongora is innocent. There is evidence to support the conviction of Respondent Nelson Gongora, but there is also ample evidence to acquit him. Based upon the exculpatory evidence, the prosecutor felt compelled to remind the jury that the person he referred to as the shooter had not testified and, therefore, the jury should consider him guilty. The prosecutor did it repeatedly. There was no mistake, there was no accident, there was no attempt to refer to anyone else whom Respondent Nelson Gongora could have called in his defense until after the sustained comments on Respondent Gongora's silence. The only reference the prosecutor was making was to Respondent Nelson Gongora, whom he referred to by name and as the shooter. The Court of Criminal Appeals failure to recognize the clear fact that the prosecutor was attempting to comment on Mr. Gongora's silence resulted in an unreasonable application of the clearly established federal law established by this Honorable Court in *Griffin v. California.*

3. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS WAS BASED UPON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING.

The second exception to the limitation on habeas review is when the State court issued an opinion which resulted in a decision that was based upon an unreasonable

determination of the facts in light of the evidence presented in the State Court proceeding.

The Texas Court of Criminal Appeals held that the complained of argument was "PROPER ARGUMENT" without ever evaluating the error based on the intrinsic right and wrong of the matter . *Gongora v. State,* (Unpublished opinion, No. AP-74,636, decided February 1, 2006) The evidence before the Texas court regarding the comments on Respondent Gongora's silence were as follows:

> "Before you get there, I want to talk about the people you heard from. We're talking about Juan and James through this entire deal. I used his first name because, in this case, we have little brothers involved, you know, Steven Gongora, you know, Pablo Vargas. I'm using first names to keep everybody clear.
>
> Who did you expect us to bring to you? There's six people inside that van. When you look at it, here it is, Who would you expect for us to give to you to establish who the shooter is? Are you going to be satisfied in a case with gang members just looking at one person, even though he telling you the exact truth, no matter what? Even if the time that he first told his story, he told the truth– he told the truth about someone's he's scared to death of – this is James Luedtke. He had nothing against him. He had no crime

pending. He had no reason to hide the truth, He had no reason to talk to us, but he told us the truth.

You listen to people inside there. Who also would you want to hear from, though? The shooter? We're not going to talk to that person. We're not going to make a deal with that person. This person deserves what they get. This person right here–

Mr. Alley: Your Honor, could the record reflect he's pointing at the Defendant's name on the chart– I can't see the Defense exhibit number – as he was making that statement?

The Court: So reflect.

Mr. Granger: Nelson Gongora, the shooter. That's the person on trial. That's the person who deserves to be found guilty of capital murder. Who should we go ahead and talk to? Who should we go ahead and present to you? Should we talk to the shooter? Should we talk to –

Mr. Alley: Your, Honor, I'm going to object. That's a comment on the failure to testify.

Mr. Granger: Let me make that clear. I don't mean talk to the shooter.

What I mean is this. Who –

Mr. Alley: Could I get a ruling on my objection?

The Court: Sustained

Mr. Granger: Let me back up.

Mr. Alley: Could we get an instruction to the jury to disregard that comment?

The Court: Jury will so disregard.

Mr. Alley Move for mistrial, Your Honor.

The Court: Denied

Mr.Granger: Let me say this. And I don't want to give this the wrong impression in any sort of way. We're asking, who do you expect to take the stand? Who do you expect to hear from, right?

Mr. Alley: Your Honor, I object. That's a continuation of the previous comments, and I, again, object to commenting on the failure to testify.

The Court: Sustained.

Mr. Granger: What –

Mr. Alley: Ask that you instruct the jury to disregard that comment.

The Court: Jury will so disregard.

Mr. Alley: Move for a mistrial.

The Court: Denied.

Mr. Granger: I don't want--to make it clear, y'all, Defendant has a Fifth Amendment right not to testify. And, of course – and I don't want to give any wrong impression on that whatsoever. Okay?

What I want to talk about is this. When you talk about the credibility of a person, I wish – and I made a – I made a big mistake there. I'll make it very clear. I'm not talking about, do you want to hear from him, because you can't do that.

Mr. Alley: Your Honor, again, I'm going to object. It's on the same continuing subject matter.

We object. To comment on the failure test –

Mr. Granger: Let me –

Mr. Alley: –to testify.

The Court: As to the particular

statement, overruled.

Mr. Granger: Let me back up and

tell you this. Let me define it by

the roles in the car. That's what I'm trying to get at. Okay?

the roles in the car. That's what I'm trying to get at. Okay?

The roles in the car are this. You have a person inside the case who is the shooter. You have a person inside the car who got out with the shooter. You have a person inside the car who was guilty– or, actually, may have participated in another shooting later that night. You have a person inside the car who is just sitting there who is present. And then you have a person inside the car who is Defendants brother, right? Where is that person? We know the person was there. The could have brought that person, but you never heard from that person. And that's –

Mr. Alley: Your Honor, Im going to object as to what that person is and ask to approach the bench to make a record.

The Court: Counsel Approach

(At the bench, on the record:)

Mr. Alley: I'll be brief. Judge, our objection is that we issued bench warrants and subpoenas. We asked to have people brought in. They took the Fifth. And when he says "that person," that diagram is still up there showing Albert and everybody else, and that is an improper comment, and it's not invited.

Mr. Granger: Judge, I'm trying to correct that right now to

make it better in terms of I'm just talking abo ut the roles of persons involved.

The Court: All right. Sustain the objection, Counselor.

Mr. Rosseau: Excuse me. Let me make one comment for the record also.

Immediately – what J.D. was talking about there, so it's clear for the record, was--That he mentioned the name "Steven Gongora". He mentioned the name, and he said, The Defendant's brother". And he said, "Where is that person?" Steven Gongora is the Defendant's brother, and his name is also on the chart, and that's what he was talking about.

The Court: All right. You need to clear it up, Counselor.

Mr. Granger: I will." (R., Vol. 40, p. 101-105)

The prosecution has commented on the Mr. Gongora's failure to testify at least 5 times and strongly implied it a couple of more times. The defense objected to the comments three times, with two additional comments being made while the defense was objecting to the previous unconstitutional comments, the trial court sustained the objections twice, with a mistrial denied each time and the trial court overruled the third direct comment on Mr. Gongora's silence, in effect telling the jury they could

consider his invocation of his right to remain silent.

The problem is, however, that Mr. Granger instead of clearing it up, commented further on Mr. Gongora's silence. He harped on who else the jury wanted to hear from, having already asked them if they would like to hear from "the shooter" several times. (R., Vol. 40, p. 101, ln 20-24) He repeated this theme in the remainder of his closing arguing stating:

> MR. GRANGER: "When you're considering and evaluating the credibility of the next person–and that's who I'm talking about who you're going to hear from. I'm talking about, when listening to Juan Vargas, there's different people who played different roles. When you consider the fact that we actually spoke to him, that's what I'm talking about. I'm not talking about who would you want to hear from, who would you expect us to call, but I meant to define it in the terms of the roles of those involved in the case. Okay? The roles that are defined in this case are abundantly clear. When you look at all the roles of those persons involved, the person in this case who is, you know, least culpable, besides the person who didn't do anything, is the driver, right? That's what I wanted you to consider. That's what I was trying to discuss about the different roles and who you would expect to hear from or expect us, you know, to be

> looking at. That was it, just examine their roles." (R., Vol. 40, p. 197-108, excerpt from remaining argument of the State)

When combined with the previous argument, the State simply commented again on Mr. Gongora's failure to testify and emphasized the previous references.

