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IN THE 13TH COURT OF APPEALS
CORPUS CHRISTI - EDINBURG

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13-18-00073-CR
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No. 13-18-00073-CR

In the Thirteenth Court of Appeals
Corpus Christi-Edinburg, Texas

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DORIAN E. RAMIREZ
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JOHN BERNARD FEIT,
Appellant

v.

STATE OF TEXAS,
Appellee

APPEAL FROM CAUSE NO. CR-0464-16-A
92ND DISTRICT COURT OF HIDALGO COUNTY, TEXAS
HON. LUIS SINGLETERRY , PRESIDING

APPELLANT'S BRIEF

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STATEMENT REGARDING THE RECORD

The record in this appeal includes a two (2) volume clerk's record, a supplemental clerk's record. The record in this appeal also includes an eleven (11) volume reporter's record, a supplemental volume one of one reporter's record, and a second supplemental one of one reporter's record.

The clerk's record will be cited as "CR [volume]@[page]," the supplemental clerk's record will be cited as "Supp.CR@ [page]." The reporter's record will be cited as "RR [volume]@[page]," "1st Supp.RR[volume]@[page], 2nd Supp.RR [volume]@[page] and "RR [volume] @ [exhibit]" where applicable.

Defendant's Exhibit 1, Oral and Videotaped Deposition of Dale Tachney of March 3rd, 2017 filed with The Thirteenth Court of Appeals on June 20th, 2019 will be cited Tachney Depo at [page].

STATEMENT OF THE CASE

Nature of the Case & Course of Proceedings:	In a one count indictment, Appellant was charged with Murder, alleged to have occurred in 1960. The Indictment was returned in 2016 and the matter was tried to a jury in 2017.
Trial Court's Disposition:	A jury found Appellant guilty of murder and sentenced him to Life in prison. On December 8, 2017, the trial court imposed sentence in accordance with the jury's verdict.[1] This appeal followed.[2]

[1] CR2@1077, 1085.

[2] CR2@1089; RR9@108-9

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument is necessary. Oral argument would aid the Court in addressing issues complained of on appeal.

ISSUES PRESENTED

1. **POINT OF ERROR NUMBER ONE**

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DISMISSAL AND SPECIFIC PERFORMANCE OF PLEA AGREEMENT.[3]

The Trial court reversibly erred by denying Appellant's motion for specific performance of a plea bargain and for dismissal, given the plea entered in the America Guerra Case was induced by the promise not to prosecute Appellant for the Irene Garza murder. Appellant's case should be dismissed once specific performance is enforced.

2. **POINT OF ERROR NUMBER TWO**

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING DALE TACHENY'S TESTIMONY BEFORE THE JURY, OVERRULING APPELLANT'S OBJECTIONS PURSUANT TO THE PENITENT PRIVILEGE DOCTRINE.

3. **POINT OF ERROR NUMBER THREE**

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING HEARSAY TESTIMONY OF FORMER DALLAS MORNING NEWS REPORTER BROOKS EGERTON REGARDING HIS CONVERSATIONS WITH FATHER JOSEPH O'BRIEN, NOW DECEASED, WHERE EGERTON TESTIFIES ABOUT ALLEGED STATEMENTS APPELLANT MADE TO O'BRIEN.

4. **POINT OF ERROR NUMBER FOUR**

THE TRIAL COURT ERRED BY ADMITTING EXTRANEOUS-MATTER EVIDENCE IN VIOLATION OF TEXAS RULES OF EVIDENCE 404(B).

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[3] RR4@114-116, 123-126, 128

The trial court reversibly erred by admitting the testimony of Clotilde Sanchez regarding extraneous matters and unrelated events where Appellant was identified as having made lewd and/or menacing comments to her, violating the proscriptions of the Relevancy Rules, specifically, 401, 404(b) and 403.

The trial court reversibly erred by admitting the testimony of Beatrice Castro Garcia regarding extraneous matters and an unrelated events where Appellant was identified as having made lewd and/or menacing comments to her, violating the proscriptions of the Relevancy Rules, specifically 401, 404(b) and 403.

The trial court reversibly erred by admitting evidence surrounding the America Guerra case and Appellant's plea, violating the proscriptions of the Relevancy Rules, specifically 401, 404(b) and 403.

5. <u>POINT OF ERROR NUMBER FIVE</u>

THE TRIAL COURT ERRED BY ADMITTING HEARSAY TESTIMONY OF DARRYL DAVIS WHEN HE RECOUNTED STATEMENTS MADE TO HIM BY *THEN* HIDALGO COUNTY DISTRICT ATTORNEY ROBERT LATTIMORE

6. <u>POINT OF ERROR NUMBER SIX</u>

THE TRIAL COURT ERRED BY ALLOWING EXPERT TESTIMONY BY THOMAS PATRICK DOYLE

7. <u>POINT OF ERROR NUMBER SEVEN</u>

THE TRIAL COURT ERRED BY ALLOWING EXPERT TESTIMONY BY THOMAS PATRICK DOYLE

8. <u>POINT OF ERROR NUMBER EIGHT</u>

THE TRIAL COURT ERRED BY ADMITTING THE HEARSAY TESTIMONY OF ANNA MARIA HOLLINSWORTH REGARDING COMMENTS ALLEGED TO HAVE BEEN MADE BY IRENE GARZA ABOUT APPELLANT PULLING IRENE OUT OF CONFESSIONAL AND TAKING TO RECTORY.

9. <u>POINT OF ERROR NUMBER NINE</u>

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING TESTIMONY OF CHIEF VICTOR RODRIGUEZ' OPINION(S)

10. <u>POINT OF ERROR NUMBER TEN</u>

THE TRIAL COURT REVERSIBLE ERRED BY ALLOWING HEARSAY TESTIMONY OF GEORGE SAIDLER REGARDING STATEMENTS MADE TO HIM BY DALE TACHENY.