TEXAS COURT OF CRIMNAL APPEALS OPINION

The Court of Criminal Appeals addressed the error in terms of the intent of the prosecutor alone and ignored the second prong as to whether "the comment is of such character that a typical jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." (Opinion, p. *10) The Court of Criminal Appeals stated that:

> "When viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on appellant's failure to produce witnesses other than appellant, which is a permissible area of comment. SEE: *Jackson v. State,* 17 S.W.3d 664, 674 (Tex.Crim.App.2000). Nonetheless, the prosecutor's actual comments tended to be inartful and often confusing, leading the trial judge to sustain appellant's objections to the remarks and to instruct the jury to disregard them. However, the court did not abuse its discretion in thereafter overruling appellant's

> various motions for mistrial on this issue. On this record, the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective. Thus the judge reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments." (Opinion, p. *10)

There are two problems with the Court of Criminal Appeals findings. One, the State's arguments when made only referred directly to Respondent Gongora and no one else. The comments were more than inartful, they were direct comments on Mr. Gongora's failure to testify. The State's entire case was attempting to show that Nelson Gongora was the shooter. And the comments kept referring the jury to the shooter's failure to testify, inferring his silence equaled guilt. Second, the trial court sanctioned the jury's consideration of Respondent Gongora's exercise of his right to remain silent by overruling the objection. This Court held in *Malloy v. Hogan*, 378 U.S. 8, 84 S.Ct. 1493-1494, "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement-the right of a person to remain silent unless he chooses to speak in the *unfettered* exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." In *Griffin v. California*, 380 S.Ct. 609 at 613-614, 85 S.Ct. 1229 at 1232, 14 L.Ed.2d 106 (1965) this Court held:

> "...comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy v.*

Waterfront Comm., 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, which the Fifth Amendment outlaws."

This Court has consistently held that comments to penalize a defendant for exercising his right to remain silent are unconstitutional.

Respondent Gongora asserts that the Texas Court of Criminal Appeals never evaluated the Federal right not to have one's silence used as evidence against them nor did the Court of Criminal Appeals address the state court prohibition against commenting on the silence of the accused at trial . This refusal on the part of the Texas Court of Criminal Appeals to even address the issue entitles Respondent Nelson Gongora to a *de novo* review of his claims. Because of the clearly established law as set out in *Griffin v. California*, 380 U.S. 609 (1965) and the obvious, undeniable references to Mr. Gongora's silence, there cannot be even an inference that the State court addressed and properly applied clearly established federal law as set out in *Griffin v. California, 380 U.S. 309.* The Texas Court of Criminal Appeals held that the complained of argument was "PROPER ARGUMENT" without ever evaluating the error based on the intrinsic right and wrong of the matter . *Gongora v. State,* (Unpublished opinion, No. AP-74,636, decided February 1, 2006)

The Texas Court of Criminal Appeals neither addressed nor recognized that the arguments were of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. The Court of Criminal Appeals ignored the standard or review and wrote and decided that "When viewed in

context, the complained-of comments appear to be the prosecutor's attempt to comment on appellant's failure to produce witnesses other than appellant, which is a permissible area of comment. *Jackson v. State*, 17 S.W.3d 664, 674 (Tex. Crim. App., 2000)" The Court of Criminal Appeals, inadvertently or intentionally, failed to address the federal issue. As Justice Alito noted, "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013). The State court evidence indisputably leads to the conclusion that the federal claim under the Fifth Amendment was never properly addressed, directly, indirectly, nor even by inference in the Texas Court of Criminal Appeals and, therefore, the state court's decision resulted in a decision that is contrary to and involves an unreasonable application of, clearly established federal law as decided by this Honorable Court in *Griffin v. Califorania*, 380 U.S. 309. The decision is not just wrong, it is unsupported by the record, by logic, and by all precedent.

The evidence presented in the State court proceeding in this case could not reasonably support the determination by the Texas Court of Criminal Appeals that the prosecutor was attempting to talk about other persons the Respondent Gongora could have called in his defense. The prosecutor never referred to anyone, directly nor indirectly, that Respondent Gongora could have called as a witness to support his defense. The prosecutor constantly referred to the jury's desire to hear from the "shooter" whom the prosecutor identified as Respondent Nelson Gongora. It is

unreasonable and irrational to believe that the prosecutor was not both commenting upon the Respondent Gongora's silence and intending to draw the jury's attention to the fact that Respondent Gongora did not testify and asking them to draw the conclusion that his silence equaled guilt when he kept asking the jury if they wanted to hear from Respondent Nelson Gongora. There is no other conclusion that can be drawn from the arguments other than that the prosecutor wanted the jury to consider Respondent Gongora's silence against him. The evidence and verdict shows the prosecutor got his wish. The Court of Criminal Appeals did not apply the proper standard and the issue raised "has not been evaluated based on the intrinsic right and wrong of the matter." *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105, 118 (2013). *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) clearly established the right to remain silent during one's trial and not to have that silence used as evidence of his guilt. It is an improper comment on an accused person's silence if the comment is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. This is a felony level, experienced prosecutor arguing who he knew was improper and he knew what he was doing and what he was saying.

4. HARM

Petitioner Stephens reliance on *O'Neal v. McAninch,*513 U.S. 432 (1995) is misplaced for two reasons. The three exceptions to deference contained in 28 U.S.C. §2254 are met by Respondent Gongora and he is entitled to de novo review. The definition of harm found in *O'Neal v. McAninch,*513 U.S. 432 (1995) does not diminish

the harm analysis required for relief under the AEDPA. The Fifth Circuit finding of harm was not totally based upon the "grave doubt" holding of *O,Neal v. McAninch*, 513 U.S. 432 (1995). The Fifth Circuit noted that the prosecutor himself had grave doubts that his case would be believed and noted that the Court also had grave doubts that the jury would have convicted had the prosecutor not made the comments on the Respondent's failure to testify. The Fifth Circuit Court of Appeals reasonably found harm. Since the Texas Court of Criminal Appeals, as found by the Fifth Circuit Court of Appeals, failed to address the constitutional error and the finding by the Texas Court of Criminal Appeals was clearly contrary to *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) . As Justice Alito noted in *Johnson v.Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1091, 185 L.Ed.2d 105, 111 (2013) the "AEDPA permits de novo review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent, see *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)." This is one of those rare cases since the Texas Court of Criminal Appeals never addressed the *Griffin* error by the second portion of the standard which looks to whether the jury would naturally take the comments as a comment on the defendant's failure to testify. The opinion of the Texas Court of Criminal Appeals, Appendix, never addresses that standard and cannot be found to have addressed that standard of review because had they done so, they would have had to find the constitutional error. Respondent Gongora is, therefore, entitled to de novo review. All three exceptions to the requirement of deference, 1. never addressed,

2. unreasonable application, and 3. there was an unreasonable determination based upon the facts before the Court of Criminal Appeals, are all present in Respondent Nelson Gongora's case.