11. <u>POINT OF ERROR NUMBER ELEVEN</u>

THE TRIAL COURT ERRED BY ADMITTING HEARSAY TESTIMONY OF DARRYL DAVIS WHEN HE RECOUNTED STATEMENTS MADE TO HIM BY *THEN* HIDALGO COUNTY DISTRICT ATTORNEY ROBERT LATTIMORE

STATEMENT OF FACTS

Appellant John Feit was a 27 year old priest in 1960. In April of that year, he was stationed at the Pastoral house of the Oblate Fathers in San, Juan, Texas,[4] where he was assigned to assist the priests at the Sacred Heart Church in McAllen, Texas with Holy Week services.[5] On the evening of April 16th, Irene Garza arrived at the rectory of the Sacred Heart Church at 7 p.m. seeking absolution.[6] According to Appellant's recollection, she arrived asking to give her confession in the rectory so as not to have to wait in the long lines; there was an average of fifty (50 people) *in each* of the church's four (4) confessionals that evening.[7] Although seen in and around the church campus throughout that evening,[8] the prosecution's theory was Appellant accosted Garza at 7 p.m. when she arrived.[9]

Medora Wooldridge lived across the street from a canal at the corner of 2nd and Houston Streets in McAllen, Texas in 1960.[10] At or around 10:30 p.m. on April

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[4] RR11 @ State's Exhibit 89
[5] RR4@223; RR11 @ State's Exhibit 89
[6] RR8@143
[7] RR11 @ State's Exhibit 89; RR8@143-145
[8] There were people present inside the rectory that evening before, during and after Irene Garza arrived at 7 p.m. None of them reported anything suspicious or which could be interpreted as a kidnapping. In fact, Irene Garza was seen inside the church kneeling and praying as late as 8:15 p.m. that same night. RR6@80, 89-91
[9] RR6@82-85; State's witness Victor Rodriguez testified as a surrogate for the McAllen Police Investigators of 1960, suggesting the investigation in 1960 was a "thorough one." He testified he *believed* Appellant accosted Irene Garza at 7 p.m. in the rectory, bound her, gagged her and ultimately killed her.
[10] "That street was out in the boondocks back then." "It was very dark at night out there – there were no street lights. RR4@190, 199; RR4@196-197; RR11 @ State's Exhibit 51-59

16, 1960, Wooldridge testified she was in her sun room and heard some noises which frightened her – a car and a car door or trunk being slammed shut. She did not see a car, nor did she see a person. [11] After a few minutes, she called her husband to come home and inspect the area across the street.[12] He didn't find anything.[13] Five days later on April 21, 1960, Irene Garza's body was pulled out of the canal just down the street from the Wooldridge home.[14]

Father Thomas McGettrick was a priest at Our Lady of Sorrows in McAllen, Texas and the Spiritual Director of the Legion of Mary in 1960. Irene Garza was a member of that club.[15] McGettrick discussed "confession" and its processes.[16] On April 16, 2016, McGettrick said mass and then went to Sacred Heart Church to discover the latest news on the disappearance of Irene Garza. McGettrick knew the Garza family, and was concerned enough to go to their home after checking in at the church.[17] McGettrick would later be called upon to identify Irene Garza's body.[18]

Juan Jose Gonzalez testified Irene Garza was his second grade teacher in 1960.[19] He was with his mother at the Sacred Heart Church in McAllen on April 16,

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[11] RR44@207
[12] Dan Wooldridge was a doctor in those days and often times – like the night of the 16th - was called out to do a house call late at night. RR4@191-193
[13] RR4@196-201
[14] RR44@202-204; RR11 @ State's Exhibit 39 and 40
[15] RR44@216
[16] RR4@213-216
[17] RR4@221-222
[18] 4RR@224; RR11 @ State' Exhibit 61 and 62
[19] 4RR@227-229

1960. Although he did not see Irene Garza that night he saw a purse which was apparently left behind on a pew inside the church. After praying, Gonzalez and his mother took the purse to the rectory and turned it over to "a priest."[20] Gonzalez did not identify Appellant, however claimed after seeing a TV broadcast about the disappearance of Irene Garza in 2002, he realized Appellant was the one to whom he delivered the purse forty-two (42) years earlier.[21] This purse would become a central part of the investigation and later of this prosecution.[22]

Alfredo R. Barrera testified he was the one who found Irene Garza's purse. He was friends with the Garza family and was one of many who went "looking" for her. He and friends went through back roads and on the Monday following Easter, found a purse at the corner of 495 and McColl roads. It was 20 or 30 yards from the roadway in a field and was covered in mud. [23] Barrera recovered the purse and took it to the Garza residence, thinking it may be Irene's. The Garza family identified the purse as belonging it Irene Garza.[24]

Evidence Tech, Monica Ballesteros, testified regarding the physical evidence in this case.[25] An evidence tech with the McAllen Police Department since 2009, the jury learned Ballesteros' job required her to keep evidence safe and secure until time

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[20] 4RR@230-232
[21] 4RR234-239
[22] 4RR@251-253, 258; RR11 @ State's Exhibit 75; RR5@31; RR6@58
[23] 4RR@249-253, 255
[24] 4RR@258-259
[25] **RR5@15**

to take to court.[26] However, she testified – clearly – this case predated her; she did not store this evidence; this case was 57 years old at the time of this prosecution and the "box of evidence" was kept in a back room with older cases.[27] Ballesteros could only identify "the box" which contained evidence believed to be associated with this case.[28] Besides watching over the evidence, Ballesteros sent some of the evidence to the crime lab for analysis.[29]

Clotilde Sanchez testified she was 21 years old in March of 1960, cooking and cleaning for the priests of the Sacred Heart Catholic Church in Edinburg, Texas.[30] She talked about the attack of America Guerra, which occurred there in March of 1960. She was familiar with priests living there and visiting priests – specifically a visiting priest named Father John Feit.[31] Sanchez identified a likeness of Father Feit as he appeared back then.[32]

There was a time when she went to the basement there at the Sacred Heart Church in Edinburg, while the priests, including Appellant, were present.[33] When she went to the basement, Appellant is alleged to have said, "how about closing the

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[26] RR5@16-17
[27] RR5@18-19, 45-46, 49
[28] RR5@18-19, 23-41; RR11@ State's Exhibits 67 – 94 (representing physical evidence taken from the "box")
[29] RR5@52-56
[30] RR5@68; RR11@ State's Exhibit 97, 98
[31] RR5@70
[32] RR3@46
[33] Sanchez testified she would go down to the basement at times for supplies. RR3@47-48

door and make Tilley, you know, disappear." This happened in March of 1960.[34] Sanchez also testified about a phone call Appellant supposedly made where he was reported to have said to her, "Tilley, you're next, honey."[35]

Beatrice Castro Garcia was 20 years old and working downtown close to the Sacred Heart Church in McAllen in 1960. On April 10, 1960, she was walking to work and a car approached her as she crossed the street. She remembers and identified Appellant having driven the car, saying to her, "I would love to take a picture of you dressed in black by the cemetery."[36]

Anna Maria Hollingsworth talked about a unique visit from Irene. She had never asked for advice; she was there to listen. It turned out Irene mentioned a new priest who thought he was handsome and how he would take her out of the confessional to give her confession in the rectory. She said it was Father Feit. She was worried because Holy Saturday was coming and she was thinking that she had to go back to confession.[37]

Forensic document examiner Kenneth Crawford was called to identify Appellant's handwriting and compare to a note written by Appellant. He identified the several samples as having been written by the same person, Appellant.[38]

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[34] RR5@71-72
[35] RR5@72-73; This was elicited in the context of the America Guerra case – "you're next, honey."
[36] RR5@57-66; RR11@ State's Exhibit 95, 96
[37] RR5@111
[38] RR5@128-142; RR11@ State's Exhibit 89, 90, 91

Steve Robertson testified in his capacity as a trace analyst with the crime lab.[39] He was called on to compare the plaster casts taken from the scene believed to be where Irene Garza's body was dumped to the petticoat that was collected from her body at autopsy.[40] Although he was also called on to analyze some hairs collected, he could not identify them as belonging to Irene Garza.[41] Ultimately, he testified he had no evidence linking Irene Garza or John Feit to any of the trace evidence submitted to him for analysis.