From the time of the hearing before the learned habeas jurist, Judge John McBryde, who found the prosecutor was intending to comment on the failure to testify of "Nelson Gongora, the shooter" to the present, it is clear to all that the comments made by the prosecutor were intended to be and were unconstitutional comments on the defendant's failure to testify. The prosecutors who argued the case in the Fifth Circuit Court of Appeals all acknowledged the multiple comments were obvious comments on the Respondent's failure to testify. The only real question in this case was the harm resulting from the multiple violations of the Fifth Amendment of the Constitution of the United States by the prosecutor in this case. He knew his case was in trouble. He knew the original stories of the co-defendants cleared Respondent Gongora of the murder. He knew that the evidence did not support a finding that the killing was in furtherance of any conspiracy, especially in light of the testimony of the only disinterested witness Ms. Sonia Ramos who identified another as the shooter and her testimony that the second person with the shooter ran around in a panic after the shooting which indicates that no one expected or anticipated a murder except the murderer himself.

The State, however, was obviously uncomfortable with their proof that Mr. Nelson Gongora actually was the shooter. They had a real reason to be concerned. The first statement of Juan Vargas showed that he originally said to the police that

Carlos Almanza and James Christopher Luedtke had killed Delfino Sierra. (State Court R., Vol. 1, p. 3, Vol. 37, p. 119-127, Vol. 38, p. 60) It was only after Mr. Juan Vargas was re-interviewed by Detective Ortega that Mr. Vargas orally contradicted his written statement to say that Mr. Nelson Gongora was now the shooter. (R., Vol. 38, p. 64-67) Petitioner Nelson Gongora's statement admitted into evidence denied he was in any way involved in the shooting. (R., Vol. 38, p. 67-78 & States Exhibit 18) Ms. Sonia Ramos testified that she saw three people walking to her left, one wearing a cowboy hat, and then suddenly the one on the left turned and shot the man with the cowboy hat. The man on the right "just kind of ran around, you know, like to get out of the way." (R., Vol. 37, p. 14, 16-17) In the diagram drawn by Detective Ortega from the second Vargas interview, Nelson was on the right of Mr. Sierra and Albert was on Ms. Sonia Ramos' left side as she was looking at them. (R., Vol. 37, p. 40, Vol. 49, Defense Exhibit 3) It was the person farther away from her that took out the gun and shot the man. (R., Vol. 37, p. 45) This description makes Albert the shooter in Detective Ortega's sketch. The bullet paths were from the back right of the crown of the hat and another bullet wound to the left of the hat brim going downward into the brain. (R., Vol. 36, p. 30-33)

Ramiro Enrique testified for the defense that he shared a pod/cell at the Tarrant County Jail with Almanza, who told him he was involved in a robbery during which he shot a Mexican man. Almanza also described the incident and how he and the others left the scene in a van. (R., Vol. 39, p. 65-66). Dylan Griffin testified that as the van pulled up to his house the night of the shooting, he heard Vargas yelling at Orosco,

who subsequently stated to Griffin that he, Orosco, had "just shot a wet back.." (R., Vol. 39, p. 106-108) The evidence for the State was weak.

The jury obviously had a question about Mr. Nelson Gongora's involvement since they requested Mr. Juan Vargas' first statement wherein he exonerated Mr. Nelson Gongora from any activity relating to the death of Mr. Delfino Sierra. (R., Vol. 40, p. 112) They also asked who the two persons were who got out of the van and there was no such question asked. (R., Vol. 40, p. 114-116) The comments on the failure to testify affected Mr. Nelson Gongora's substantial rights. By constantly asking if the jury wanted to hear from Nelson Gongora, the State made Mr. Gongora's silence the best evidence the State had to convict Respondent Gongora.

Even if the Court were to consider the Federal issue as having been adjudicated on the merits, the decision of the Texas Court of Criminal Appeals resulted in a decision that was contrary to and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and subsequent cases. The right to remain silent at one's own trial is an absolute, self effectuating Fifth Amendment Constitutional right. As previously noted, the application of this clearly established Federal law, is in the fact that with the words used, the continued reference to Mr. Nelson Gongora as the shooter, and then asking the jury who they wanted to hear from makes the finding by the Texas Court of Criminal Appeals that the prosecutor was simply trying to comment on the defendant's failure to call other witnesses is contrary to facts before the state court and contrary to clearly established

Federal law as determined by this Honorable Court. The evidence unequivocally points to the fact that the prosecutor manifestly intended the comment to be a reference to Respondent Nelson Gongora's silence and the comment is of such character that a typical juror or any other rational individual of any age would naturally and necessarily take the comments to be, a comment on the defendant's failure to testify. The exceptions to deference have been met.

CONCLUSION AND PRAYER

This case does not warrant certiorari review by this Honorable Court. The State court never addressed the federal issue which allows for de novo review. The State court decision is contrary to clearly established federal law and allows for de novo review. The decision reached by the Texas Court of Criminal Appeals is clearly unreasonable based upon the facts presented to the State court. The harm is shown from the original, non-custodial statements of the co-defendants. The original evidence from the statements of the actors show Respondent Nelson Gongora did not commit this murder nor did anyone, other than the co-defendant anticipate that a murder would be committed. This Honorable Court should deny the Petitioner's request for certiorari.

Additionally, the State's request that this Honorable Court decide the punishment issue raised by *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 713 L.Ed.2d 1140 (1982) is not properly before the Court since the Fifth Circuit Court of Appeals did not address that point of error due to the reversal of the guilt phase of the trial and this

Honorable Court is a Court of last review and not of first review. SEE: *Ford Motor Company v. United States*, 571 U.S. ___ (decided December 2, 2013)

The State's reference to waiting for a decision in *White v. Woodall*, 133 S.Ct. 2886 (2013) (12-794), is without merit. *White v. Woodall* involves a question of whether the Court of Appeals can grant relief on an issue that has not been decided by the Supreme Court. *Griffin v. California*, 380 U.S. 609 at 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) was decided long before Respondent Nelson Gongora's case arose. The question in *White v. Woodall* as to whether harmless error applies to a jury charge the Supreme Court has never required is not an issue in Respondent Nelson Gongora's case involving repeated violations of his Fifth Amendment right to remain silent during his trial and not have that used against him which has been repeatedly condemned by this Honorable Court.

Respondent Nelson Gongora respectfully submits that this case was correctly decided on the law long established by the Supreme Court and Respondent Nelson Gongora respectfully requests that the Application for Certiorari filed by Petitioner

William Stephens, Director of the Texas Department of Criminal Justice Correctional Division be denied in all things.

Respectfully submitted;

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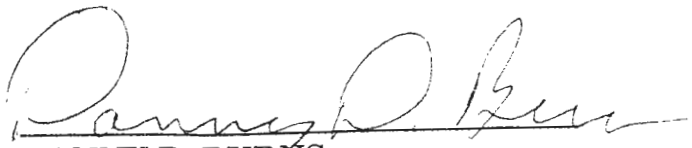
CERTIFICATE OF COMPLIANCE

Pursuant to the Supreme Court Rule 33.2(b), the undersigned certifies this brief complies with the type-volume limitations listed in Rule 33.2(b).

1. Exclusive of the exempted portions, the cover page, table of contents, and table of cases and authorities, this Certificate of Compliance, and the Motion to Proceed In forma pauperis, the Reply to the petition for certiorari consists of 32 pages prepared in Century Schoolbook fonts, 12 points.

2. The Brief was prepared in proportionally spaced typeface using WordPerfect X6 in Century Schoolbook, 12 pt.

3. The Undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits of Rule 33.2 may result in the Court's striking the brief and imposing sanctions against the person signing the brief.



DANNY D. BURNS

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. AP-74,636

NELSON GONGORA, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL OF CAUSE NO. 0810355A

FROM THE 371ST JUDICIAL DISTRICT COURT

TARRANT COUNTY

Meyers, J., ***delivered the opinion of the Court, in which*** **Price, Keasler,** ***and*** **Hervey, JJ.,** ***join.*** **Keller, P.J.,** ***concurs in points of error seventeen and eighteen, and otherwise joins the opinion, and*** **Cochran, J.,** ***concurs in point of error fifteen, and otherwise joins the opinion.*** **Womack, J.,** ***filed a dissenting opinion, in which*** **Johnson,** ***and*** **Holcomb, JJ.,** ***join.***

In March 2003, a jury convicted appellant of capital murder. Tex. Penal Code Ann. § 19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071, § 2(g).[1] Direct appeal to this Court is automatic. Art. 37.071, § 2(h). Appellant raises twenty-seven points of error. We affirm.

FACTS

On the night of April 7, 2001, Juan Vargas was driving his van accompanied by appellant, Carlos Almanza, Albert Orosco, Steven Gongora, and James Luedtke when they saw Delfino Sierra walking down the street and decided to rob him. When Vargas pulled over, appellant and Orosco jumped out of the van, ran toward Sierra, and demanded his money. When Sierra began to run, appellant shot him in the head with a .38 caliber handgun. Appellant and Orosco then returned to the van. Appellant told his companions that he "took [Sierra's] dreams" and did "what [he] had to do" and warned them to remain silent. Appellant appeared to be bragging about what he had done. The group then returned to appellant's house for a cookout.

Appellant and Vargas were leaders in the criminal street gang Puro Li'l Mafia ("PLM"). Approximately two hours after appellant killed Sierra, Vargas drove appellant and Almanza to the house of a rival gang member. Almanza, in order to become a PLM member, shot into the house in retaliation for drive-by shootings that had occurred at appellant's house. During the shooting, appellant stood outside the van armed with a nine-millimeter handgun. The victim of this shooting survived.

Several days later, an anonymous phone call helped establish that Vargas and Maria Morales owned the suspect van. Vargas was arrested on April 27, and gave a written statement to police naming Almanza as Sierra's killer. On May 9, Vargas met with Detective Carlos Ortega to correct the falsehoods in his first statement and identified appellant as the shooter. Vargas explained that he had initially lied because he feared retaliation from appellant.

On June 19, after he was arrested pursuant to a warrant, appellant waived his rights and gave a voluntary signed statement. In his statement, appellant admitted getting out of the van with others to rob Sierra. Then he heard shots and saw the man lying on the ground, but claimed not to know who fired the shots.

INDICTMENT

In his first three points of error, appellant claims that the trial court erred in overruling his motion to quash the indictment because it failed to put him on notice that the State would be seeking to establish his criminal responsibility as a party or co-conspirator. *See* Texas Penal Code §§ 7.02(a) and (b). Appellant asserts that the law of parties must be pled in the indictment because guilt as a party is an "additional element of the offense" which the State must prove beyond a reasonable doubt. Appellant relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to support his argument.

Apprendi and *Ring* apply to facts that increase the penalty for a crime beyond the statutory maximum. Guilt as a party does not increase a defendant's responsibility for a crime, nor does it increase the maximum sentence to which a defendant might be subjected. It is well settled that the law of parties need not be pled in the indictment. *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005); *Marable v. State*, 85 S.W.3d 287 (Tex. Crim. App. 2002). *Apprendi* and *Ring* do not change this caselaw. Points of error one through three are overruled.

ADMISSION OF EVIDENCE

Appellant complains in his fourteenth point of error that the trial court abused its discretion when it prohibited him from cross-examining Vargas about an aggravated robbery offense he had allegedly committed with Morales using the same van as the one used in the instant capital murder. Appellant asserts that the trial court's ruling denied him his confrontation, cross-examination, and due process rights.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 315 (1974). A primary interest secured by the Confrontation Clause is the right of cross-examination. *Davis*, 415 U.S. at 315. A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias, or interest for the witness to testify. *Hoyos v. State*, 982 S.W.2d 419, 421 (Tex. Crim. App. 1998). Each Confrontation Clause issue must be weighed on a case-by-case basis, carefully taking into account the defendant's right to cross-examine and the risk factors associated with admission of the evidence. *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). In weighing whether evidence must be admitted under the Confrontation Clause, the trial court should balance the probative value of the evidence sought to be introduced against the risk of harm its admission may entail. *Id.* The trial court maintains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence. *Id.*; *Lagrone v. State*, 942 S.W.2d 602, 613 (Tex. Crim. App.), *cert. denied*, 522 U.S. 917 (1997).

In a hearing outside the presence of the jury, appellant told the court that Vargas had participated in two shootings that were the subject of a plea agreement. Further, he claimed that Vargas was involved in an aggravated robbery with his wife, Maria Morales, and appellant needed to ask him about that crime for purposes of establishing bias for the State. Appellant understood that Vargas intended to invoke his Fifth Amendment right to remain silent about the aggravated robbery, but asserted that he needed to call Vargas to the stand to determine if that was, in fact, what was going to happen.

Vargas testified outside of the jury's presence that he had been arrested as a co-defendant for the same capital murder for which appellant was on trial. Pursuant to a plea agreement in which he agreed to testify against appellant, Vargas was allowed to plead guilty to a reduced charge of murder and would have a sentence of 23 years imposed at a later time. The State also agreed that it would not charge Vargas in the second shooting that happened around the same time. In response to questioning, Vargas told the court that Morales was his common-law wife and that she had been charged with aggravated robbery in a case unrelated to the instant offense in which she had pled guilty to the lesser charge of robbery and was currently serving the time imposed on that plea. Vargas stated that he had never been arrested for that crime, and he understood that the plea bargain he had struck with the State had nothing to do with that offense. In fact, the State made it clear, and Vargas stated that he understood, that if evidence later came to light connecting him to that robbery, he could be charged.