Jose Davila Garcia testified he took a class with Appellant at Pan American University in Edinburg, Texas back in 1960.[42] One day back then, he noticed scratches on Appellant's right hand. That weekend before, he'd heard about what happened to Irene Garza, so these scratches were suspicious to him.[43] He made the assumption that it could've been him since he'd read the paper about the Garza incident couple days before I saw the scratches. But he didn't report it.[44]

McAllen Police Chief Victor Rodriguez testified as a surrogate for the McAllen Police Investigators of 1960, suggesting the investigation in 1960 was a "thorough one." He testified he believed Appellant accosted Irene Garza at 7 p.m. in

[39] RR5@142
[40] RR5@147-150
[41] RR5@151-152
[42] RR5@158
[43] RR5@158-159, 162; RR11@ State's Exhibit 99
[44] RR5@165

the rectory, bound her, gagged her and ultimately killed her.[45] He admitted the Sacred Heart Church campus in McAllen that night was crowded; there were many people waiting to go to confession. There were four (4) confessionals operating simultaneously to handle the crowd.[46] There were people present inside the rectory that evening before, during and after Irene Garza arrived at 7 p.m.; none of them reported anything suspicious or which could be interpreted as a kidnapping.[47] In fact, Irene Garza was seen inside the church kneeling and praying as late as 8:15 p.m. that same night, according to witnesses.[48] Ultimately, Chief Rodriguez admitted there was no evidence recovered and/or analyzed affirmatively linking Appellant to this crime.[49]

Texas Ranger Nathan Mutz testified about his participation in this case; he was tasked with producing a Leica Scan.[50] The Leica scans of the church and the Basilica were done in June of 2016.[51] Since these scans were done in 2016, this witness could not testify to the accuracy of the scans to the condition of the rectory and basilica in 1960.[52]

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[45] RR6@82-85
[46] RR6@88-89
[47] RR6@89-91
[48] RR6@80
[49]RR6@103
[50] RR6@131
[51] RR6@138, 144
[52] RR6@145-150

George Saidler was a retired police officer from San Antonio, Texas at the time of this trial and a member of the "cold case" unit from the year 2000 until he retired in 2007. In April of 2012, Saidler received a phone call from Dale Tacheney. This phone call would lead to the re-opening of the Irene Garza cold case murder.[53] Saidler ultimately admitted he was called to testify about statements made to him by Dale Tacheney; this was the only reason he was called to testify.[54]

Dale Tacheney[55] testified he met Appellant at a monastery in Ava, Missouri in 1963.[56] After identifying Appellant in the courtroom, he told the jury he was tasked with determining Appellant's fitness for the monastic life back in 1963.[57] During these discussions, Tacheney said Appellant admitted to killing Irene Garza; that Appellant admitted he was being protected by the Church; that Appellant heard Irene Garza's confession, then took her blouse off and fondled her before keeping her in the basement of the rectory.[58] Later, according to Tacheney, Appellant said he'd taken Irene Garza to the pastoral house where he paced her in a bathtub. As he left her there, Appellant said he could hear her saying, "I can't breathe." After he

[53] RR6@155
[54] RR6@172
[55] RR11 @ State's Exhibit 103-107
[56] RR6@196
[57] RR6@198, 238-240
[58] RR6@199-204

returned, he found her dead and later dumped her body on the side of the road close to a canal.[59]

Tacheney did not report these statements to the authorities. He never told anyone about what Appellant told him until 2002. It was then that he began working on a story for a book in which he'd been invited to participate.[60] Tacheney researched murders in that area in that time frame until he was satisfied he knew relevant facts. He then contacted San Antonio Police Department Investigator George Saidler and began sharing these comments.[61] Tacheney admitted he *assumed* Appellant had bound her and gagged her. Nor did Appellant tell him anything about a cellophane bag. [62] Tacheney would admit he didn't go to the police until 2002 because he needed to get more facts about the case so he could be more credible, so he carried out his own investigation gathering facts, employing libraries, newspapers and friends.[63]

Next, former Dallas Morning News reporter Brooks Egerton[64] was called upon by the State to discuss a conversation he had with Father Joseph O' Brien.

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[59] RR6@205-206
[60] RR6@211-212, 225, 242-43
[61] RR6@213-215, 228-229; RR11@ State's Exhibit 102
[62] Although he wrote this in his letter to Saidler – *See* RR11@ State's Exhibit 102; RR6@217-218, 230-232
[63] RR6@241-42
[64] RR7@33

O'Brien told Egerton he'd confronted Appellant and he finally confessed to the killing.[65]

Thomas Patrick Doyle, a catholic priest, was called by the State and offered expert opinion testimony in the area of victims affected – assaulted – sexually assaulted by clergy.[66] In his experience dealing with sexual abuse, which is a felony, very often, Church authorities would enter into some sort of unofficial or even an official agreement with the local civil authorities, and rather than prosecute the priest, he would be sent to a monastery, or on a retreat, or sent to some other country to get him out of the picture. That was a common way of dealing with those situations.[67] It was much more common then to enter into these type of unofficial agreements and to simply change the priest - moving him from one place to another.[68]

Richard Sipe was called to testify about the sexuality and sexual behavior of Roman Catholic Priests.[69] He spoke to the jury about the statistical relationship between Roman Catholic Priests and sexuality.[70] He is quoted as saying, "No more than 50 of the Roman Catholic Priests in the United States were actually practicing

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[65] RR7@36, 39-40
[66] RR7@56
[67] RR7@64
[68] RR7@64-65
[69] RR7@129-130, 132, 148 The study of celibacy and sexual behavior of priests - "how they act out sexually."
[70] RR7@149-150

perfect and perpetual chastity or celibacy."[71] "In all the studies that I've done, my statistics were true and they continue to be true today."[72] He was asked and he did review documents, including depositions, medical background, seminary background, movement history from church to church, transcripts from previous testimony of Feit, other witness' testimony, documents obtained from religious orders, etc.[73] Ultimately this witness testified Appellant's reported behavior in this case was consistent with his studies over the years. He opined Appellant was a man, at least in terms of the documents that he'd seen, a man who would fit into immature psychosexual development, and also a socio-pathological tendency in terms of sexuality.[74]

Norma Jean Farley testified about the cause of death – asphyxiation.[75]

Appellant John Feit was indicted for the offense of murder alleged to have been committed in April of 1960.[76] The indictment came fifty-six (56) years after the disappearance and murder of Irene Garza. After going "cold" these allegations would finally see a courtroom.