Appellant then attempted to establish through cross-examination that Vargas owned the van that was used in both this capital murder and the robbery for which Morales was serving time. However, Vargas' attorney informed the court that Vargas intended to invoke his Fifth Amendment right to remain silent with respect to any question pertaining to Vargas's alleged participation in that robbery. Appellant then asked each question for the record, and Vargas invoked his right to remain silent. Vargas did testify that he did not have a deal with the State concerning the aggravated robbery, and his counsel reiterated that the robbery was not discussed during the plea negotiations. The prosecutor commented that it was intentionally not included in the discussions because there was no current evidence of Vargas's involvement, not because of some oversight.

At the end of the examination, appellant argued that allowing Vargas to invoke the Fifth Amendment violated Rule of Evidence 613(b), denied appellant "the right of effective cross-examination and confrontation in front of the jury," and prevented him from getting impeachment evidence before the jury. The State and Vargas's counsel stated that the defense could ask Vargas whether the aggravated robbery offense had any bearing on his plea bargain with the State regarding the instant offense. However, both objected to the defense asking Vargas questions about the underlying facts of the robbery and whether he was involved with it in any way, including questions involving his ownership of the van.

In the presence of the jury, Vargas testified that he had reached a plea agreement with the State in the instant case. He stated that he had pled guilty to a reduced charge of murder and would receive a twenty-three-year sentence in exchange for his truthful testimony against appellant. Vargas testified that, after he was arrested for this offense, he initially told the police detective that Almanza had shot the victim. However, Vargas admitted to the jury that he had lied in that first statement because he was afraid appellant would harm his family if he told the truth. After obtaining counsel, he again met with the detective and informed him that he had lied in his earlier statement.

Under these circumstances, the trial court did not abuse its discretion in refusing to allow appellant to question Vargas about the aggravated robbery charge. The testimony established that the robbery was unrelated to the instant offense, and the issue of Vargas's alleged involvement in the robbery was deliberately not included within the terms of plea agreement securing Vargas's testimony in this case. The trial court's ruling did not prevent appellant from pursuing all relevant avenues of cross-examination with Vargas. *Hoyos*, 982 S.W.2d at 421. An unrelated offense for which there was no evidence demonstrating Vargas's involvement was not relevant.

Appellant also complains in this point of error that the trial court erred when it prohibited him from questioning Vargas about statements Vargas made to Morales following the capital murder which exonerated appellant or at least "impeached [Vargas's] versions of the facts related to the jury at trial and to the police on [two] different occasions." However, appellant does not set out in his brief what statements Vargas allegedly made to his wife, and the only record citations he provides refer to a statement and testimony from Morales. Without more, this portion of appellant's point of error is inadequately briefed, and we refuse to address it. Tex. R. App. P. 38.1. Point of error fourteen is overruled.

In his related fifteenth point of error, appellant complains that the trial court abused its discretion when it prohibited him from questioning Morales about the aggravated robbery that she had allegedly committed using the same van as the one used in this capital murder offense. Appellant asserts that the trial court's ruling violated his confrontation, cross-examination, and due process rights.

Because the aggravated robbery was not related to the instant crime, and because the commission of that offense had no bearing on the plea agreement reached with Vargas, testimony about the robbery was not relevant to appellant's trial, and the court's ruling did not violate appellant's confrontation rights. Therefore, the trial court did not abuse its discretion when it prohibited this testimony.

Appellant also complains in this point of error that the trial court erred when it prohibited him from examining Morales about statements Vargas made to her following the instant offense which exonerated appellant or at least "impeached [Vargas's] versions of the facts related by him to the jury at trial and to the police on [two] different occasions."

In a statement given to the police, Morales stated that on a night around the time of the offense, Vargas came home crying. Although he would not initially tell her the reason, Vargas eventually explained that he and some others had been in the van when they saw a man (apparently referring to Sierra) that Almanza claimed owed him money. When they stopped the van, Almanza killed the man for no reason.[2]

Even if the trial court abused its discretion when it refused to allow appellant to cross-examine Morales regarding these statements, appellant was not harmed by this error. *See* Tex. R. App. P. 44.2. Appellant claims that Morales's information would have impeached Vargas's version of the facts as described to the jury at trial. However, Vargas admitted at trial that he had initially told the police that Almanza had killed Sierra but that he later recanted that statement explaining that he had lied. Thus, the information that Vargas initially claimed that Almanza killed Sierra was elicited from Vargas himself. That he may have also told his wife this version of the story does not further impeach his testimony at trial. Allowing appellant to cross-examine Morales on this point would not have exposed any further motive, bias, or interest on Vargas's part. Appellant's fifteenth point of error is overruled.

In his sixteenth point of error, appellant complains that the trial court abused its discretion in overruling appellant's motion for mistrial "because of the State's calculated actions" to deny appellant mitigating testimony from his sisters, Ana and Erika Gongora. Appellant claims that the State and the trial court colluded against him to deny him this evidence, and thereby, denied him due process.

In arguing his point, appellant explains that, prior to their testimony, his sisters were arrested on warrants alleging that they had threatened a co-defendant's family members who had been watching the proceedings. Appellant claims that the arrest was conducted at the direction of the prosecutors and with the assistance of the court's bailiffs and the trial court judge after *ex parte* communications with the court. Furthermore, because the State refused to dismiss the charges or offer grants of immunity "so as to allow these witnesses to testify at the punishment phase" of appellant's trial, he was deprived of this evidence because both sisters invoked their right to remain silent when called to the stand. As a result, appellant was denied mitigation evidence and due process.

According to affidavits filed by appellant's investigator, the sisters would have testified to "family socio-economics, family work stability, the practical effects of residential mobility, substance abuse within the household, general family/home environment, and [appellant's] peers." The investigator stated in the affidavit that this testimony from the sisters was critical because the other relatives who could testify to these issues had criminal histories, suffered from learning or language disabilities that might render their testimony unclear, or were not fluent in English, thereby reducing the persuasiveness of the testimony.

The record does not support appellant's assertion that the State's actions deprived him of this evidence. The arrests resulted from the sisters' voluntarily undertaken criminal acts. Further, the arrests were made outside of the presence of the jury, and the State agreed that, should the sisters testify, no questions would be asked concerning the arrests or the facts underlying the arrests. The trial court supported this concession, stating that no such evidence would be allowed. Finally, although appellant apparently preferred the sisters' testimony to that of other family members for various reasons, other

family members could have testified, and to some extent did testify, to the same information that appellant asserts could only be provided by Ana and Erika. This record does not establish that appellant was denied this evidence, only that he was denied the evidence in the precise manner in which he wished to present it. Thus, the trial court did not abuse its discretion in denying appellant's motion for mistrial.

Appellant also claims in this point that the trial judge's role in these arrests compromised the fairness and impartiality of the tribunal and showed that the judge was not in fact a "neutral and detached" magistrate. Appellant contends that, following this incident, the judge should have recused himself from the remainder of the proceedings. However, appellant failed to raise this issue at trial by filing a motion to recuse or otherwise challenging the judge. Therefore, this portion of appellant's claim is not preserved. Tex. R. App. P. 33.1. Appellant's sixteenth point of error is overruled.

LESSER INCLUDED OFFENSE CHARGE

In his seventeenth point of error, appellant asserts that the trial court abused its discretion in failing to include an instruction on the lesser-included offense of robbery in the jury charge at the guilt phase. In his eighteenth point of error, appellant asserts that the trial court abused its discretion in overruling his objection to the absence of such an instruction. Appellant asserts that the admission of his confession at trial, in which he admitted participation in the robbery but denied any part in the murder, supports the inclusion of such an instruction.

A charge on a lesser-included offense should be given when (1) the lesser-included offense is included within the proof necessary to establish the offense charged; and (2) there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App.), *cert. denied*, 510 U.S. 919 (1993). The evidence must be evaluated in the context of the entire record, and the reviewing court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998); *Rousseau*, 855 S.W.2d at 672. Any evidence that the defendant is guilty only of the lesser-included offense is sufficient to entitle the defendant to a jury charge on the lesser-included offense. *Id.* However, the evidence must establish the lesser-included offense as a valid rational alternative to the charged offense. *Wesbrook v. State*, 29 S.W.3d 103, 113-14 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001); *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997).

The State concedes that robbery is a lesser-included offense of the instant capital murder. Therefore, the first prong is met. We must next determine whether there is some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Salinas*, 163 S.W.3d at 741.

According to appellant, his own written statement is sufficient to support the lesser-included instruction on robbery. In his statement, appellant claimed that, "All we wanted to do is get a little money and go about our business." However, this statement must be evaluated in the context of the entire record. *Moore*, 969 S.W.2d at 8; *Rousseau*, 855 S.W.2d at 672. Even if the jury had believed appellant's statement in its entirety, it still would not have entitled him to a lesser-included charge of robbery. Appellant was indicted as a party or co-conspirator to the capital murder. Tex. Penal Code §§ 7.02(a) and (b). Under these circumstances, appellant was criminally responsible for his co-defendant's actions, and because a murder occurred, appellant could also be held to answer for that crime. Thus, the jury could not rationally have acquitted appellant of capital murder and convicted him only of robbery. The trial court did not abuse its discretion in refusing to give the lesser-included offense instruction. Points of error seventeen and eighteen are overruled.

PROPER ARGUMENT

In points of error nineteen through twenty-one, appellant asserts that the trial court abused its discretion in overruling his motion for mistrial based upon the prosecutor's improper comment on his failure to testify. Specifically, appellant complains about the following argument:

[THE PROSECUTOR:] I want to talk about the people you heard from. We're talking about Juan [Vargas] and James [Luedtke] through this entire deal. I used his first name, because, in this case, we have little brothers involved, you know, Steven Gongora, you know, Pablo Vargas. I'm using first names to keep everybody clear.

Who did you expect us to bring to you? There's six people inside that van. When you look at it, here it is. Who would you expect for us to give to you to establish who the shooter is? Are you going to be satisfied in a case with gang members just looking at one person, even though he's telling you the exact truth, no matter what? Even if the time that he first told this

story, he told the truth - he told the truth about someone he's scared to death of - this is James Luedtke. He had nothing against him. He had no crime pending. He had no reason to hide the truth. He had no reason to talk to us, but he told us the truth.

You listen to people inside there. Who else would you want to hear from, though? The shooter? We're not going to talk to that person. We're not going to make a deal with that person. This person deserves what they get. This person right here -

[DEFENSE COUNSEL:] Your Honor, could the record reflect he's pointing at the Defendant's name on the chart - I can't see the Defense exhibit number - as he was making the statement?

THE COURT: So reflect.

[THE PROSECUTOR:] Nelson Gongora, the shooter. That's the person on trial. That's the person who deserves to be found guilty of capital murder.

Who should we go ahead and talk to? Who should we go ahead and present to you? Should we talk to the shooter? Should we talk to -

[DEFENSE COUNSEL:] Your Honor, I'm going to object. That's a comment on the failure to testify.

[THE PROSECUTOR:] Let me make that clear. I don't mean talk to the shooter. What I mean is this. Who -

Defense counsel then asked for a ruling on his objection and the trial court sustained it. The trial court then granted counsel's request for an instruction to the jury to disregard the comment but overruled counsel's motion for a mistrial. The prosecutor continued:

[THE PROSECUTOR:] Let me say this. And I don't want to give the wrong impression in any sort of way. We're asking, who do you expect to take the stand? Who do you expect to hear from, right?

[DEFENSE COUNSEL:] Your Honor, I object. That's a continuation of the previous comments, and I, again, object to commenting on the failure to testify.

The court again sustained appellant's objection to the prosecutor's comment, granted his request to instruct the jury to disregard the comment, and overruled his motion for a mistrial. The prosecutor continued:

[THE PROSECUTOR:] I don't want - to make it clear, y'all, Defendant has a Fifth Amendment right not to testify. And, of course - and I don't want to give any wrong impression on that whatsoever. Okay?

What I want to talk about is this. When you talk about the credibility of a person, I wish you - and I made a - I made a big mistake there. I'll make it very clear. I'm not talking about, do you want to hear from him, because you can't do that.

[DEFENSE COUNSEL:] Your Honor, again, I'm going to object. It's on the same continuing subject matter. We object to comment on the failure . . . to testify.

THE COURT: As to that particular statement, overruled.

[THE PROSECUTOR:] Let me back up and tell you this. Let me define it by the roles in the car. That's what I'm trying to get at. Okay?

The roles in the car are this. You have a person inside the car who is the shooter. You have a person inside the car who got out with the shooter. You have a person inside the car who was guilty - or, actually, may have participated in another shooting later that night. You have a person inside the car who is just sitting there who is present. And then you have a person inside the car who is the Defendant's brother, right? Where is that person? We know the person was there. They could have brought that person, but you never heard from that person. And that's -

[DEFENSE COUNSEL:] Your Honor, I'm going to object as to what that person is and ask to approach the bench to make a record.

THE COURT: Counsel approach.

(At the bench, on the record:)

[DEFENSE COUNSEL:] I'll be brief.

Judge, our objection is that we issued bench warrants and subpoenas. We asked to have people brought in. They took the Fifth. And when he says "that person," that diagram is still up there showing Albert [Orosco] and everybody else, and that is an improper comment, and it's not invited.

[THE PROSECUTOR:] Judge, I'm trying to correct that right now to make it better in terms of I'm just talking about the roles of the persons involved.

THE COURT: All right. Sustain the objection, Counselor.

[THE PROSECUTOR:] Excuse me. Let me make one comment for the record also.

Immediately - what [the prosecutor] was talking about there, so it's clear for the record, was that he mentioned the name "Steven Gongora." He mentioned the name, and he said, "The Defendant's brother." And he said, "Where is that person?"