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[71] RR7@150
[72] RR7@152-153
[73] RR7@154-
[74] RR7@159
[75] RR8@56
[76] CR1@11

SUMMARY OF THE ARGUMENT

The trial of the *State of Texas v. John Feit* came some 56 years after Irene Garza went missing. Over that time, witnesses would become unavailable that much of the evidence elicited by the State came in the form hearsay. From the first witness, Darryl Davis, the jury was fed hearsay statements made by then District Attorney John Lattimore. However, Davis' hearsay testimony would document the plea agreement ultimately reached by the parties in 1963 with the resolution of the America Guerra case. Appellant urges the Court to recognize the terms of the plea agreement and specifically enforce its terms – dismiss this case.

Dale Tacheney's testimony regarding statements purportedly made by Appellant were inadmissible as privileged. The statements, if any were made, were made during spiritual advisement and the discernment process of Appellant's journey into the Monastic life. These statements are recognized as privileged by Missouri law, where the statements allegedly took place and Texas law, the local law of the forum. These statements should have been excluded.

Former Dallas Morning News reporter Brooks Egerton was allowed to testify over objection about Joseph O'Brien's interview regarding his knowledge of the Irene Garza disappearance and murder. Although O'Brien was deceased at the time of the trial, Egerton brought him to life in the form of hearsay testimony – testimony showing Appellant *confessed* to committing Irene Garza's murder.

During the trial, the State elicited various extraneous/bad acts evidence. Clotilde Sanchez and Beatrice Castro Garcia were allowed to testify over objection about lewd comments and/or frightening behavior committed by Appellant against them back in 1960. The State won the day by convincing the Court this evidence was necessary to "prove the elements" in the indictment, referring to the determination of malice aforethought. However, malice aforethought was and is a punishment enhancement. Therefore any evidence elicited for purpose of proving malice aforethought at the guilt-innocence stage of the proceedings was error. Appellant's rights were substantially harmed by this presentation at the guilt-innocence stage of the proceedings. The State relied heavily on this evidence by using it in support of expert testimony regarding Appellant's proclivity to sexual misbehavior. Ultimately, the State relied on this evidence to argue to the jury during summation that Appellant was a "wolf in sheep's clothing" – a predator. If he did this to *them*, he must have done *this* to Irene Garza.

When the State elicited testimony from Anna Maria Hollingsworth, the trial court erred by allowing hearsay statements made by Irene Garza. All of these statements attributed to Irene Garza were hearsay without any exception. Although the State relied on a hearsay exception, TRE 803(3), they failed in their burden to satisfy the exception applied. Hollingsworth was allowed to testify about Irene Garza's description of Appellant and how he'd pulled her out of the confessional on

previous occasions. This testimony was used by the State to perpetuate, inter alia, the theory that Appellant was a predator.

McAllen Police Chief Victor Rodriguez was allowed to share his opinions. This opinion testimony did not satisfy the reliability requirements of TRE 701 or 702. He had no personal knowledge of any of the investigation such that his lay opinion should have been allowed. Further, he was not qualified as an expert in any area that would have allowed him to opine on Appellant's state of mind at the time of the investigation, nor what the evidence – or lack thereof – supported or didn't support. The trial court erred by allowing his opinion testimony.

ARGUMENT & AUTHORITY

POINT OF ERROR *ONE*

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DISMISSAL AND SPECIFIC PERFORMANCE OF PLEA AGREEMENT[77]

The Trial court reversibly erred by denying Appellant's motion for specific performance of a plea bargain and for dismissal, given the plea entered in the America Guerra Case was induced by the promise not to prosecute Appellant for the Irene Garza murder. Appellant's case should be dismissed once specific performance is enforced.

Appellant Feit was arrested and charged with assaulting America Guerra at the Sacred Heart Church in Edinburg, Texas, alleged to have occurred March 23,

[77] RR4@114-116, 123-126, 128

1960.[78] *That* trial resulted in a hung jury. Before being *re*-tried, an plea agreement was reached: Appellant was to plea "nolo contendere" and agree to a $500 fine and costs of court.[79] In exchange, *then* Hidalgo County District Attorney Robert Lattimore would agree not to prosecute Appellant for the murder of Irene Garza. Over the next fifty-six (*56*) years, no charges were brought alleging Appellant's responsibility for the disappearance and murder of Irene Garza. *Then*, in 2016, the instant indictment was returned against Appellant.[80]

In *this* case, the State elicited testimony from Darryl Davis regarding the above-described "plea bargain."[81] Apparently, then Hidalgo County District Attorney Robert Lattimore called Davis and several reporters into an "off-the-record" meeting at his office, where reporters were told about the agreement.[82] The Appellate record reflects that plea was consummated.[83] Appellant avers the trial court erred by denying Appellant's Motion to Dismiss and for specific performance of *that* plea bargain.

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[78] RR11@ State's Exhibit 66
[79] RR11@ State's Exhibit 66; RR4@ 102-104
[80] 1CR11
[81] RR4@102-107
[82] There was testimony regarding the Catholic Church participating in this agreement, agreeing to move Appellant out of the area, placing him in a monastery. The Catholic Church was not a party in the *State of Texas v. John Feit*, a case where America Guerra was alleged to be the victim. Nor was there any evidence *Appellant* agreed to go to any monastery – just that he plead no contest and be responsible for fines and costs. Appellant had no control over the Catholic Church. RR4@103
[83] RR4@102-107; RR11@State's exhibit 66.

I. Plea bargains are enforceable.

Plea bargains are enforceable and protected by the due process clause.[84] If a defendant pleads guilty or nolo contendere as part of a plea bargain and the prosecutor fails to uphold his end of the deal, the defendant is entitled to either specific performance of the agreement or withdrawal of his plea.[85] "This is true even in cases where neither the State nor the court had authority to ensure compliance with the plea bargain."[86]

For example, in *Gibson v. State*, Gibson was charged with two offenses: amphetamine possession and retaliation.[87] He struck a plea bargain with the prosecutor, agreeing to plead guilty to the retaliation charge and serve 40 years' confinement in exchange for dismissal of his amphetamine charge. Gibson pleaded guilty and was taken into custody for retaliation but the amphetamine charge was *not* dismissed. Two months later, Gibson filed for enforcement of the plea bargain. The motion was denied and a jury subsequently convicted him of possession of amphetamines, sentencing him to 20 years' imprisonment.[88]

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[84] *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"); *Gibson v. State*, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991) (en banc).
[85] *Gibson*, 803 S.W.2d at 318; *Ex parte Austin*, 746 S.W.2d 226, 227 (Tex. Crim. App. 1988) (en banc) (orig. proceeding).
[86] *Ex parte Austin*, 746 S.W.2d at 227.
[87] 803 S.W.2d at 317.
[88] *Id*.

The Court of Criminal Appeals granted Gibson's petition for a writ of habeas corpus, holding "when, as in this cause, a guilty plea rests to any significant degree on a promise of the prosecutor, so it can be said the promise is part of the inducement or consideration for the plea, the due process clause of the Fourteenth Amendment requires such promise be fulfilled."[89] The prosecutor did not fulfill his promise, thus Gibson was entitled to specific performance or withdrawal of his guilty plea. Since Gibson had already served three years of his sentence by the time the Court of Appeals heard the case, specific performance was appropriate.[90]

Three years earlier in *Ex parte Austin*, the Court of Criminal Appeals granted similar relief to a defendant accused of attempted murder.[91] There, Austin pleaded guilty to attempted murder as part of a plea bargain with the State where he was granted shock probation.[92] The court accepted the plea bargain and sentenced Austin to 10 years' confinement, noting he would be reviewed for shock probation after 120 days.[93] However, Austin was not eligible for shock probation under the Code of Criminal Procedure; neither the trial court nor the prosecutor had authority to carry out the terms of the plea bargain.[94] The Court of Criminal Appeals held "the State is bound to carry out its side of the plea bargain," and Austin was entitled to relief

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[89] *Id.* at 318
[90] *Id.*
[91] *Ex parte Austin*, 746 S.W.2d at 227
[92] *Id.* at 226–27
[93] *Id.* at 226
[94] *Id.* at 229

"even though the State or the court never did have the authority to ensure compliance with the plea bargain."[95] Defendant's conviction was set aside, and he was released from custody.[96]

Gibson and *Austin* are representative examples of the larger rule that plea bargains have teeth, and are consistently enforced.

II. *Oral* plea bargains are just as binding and enforceable as written plea bargains.

A plea bargain is not rendered ineffective or unenforceable by the parties' failure to put it in writing.[97] Though the legitimacy of such verbal agreements is often implicitly rather than explicitly affirmed, oral plea bargains are analyzed and enforced just like written plea bargains.[98]

For example, in *U.S. v. Garcia-Costilla*, Joel Angel Garcia-Costilla entered into an oral plea bargain with prosecutors, agreeing to plead guilty if they

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[95] *Id*. at 227
[96] *Id*. at 239–40

[97] *Smith v. State*, 96 S.W.3d 377, 384 (Tex. App.—Amarillo 2002, pet. ref'd); *see also United States v. Garcia-Costilla*, 113 Fed. Appx. 616 (5th Cir. 2004) (unpublished).
[98] *See, e.g., id*.; *United States v. Brown*, 547 Fed. Appx. 637 (5th Cir. 2013) (unpublished) (analyzing an oral post-plea agreement without but holding that "assuming arguendo that the Government did enter into a subsequent verbal agreement with the defendant, the Court could not compel the Government" to perform because *Santobello* does not apply to post-plea agreements); *Escojido v. State*, No. 13-01-299-CR, 2003 WL 21197201 (Tex. App.—Corpus Christi May 22, 2003, no pet.) (mem. op.) (not designated for publication) (analyzing verbal plea bargain and holding that the State fully complied its terms); *Hernandez v. State*, No. 05-96-01984-CR, 1998 WL 546142, at *1 (Tex. App.—Dallas Aug. 28, 1998, no pet.) (mem. op.) (not designated for publication) (determining existence of informal verbal plea bargain, discussing only the evidence presented rather than the parties' failure to reduce the agreement to writing).

recommended he receive credit for accepting responsibility for his actions.[99] Garcia pleaded guilty pursuant to the agreement, but prosecutors argued *against* any reduction in sentence.[100] Garcia appealed, asking the Fifth Circuit to protect his right to due process by allowing him to withdraw his plea or enforce the oral plea bargain.[101] Without hesitation, the Fifth Circuit vacated Garcia's sentence holding the government's breach of the agreement "affected Garcia's substantial rights," and tainted "the fairness, integrity, and public reputation of judicial proceedings."[102]

Similarly, in *Runyon v. State*, Runyon pleaded guilty to felony theft, and was sentenced to ten years' confinement.[103] Runyon appealed, claiming there was a plea bargain with the State entitling him to probation upon pleading guilty, and payment of approximately $215,000 in restitution. Although the agreement was never reduced to writing, the court of appeals sought to determine its existence and terms.[104] Thus, although oral plea bargains are valid and enforceable, the challenge lies in proving their existence and terms.[105]

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[99] *Id.* at 617.
[100] *Id.* at 618.
[101] *Id.* at 617.
[102] *Id.* at 618
[103] *Runyon v. State*, 754 S.W.2d 430, 431 (Tex. App.—Dallas 1988, no pet.).
[104] *Id.*at 431–32.
[105] RR4@102-107; 123-128

III. **The rules of contract law are applied to determine the existence and terms of a plea bargain.**

Courts determine the existence and terms of a criminal plea bargain based on general contract law principles.[106] Courts look mainly to the written plea bargain or the minutes of the plea hearing to determine the parties' agreement, but will imply additional covenants from *other evidence when necessary* "to effectuate the intention of the parties as disclosed by the contract as a whole."[107]

Yet, "although contractual concepts apply to plea bargains, such should not be strictly enforced to the detriment of due process."[108] Rather than requiring a formulaic set of factors to determine if a plea bargain exists, criminal courts take a much more simplified view: "circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the

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[106] Ex parte Cox, 482 S.W.3d 112, 116 (Tex. Crim. App. 2016) (orig. proceeding); Ex parte De Leon, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013) (orig. proceeding) ("A plea bargain is a contract between the State and the defendant."); In re Morris, No. 03-11-00692-CV, 2011 WL 6938504, at *2 (Tex. App.—Austin Dec. 29, 2011, orig. proceeding) (mem. op.) (not designated for publication) ("General contract law principles apply to the review of issues involving the content of a plea agreement in a criminal case."); *see also* Adams v. State, No. 01-92-00763-CR, 1993 WL 74698, at *3 (Tex. App.—Houston [1st Dist.] Mar. 18, 1993, pet. ref'd) (not designated for publication) (releasing Adams from a plea bargain because "there was never a meeting of the minds").

[107] Ex parte Moussazadeh, 64 S.W.3d 404, 411 (Tex. Crim. App. 2001) (orig. proceeding), *rev'd on reconsideration sub nom.* Ex parte Moussazadeh, 361 S.W.3d 684 (Tex. Crim. App. 2012) (orig. proceeding).