Steven Gongora is the Defendant's brother, and his name is also on the chart, and that's what he was talking about.

THE COURT: All right. You need to clear it up, Counselor.

[THE PROSECUTOR:] I will.

(Open court:)

Defense counsel then asked if his objection was sustained. The trial court sustained the objection and, on request of defense counsel, instructed the jury to disregard the comment. The trial court then overruled appellant's motion for mistrial. The prosecutor continued:

[THE PROSECUTOR:] Ladies and gentlemen, I want to wrap this up, because that's what I'm talking about, the confusion in the case.

When I - when you're talking about the people inside the car, this is it. You have the person inside the van and, from all the testimony, established one person is the shooter. You have a person in the car who got out and could possibly have stopped the killing from ever taking place. You have a person inside the car, by the testimony, you all know was involved in another shooting later that night. You have a person in the car who was related to the Defendant. That is his brother. Right? Then you have a person inside there who is just present. Okay?

* * *

Those are the different roles of the persons inside the car. You ask who - you know, you hear from this case, and who should - you know, how to determine the credibility. Who do you want to hear from? Who do you expect to hear from? The person who wasn't involved at all, that had nothing at all, just present during that deal? Of course, you hear from that person.

When you're considering and evaluating the credibility of the next person - and that's who I'm talking about in talking about who you're going to hear from. I'm talking about, when listening to Juan Vargas, there's different people who played different roles. When you consider the fact that we actually spoke to him, that's what I'm talking about. I'm not talking about who would you want to hear from, who would you expect us to call, but I meant to define it in the terms of the roles of those involved in the case. Okay?

The roles that are defined in this case are abundantly clear. When you look at all the roles of those persons involved, the person in this case who is, you know, least culpable, besides the person who didn't do anything, is the driver, right?

That's what I wanted you to consider. That's what I was trying to discuss about the different roles and who you would expect to hear from or expect us, you know, to be looking at. That was it. Just examine their roles.

When you look at all of this, the facts in the case are clear when you establish who is the shooter. Determine the credibility regarding what you heard. Determine the credibility by asking whether their statements were consistent. The consistencies - consistencies throughout this trial are abundantly clear.

When you look at this case, the fact is this. When Nelson Gongora got back inside his car - excuse me - got back inside the van, was he remorseful when he got back inside there? No. You heard from Juan and James. When he got back inside there, the fact is, he wasn't crying. The fact is, he was not remorseful. The fact is, he was not yelling at someone, saying, "Why did you kill this person?" You heard from them. The fact is, when he got back inside there, he was bragging about what he did.

You heard from James Luedtke what [appellant] said when he got out - got inside that van. He said this. "I took his dreams. I took his dreams."

Well, he not only took his dreams, he took the family's dreams. He took a family's dreams. He took his brother's dreams. He took his children's dreams. Took his wife's dreams. He took all of Delfino Sierra's family's dreams.

A prosecutor's comment amounts to a comment on a defendant's failure to testify only if the prosecutor manifestly intends the comment to be, or the comment is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Wead v. State*, 129 S.W.3d 126, 130 (Tex. Crim. App. 2004). It is not sufficient that the comment might be construed as an implied or indirect allusion to the defendant's failure to testify. *Id.*

When viewed in context, the complained-of comments appear to be the prosecutor's attempt to comment on appellant's failure to produce witnesses other than appellant, which is a permissible area of comment. *See Jackson v. State*, 17 S.W.3d 664, 674 (Tex. Crim. App. 2000). Nonetheless, the prosecutor's actual comments tended to be inartful and often confusing, leading the trial judge to sustain appellant's objections to the remarks and to instruct the jury to disregard them. However, the court did not abuse its discretion in thereafter overruling appellant's various motions for mistrial on this issue. On this record, the prosecutor's comments were not so blatant that they rendered the instructions to disregard ineffective. Thus, the judge reasonably concluded that the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments. *See Moore v. State*, 999 S.W.2d 385, 405-06 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000). Points of error nineteen through twenty-one are overruled.

In his twenty-second point of error, appellant complains that the trial court abused its discretion in overruling his motion for mistrial because of the prosecutor's improper argument at the punishment phase of trial. During argument, the prosecutor reviewed with the jury evidence of other crimes appellant had committed. In reviewing the evidence of an assault appellant committed within three months of becoming an adult, the prosecutor reminded the jury that the surviving victim had not been shown a photo spread in the case and the wrong person, Pablo Vargas, had been charged with the crime. When the victim came to court, she saw the person charged and stated that he was not the person who committed the crime. The prosecutor then made the following statements of which appellant now complains:

[THE PROSECUTOR:] In this case, the criminal justice system somewhat failed [the victim] Amy Arreola, and y'all can resolve this. Something kind of unique in that case happened. They didn't show the victim a photo spread. No one was shown a photo spread in that case. Sure enough, when she went to court, when the person who was supposedly charged with this offense went to court, Amy looked at this person and said, "That's not the person who did it."

That's why [co-counsel] offered these plea papers here. Y'all heard, once the victim went to court out at juvenile, Amy, she looked at the person who was willing to accept the guilt for this - remember, that was Pablo Vargas. And you heard from Maria Almendarez [a witness who identified appellant as the actual perpetrator]. Why would [Vargas] do that? *Frankly, because having to rat out [appellant] has more repercussions than simply accepting the guilt.*

(Emphasis added). Appellant then objected that this argument was outside of the record, and the trial court sustained the objection. The court thereafter granted appellant's request that the jury be instructed to disregard the comment, but denied appellant's motion for mistrial.

Even assuming that the prosecutor's comment was improper, it was not so blatant that it rendered the instruction to disregard ineffective. Thus, the judge reasonably concluded that the instruction to disregard effectively removed any possible prejudice caused by the prosecutor's comment. *See Moore*, 999 S.W.2d at 405-06. Point of error twenty-two is overruled.

CONSTITUTIONALITY AND RELATED ISSUES

In his fourth through ninth points of error, appellant claims that the mitigation question submitted to the jury pursuant to Article 37.071, section 2(e), is unconstitutional, and that he was denied his right to due process and to a jury trial because the court refused to instruct the jury that the State had the burden to prove beyond a reasonable doubt that there was insufficient mitigating evidence to support a life sentence. Appellant relies upon the United States Supreme Court's opinions in *Ring*, 536 U.S. 584, *Apprendi*, 530 U.S. 466, and their progeny to support his argument. We have previously rejected such claims and appellant has given us no reason to revisit the issue here. *See Perry v. State*, 158 S.W.3d 438, 446-47 (Tex. Crim. App. 2004), *cert. denied*, 126 S.Ct. 416 (2005). Appellant's fourth through ninth points of error are overruled.

In his tenth through twelfth points of error, appellant claims that the Texas capital- sentencing scheme is unconstitutional, and that he was denied due process and his right to a jury trial because the court refused to define "probability" for the jury as that term is used in the future-dangerousness punishment question. *See* Article 37.071, § 2(b)(1). This Court has repeatedly held that failing to define the term "probability" does not render the death-penalty statute unconstitutional. *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004), *cert. denied*, 125 S.Ct. 1697 (2005). Points ten through twelve are overruled.