[108] Ex parte Cox, 482 S.W.3d at 116 (*quoting* Ex parte Adkins, 767 S.W.2d 809, 810 (Tex. Crim. App.1989) (orig. proceeding)).

prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[109]

The Court of Criminal Appeals summarized the key elements of plea bargains as follows:

> Essentially, plea bargaining consists of the prosecutor making concessions regarding specific punishment, lesser charges, or the reduction of counts which comprise the charging instrument in exchange for the defendant's concession as to his plea of guilty or plea of nolo contendere.[110]

The record *in the instant case* reflects an agreement reached in 1962.[111] Hidalgo County District Attorney Robert Lattimore *induced* Appellant to plead nolo contendere to aggravated assault against Maria America Guerra by promising to stop investigating or refrain from charging him with Irene Garza's murder.[112] Clearly, the agreement was approved by the trial court and consummated by the plea entered by

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[109] *Santobello v. New York*, 404 U.S. 257, 262 (1971).
[110] *Ex parte Williams*, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982) (en banc) (orig. proceeding).
[111] RR4@102-107; The State fought long and hard to convince the trial court that Davis' hearsay testimony was "reliable." The trial court made a finding that testimony was indeed "reliable." RR4@129; Thus, we have evidence of a plea agreement, clearly consummated by State's Exhibit 66.
[112] RR4@102-107; RR11@ State's Exhibit 66

Appellant Feit.[113] A trial court does not have to have announced the full terms of the plea bargain on the record, but rather indicated it would "follow the plea bargain."[114]

A plea bargain was reached between Appellant and the Hidalgo County District Attorney's Office in 1962. Appellant upheld his end of the bargain by pleading nolo contendere and paying $500 and court costs. In return, the State promised neither to investigate further nor prosecute Appellant for Irene Garza's murder.[115] There was no evidence presented showing Appellant violated *his* side of the agreement. The State's judgment or ability to ensure the *Catholic Church* would uphold its end of the deal *was immaterial*; the State "is bound to carry out its side of the plea bargain."[116]Appellant cannot undo *his* performance of the plea bargain; he agreed to the terms of the agreement as evidenced by his plea. Appellant has now lived with this conviction on his record for more than a half-century, suffering from the corresponding stigma, character vulnerability, and similar consequences, not to mention the use of the America Guerra conviction in the instant trial. There is no

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[113] RR11@ State's Exhibit 66; *Perkins v. Court of Appeals*, 738 S.W.2d 276, 283 (Tex. Crim. App. 1987) (en banc) (orig. proceeding) ("when a defendant enters a plea of guilty or nolo contendere pursuant to a plea bargain agreement with the prosecutor, and the plea is accepted and the agreement is approved by the trial judge, the defendant is entitled to specific enforcement if the agreement can be enforced"); *Tate v. State*, 834 S.W.2d 566, 572 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) ("[T]he 'contract' does not become enforceable until the trial judge announces that the court will be bound by the plea bargain agreement.").

[114] *Gibson*, 803 S.W.2d at 317 (enforcing plea bargain to dismiss Gibson's second charge if he pleaded guilty to the first, even though the judge simply said he would "follow the plea bargain," but did not announce the dismissal on the record).

[115] RR4@102-107; RR11@ State's Exhibit 66

[116] *Ex parte Austin*, 746 S.W.2d 227

way to undo Appellant's plea at this point. Thus, Appellant is entitled to specific performance of the plea bargain.

Appellant sought such enforcement via a motion for specific performance of the plea bargain or a motion to dismiss.[117] Although Appellant fought to exclude Davis' hearsay testimony regarding the statements made by then District Attorney Lattimore, the trial court overruled that objection and in so doing made a finding those hearsay statements were "reliable."[118] In doing so, the trial court memorialized the terms of the plea agreement in the form of sworn testimony.[119]

Accordingly, Appellant prays this Court make a finding a plea agreement was indeed reached between the parties – the State of Texas and Appellant – regarding the resolution of the America Guerra case. Further, Appellant prays this Court make findings the plea agreement called for Appellant to plead nolo contendere and be

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[117] RR4@113-126; *See, e.g.*, *Thi Van Le v. Perkins*, 700 S.W.2d 768 (Tex. App.—Austin 1985, orig. proceeding) (Austin Court of Appeals requiring judge to enforce plea bargain); *Perkins v. Court of Appeals*, 738 S.W.2d 276 (Tex. Crim. App. 1987) (en banc) (orig. proceeding) (upholding Austin Court of Appeals' mandamus ordering enforcement of plea bargain). *See also*, *Dupree v. State*, No. 05-94-01104-CR, 1995 WL 785156, at *1 (Tex. App.—Dallas Dec. 21, 1995, no pet.) (not designated for publication) (Dupree raised the issue in a motion to enforce a plea bargain); *Gibson*, 803 S.W.2d at 317 (after State failed to dismiss its second charge against Gibson in exchange for his guilty plea to the first, Gibson filed a motion to enforce in the first cause and a motion to dismiss in the second).

[118] RR4@129

[119] *Ex parte Cox*, 482 S.W.3d at 116 ("The terms of plea agreements, being contractual in nature, are left to the parties to determine and agree upon, and this Court will rarely disturb the terms of such agreements."); *Perkins*, 738 S.W.2d at 285 ("Given what this Court has stated and held regarding specific enforcement of a valid plea bargain agreement, we find that those decisions placed a ministerial, mandatory, and non-discretionary duty on Relator [i.e., Judge Perkins] to specifically enforce the plea bargain agreement that was made by the parties and approved by him in Le's case.").

responsible for $500 fine and costs associated with that prosecution. In exchange, the State, by and through then Hidalgo County District Attorney Lattimore, would forego prosecuting Appellant for the murder of Irene Garza. Further still, Appellant prays this Court make findings this plea bargained agreement was memorialized by sworn testimony of Darryl Davis and clearly consummated as evidenced by State's Exhibit 66. Even further, it should not be lost on this Court that Appellant was indeed *not* indicted for the Irene Garza murder until 2016. This fact should weigh heavily in favor of a finding there was indeed an *agreement* not to prosecute. Finally, given the forgoing, Appellant prays this Court reverse the judgment of the trial court with instructions for the trial court to specifically enforce the plea bargained agreement and dismiss the instant case.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING DALE TACHENEY'S TESTIMONY BEFORE THE JURY, OVERRULING APPELLANT'S OBJECTIONS PURSUANT TO THE PENITENT PRIVILEGE DOCTRINE.

Dale Tacheney, a former priest and monk testified in a deposition – before trial on March 3, 2017.[120] Appellant objected to this testimony citing the penitent

[120] CR11-124; *See* Tex.Code.Crim.Proc. art 39.02; Due to Tacheney's age and medical issues, the State applied for a pre-trial deposition. At a pretrial hearing held November 27, 2017 to address the admissibility of Tacheney's testimony, the testimony/proffer upon which the parties relied was the deposition testimony obtained on March 3, 2017. *See* Second Supp. RR 1 of 1; Tachney Depo.

privilege,[121] arguing that any statements made by Appellant, if any, were made to Tacheney in his capacity as a spiritual advisor and therefore privileged.

In his March 3, 2017 deposition, Tachney testified regarding his sessions with Appellant while they were living at Lady of Assumption Abbey near Ava, Missouri in 1963.[122] At the time, Appellant was a postulant[123] living at the Abbey and pursuing the monastic life.[124] Tachney was a priest and a monk at the Abbey, and was responsible for counselling and guiding postulants in the novitiate[125]—including Appellant—to determine whether they were called to the monastic life.[126]

Tachney now claims that, during his discernment sessions with Appellant, he admitted to the murder of Irene Garza.[127] Specifically, Appellant allegedly explained that after hearing Irene Garza's confession, he removed some of her clothing, fondled her breasts, and kept her in the basement of the rectory before moving her to his residence.[128] The following day, Tachney claims, Appellant left Irene in the bathtub while he went to Easter Sunday mass, and heard her cry out that she could

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[121] Texas Rules of Evidence 505; *See* Second Supp. RR 1 of 1 at 6
[122] *See* Second Supp. RR 1; Defendant's Exhibit 1 @ 23, 82, 84; Tachney Depo.
[123] *See* "postulant." *Merriam-Webster.com*. Merriam-Webster, 2019. Web. - a person admitted to a religious order as a probationary candidate for membership
[124] Tachney Depo. at 100.
[125] *See* "novitiate." *Merriam-Webster.com*. Merriam-Webster, 2019. Web. – the period of being a novice; a house where novices are trained.
[126] Tachney Depo. at 48–50, 93.
[127] Tachney Depo. at 49–56.
[128] Tachney Depo. at 51–53.

not breathe.[129] Tachney testified Appellant found Garza dead upon returning from mass, and dumped her body on the side of the road near a canal.[130]

I. The modern privilege rules apply to Feit's case.

Generally, the Ex Post Facto Clauses of the United States and Texas Constitutions protect criminal defendants from the retroactive application of state laws.[131] However, the Clauses apply only to vested, substantive rights.[132] Consequently, changes to the rules of privilege do not implicate the Ex Post Facto Clauses, and can be retroactively applied.[133] Rather than "allowing less or different testimony in order to convict than the law required before the commission of the offense," changes in the rules of privilege "simply enlarge the class of witnesses eligible to testify at trial."[134] Consequently, even though the alleged offense occurred

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[129] Tachney Depo. at 53–55.
[130] Tachney Depo. at 54–55.
[131] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"), art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). "Texas interprets the proscription against ex post facto laws in the Texas Constitution to have the same meaning as the proscription against ex post facto laws found in the United States Constitution." *State v. Pieper*, 231 S.W.3d 9, 12 (Tex. App.—Houston [14th Dist.] 2007, no pet.).
[132] *See Ibarra v. State*, 11 S.W.3d 189, 192 (Tex. Crim. App. 1999).
[133] *Freeman v. State*, 786 S.W.2d 56, 58 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (spousal privilege rules in effect at the time of trial govern, and can be retroactively applied); *Medrano v. State*, 768 S.W.2d 502, 504 (Tex. App.—El Paso 1989, pet. ref'd) (distinguishing between "changes in the nature of the evidence necessary for conviction," and "procedural changes in rules of admissibility of evidence" in holding that changes to spousal privilege making defendant's wife competent to testify could be retroactively applied); *Tumlinson v. State*, 757 S.W.2d 440, 442 (Tex. App.—Dallas 1988, pet. ref'd) (holding that amended rule of evidence allowing previously-privileged conversations with psychotherapists to be admitted could be applied retroactively).
[134] *Freeman*, 786 S.W.2d at 58; *Tumlinson*, 757 S.W.2d at 443.

in 1960, and the conversation with Tachney occurred in 1963, the modern privilege rules apply to Feit's case.

II. Both the Texas *and* Missouri privilege rules apply.

For Appellant's alleged admissions to Tachney to be excluded from evidence, the conversation must qualify as privileged under both Texas *and* Missouri law.

The Texas Supreme Court and Texas Court of Criminal Appeals have adopted Section 139 of the Restatement (Second) of Conflict of Laws to determine the governing law when a privileged communication that occurs in a foreign state is offered into evidence in Texas state court:

> **(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.**
>
> **(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.**[135]

[135] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971); *Gonzalez v. State*, 45 S.W.3d 101, 104 (Tex. Crim. App. 2001) (holding that Section 139 governs conflicts of privilege laws, and recognizing that the Texas Supreme Court holds the same); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (holding that Section 139 governs conflicts of privilege laws, and applying the rule to the attorney-client privilege to hold that the law of the state with the most significant contacts governs because of the importance of the policy interest); *Perkins v. State*, 2004 WL 3093239, at *6 (Tex. Crim. App. 2004) (not designated for publication) (acknowledging that Section 139 governs a conflict of privilege laws, but holding no conflict existed).

Under the Restatement, a communication is privileged only if it qualifies under *both* the laws of the forum *and* the laws of the state with the most significant relationship to the communication, unless one state has a strong, overriding public policy favoring admission or exclusion. The Texas Court of Criminal Appeals has explained that the rule favors admissibility of evidence because "unlike other rules of evidence, privileges are not designed primarily to exclude unreliable evidence," but "expressly subordinate the goal of truth-seeking to other societal interests protected by the privilege."[136]

"The state where the communication took place is generally the state with the most significant relationship;" particularly when the parties to the conversation do not have a prior relationship in another state.[137] For example, in *Gonzalez v, State,* Pastor Folgheraiter testified that during his counseling sessions with Gonzalez in California, Gonzalez confessed to a murder he committed in Texas.[138] Gonzalez objected to Folgheraiter's testimony, arguing that it was privileged under Texas Rule of Evidence 505.[139] The trial court admitted the evidence, and the Court of Criminal Appeals affirmed.[140]

In *Gonzalez* the Court of Criminal Appeals adopted Restatement Section 139

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[136] *Gonzalez v. State*, 45 S.W.3d 101, 105–06 (Tex. Crim. App. 2001).
[137] *Springsteen v. State*, AP-74,223, 2006 WL 1412244, at *13 (Tex. Crim. App. May 24, 2006) (not designated for publication); *Gonzalez*, 45 S.W.3d at 106.
[138] *Id.* at 102.
[139] *Id.* at 103.
[140] *Id.* at 103–07.