Appellant asserts in his thirteenth point of error that he was denied his constitutional rights

because the Texas death penalty scheme diminishes the burden placed upon the State of Texas to establish an actor's guilt of an intentional capital murder on evidence amounting to only mere anticipation of the act of [sic] although the actor's [sic] neither intended the result nor the same flowed from his own intentional conduct so that the Texas death penalty scheme is unconstitutional.

In arguing his point of error, appellant refers to both the conviction of a defendant and the process of sentencing-two different phases of trial to which slightly different laws can apply. Thus, appellant's point as phrased is confusing. Nonetheless, we interpret appellant's point to be a challenge to the constitutionality of what has come to be known as the "anti-parties" charge of Article 37.071, section 2(b)(2), because of his citation to the United States Supreme Court cases of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), to support his claim.

Both *Enmund* and *Tison* were concerned with the implementation of the death penalty on defendants who were not proven to have an intent to kill. In *Enmund*, the Supreme Court held that the Eighth Amendment of the United States Constitution proscribes the execution of an individual who, albeit acting in the commission of a crime with others, does not himself intend that murder be committed and participates in only an attenuated capacity. *Enmund*, 458 U.S. at 790-91; *see also Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996). In *Tison*, the Supreme Court clarified *Enmund* and held that the federal constitution does not proscribe the execution of a major participant in an offense who possesses "reckless indifference" towards a murder committed by parties acting with him in a crime. 481 U.S. at 158; *Lawton*, 913 S.W.2d at 555.

The testimony in the instant case showed that appellant himself exited the van and shot the victim. Thus, he was a major participant in an offense who possessed "reckless indifference" towards the murder. Considering the evidence, the fact that the jury was authorized by the charge to convict appellant as a party does not make Article 37.071, section 2(b)(2) unconstitutional as applied to appellant in this case. *See Cantu v. State*, 939 S.W.2d 627, 644 (Tex. Crim. App. 1996) (holding that in reviewing the constitutionality of a statute, we view the statute as applied to appellant only). Appellant's thirteenth point of error is overruled.

In his twenty-third point of error, appellant asserts that the "10/12" rule of Article 37.071 violates the Constitution. In his twenty-fifth point, appellant asserts that the death-penalty scheme is unconstitutional "because of the impossibility of simultaneously restricting the jury's discretion to impose the death penalty while also allowing the jury unlimited discretion to consider all evidence militating against imposition of the death penalty." This Court has previously considered and rejected these claims, and appellant has given us no reason to reconsider them here. *Escamilla*, 143 S.W.3d at 828. Appellant's twenty-third and twenty-fifth points of error are overruled.

In his twenty-fourth point, appellant asserts that he was denied due process by this Court's refusal to review the sufficiency of the mitigation evidence. In his related point of error twenty-six, appellant asserts that there is sufficient evidence of mitigating circumstances to require that appellant's death sentence be set aside and reformed to reflect a sentence of life in

prison. Appellant correctly states that we do not review the sufficiency of the mitigation evidence. *See Green v. State*, 934 S.W.2d 92, 106-07 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997). We have also held that the failure to conduct such a review does not violate an appellant's constitutional rights. *Id.* Appellant gives us no reason to reconsider that holding. Points of error twenty-four and twenty-six are overruled.

Appellant asserts in his twenty-seventh point of error that the cumulative effect of the above-enumerated constitutional violations denied him due process of law. Because appellant has not shown any constitutional violations, there can be no cumulative effect. *Escamilla*, 143 S.W.3d at 829. Point of error twenty-seven is overruled.

We affirm the judgment of the trial court.

Delivered: February 1, 2006

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1. Unless otherwise indicated, all references to Articles refer to the Code of Criminal Procedure.

2. At trial, Morales claimed her Fifth Amendment privilege with regard to questions about any offenses, and she claimed spousal privilege with regard to questions concerning anything her husband might have said to her.

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

AP-74,636

NELSON GONGORA, Appellant

v.

THE STATE OF TEXAS

Appeal from

Tarrant County

Womack, J., filed a dissenting opinion, in which Johnson and holcomb, JJ., joined.

The witness Juan Vargas, who drove the van for his gang in this robbery-murder, testified that the appellant fired the murderous shot. He was impeached with his prior, inconsistent statement to the police that Carlos Almanza shot the victim. He could have been impeached further with his statement to his wife that Carlos Almanza shot the victim. But the trial court did not permit it.

The Court's opinion does not attempt to say that this was no error. It says that it was a harmless error because Vargas's statement to his wife "does not further impeach his testimony at trial." *Ante*, at 9. But it does.

His statement to his wife was made "on a night around the time of the offense, [when] Vargas came home crying," and refusing to say why. Eventually he told her that Almanza killed the man. *Ibid*. So the statement was made more contemporaneously, under the influence of excited emotions, and to a spouse.

Unlike the Court, I think this would have more impeachment value than the later statement that he gave a police officer. I would reverse the judgment and remand for a new trial.

The Court's opinion says that the conflict in the evidence over who fired the shot and the appellant's intent to do no more than rob the victim did not require an instruction on the lesser-included offense of robbery. *See ante*, at 13-14. The opinion seems to say that the such facts require either a conviction of capital murder or an acquittal for every person who was a party to a robbery in which another party killed someone. No authority is cited for this assertion, which I am not prepared to join.

The appellant has another point of error, which goes only to the punishment, that the "anti-parties" charge in the court's charge on punishment was unconstitutional. The Court's opinion says,"The testimony in the instant case showed that appellant himself exited the van and shot the victim," so "the fact that the jury was authorized by the charge to convict appellant as a party does not make [the statute] unconstitutional as applied to appellant in this case. *See Cantu v. State*, 939 S.W.2d 627, 644 (Tex. Cr. App. 1996) (holding that in reviewing the constitutionality of a statute, we view the statute as applied to appellant only)." *Ante*, at 23.

But the fact that there was disputed testimony which, if believed, would have supported a decision that the appellant did have the requisite intent is not enough. The charge must be correct, as the next page of the *Cantu* opinion makes clear:

At the guilt/innocence phase of the [*Cantu*] case, the jury was specifically charged that they could not find appellant guilty of capital murder unless he intentionally murdered the victim or intentionally assisted in the commission of the murder and the aggravating offense. The jury's finding of guilt satisfied *Tison* and *Enmund*. For purposes of the Eighth Amendment, at least, there was no need for further factfinding at the punishment phase of trial. Any facial unconstitutionality inhering in Article 37.071 § 2(b)(2) did not affect [Cantu].

939 S.W.2d, at 645 (citations omitted).

It seems clear, from the Court's discussion of the jury charge at the guilt stage (*ante*, at 13) that there was no such instruction to this jury. If that is so, then *Cantu* would not support the decision to overrule the appellant's point of error as it has been interpreted by the Court.

I respectfully dissent.

En banc.

Filed February 1, 2006.

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