as the choice-of-law rule for privileged communications.[141] The Court then applied the "most significant relationship" test, finding that because the relevant conversation occurred in California and the parties had no prior relationship, California was the state with the most significant relationship to the communication. Under California law, the admission was not privileged.[142] Finally, the Court held that admitting the privileged statement would not be contrary to the strong public policy of the state because the history and context of the priest-penitent privilege reveal that the legislature did not intend the privilege to be unlimited or impenetrable. Rather, the legislature provided exceptions to the privilege in specific cases involving child abuse, and the original codified version of the privilege enacted in 1967 allowed a court to compel privileged testimony when necessary for the "proper administration of justice." Thus, the testimony was properly admitted into evidence. [143]

Here, as in *Gonzalez*, Appellant is alleged to have committed the underlying crime in Texas, then discussed the act with a spiritual advisor in *another* state. Appellant and Tachney had no history with one another prior to their shared time in Missouri, and they did not spend any subsequent time together in another state.[144]

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[141] *Id.* at 104–05 (*noting* also that the Texas Supreme Court had already adopted Section 139 in *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995)).
[142] *Id.* at 106.
[143] *Id.* at 107.
[144] Second Supplemental RR1 @35; Defendant's Exhibit 1@40-41, 62

Consequently, Missouri is the state with the most significant relationship to the communication. Thus, under Restatement 139, Tacheney's testimony must be privileged under both Missouri and Texas law to be excluded from evidence.

III. The priest-penitent privilege supports exclusion of Tacheney's testimony.

A. The Missouri priest-penitent privilege encompasses Feit's discussions with Tacheney.

Missouri's priest-penitent privilege statute provides:

> The following persons shall be incompetent to testify:
> . . . .
> Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him or her in his or her professional capacity as a spiritual advisor, confessor, counselor or comforter. [145]

This privilege was applied to provide protection in a case very similar to the one at hand, where an appellate court in Missouri held the communications between a nun and a postulant seeking admission into a religious congregation were privileged.[146]

In *Eckmann*, Sister Dominic Rowe was subpoenaed for a deposition regarding her conversations with plaintiff, Jeanne Eckmann.[147] Sister Dominic appeared but

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[145] MO. ANN. STAT. § 491.060(4). Missouri's privilege statute is merged with its competency statute, and renders attorneys, priests, and physicians incompetent to testify regarding confidential communications, while also encompassing the more traditional competency rules regarding children and mentally incapacitated persons. MO. ANN. STAT. § 491.060.
[146] *Eckmann v. Bd. of Educ. of Hawthorn Sch. Dist. No. 17*, 106 F.R.D. 70 (E.D. Mo. 1985)
[147] 106 F.R.D. 70, 71 (E.D. Mo. 1985).

refused to answer questions, claiming her conversations with Eckmann were protected under the priest-penitent privilege.[148] Specifically, Sister Dominic provided "some documentation that plaintiff had been a postulant seeking admission as a sister in the religious congregation of the School Sisters of Notre Dame" at the time of the communications. Sister Dominic Rowe served as Eckmann's spiritual director during her postulancy, as was required "to fulfill a requirement for admission to the congregation."[149] Sister Dominic provided evidence that her position as a spiritual director was "a recognized office in the Catholic Church;" "is considered to be a form of ministry of the Gospel by the Church;" and allows the director "to engage in religious and spiritual direction."[150] The circumstances of the communication were thus very similar to those between Appellant and Tachney: the postulant submitted to spiritual advising as part of the admission process for the religious society, and confided in the counselor or advisor. The Eastern District Court of Missouri held that, under these circumstances, "Sister Dominic's position as plaintiff's spiritual advisor is conduct sufficient to invoke the priest-penitent privilege under both Missouri and federal law," and thus Sister Dominic was incompetent to testify regarding her conversations with Eckmann.[151]

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[148] *Id.*
[149] *Id.*
[150] *Id.* at 72–73.
[151] *Id.* at 71–73.

Similarly, Missouri's priest-penitent privilege renders Tachney incompetent to testify about Appellant's alleged confession during his discernment sessions and spiritual counseling at the Abbey.[152] At the time, Tachney was a monk and a priest.[153] There is thus no dispute Tachney was "practicing as a minister of the gospel, priest . . . or other person serving in a similar capacity for an organized religion" when the alleged confession was made.[154]

Moreover, at the time of the discernment sessions, Appellant was living at the Abbey as a postulant and was being evaluated, trained, and counseled for dedication to the religious life.[155] Tachney was "considered the discerner or the counselor for all of those in the novitiate who had a desire to become a monk."[156] Tachney thus acknowledged he personally "counseled" Appellant through the discernment process, guiding him in the lifestyle of a monk and monastic teachings, helping Appellant with the spiritual decision of whether to commit his future to the Abbey.[157] Tachney explicitly agreed this counseling required and relied upon trust, honesty, and openness.[158]

The counseling continued throughout Appellant's time at the Abbey.[159] In

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[152] *See* Second Supplemental RR1 @35; Defendant's Exhibit 1@50
[153] See Second Supplemental RR1 @35; Defendant's Exhibit 1@34–35.
[154] MO. ANN. STAT. § 491.060(4).
[155] See Second Supplemental RR1 @35; Defendant's Exhibit 1@ 43–44, 61, 94.
[156] See Second Supplemental RR1 @35; Defendant's Exhibit 1@ 93:5–8.
[157] See Second Supplemental RR1 @35; Defendant's Exhibit 1@ 100:11–101:10.
[158] See Second Supplemental RR1 @35; Defendant's Exhibit 1@ at 95:6–96:7.
[159] See Second Supplemental RR1 @35; Defendant's Exhibit 1 35–36, 50, 103.

fact, the limitations on speech among the postulants ensured that Appellant and Tachney did not talk apart from these discernment sessions.[160] Tachney confirmed that "*all* of the statements" that he claims Appellant told him occurred "during the counseling sessions."[161]

Finally, Tacheney's actions reveal his understanding the discernment sessions were confidential: Tachney did not report Appellant's alleged crime to the authorities for decades.[162] Moreover, Tacheney's own contextualization of the alleged confession further affirms the communication was confidential. Tachney testified Appellant told him he was not in jail because the alleged murder was "protected by the church" and his statements were "protected by confessional secrecy."[163] Assuming arguendo these statements were made, clearly this is an affirmation of the parties' understanding the discernment sessions were secret and confidential and "protected by confessional secrecy."[164]

In sum, Tacheney's description of the discernment sessions establishes that Appellant's statements to Tachney were communicated confidentially based on Tacheney's "professional capacity as a spiritual advisor, confessor, counselor or comforter."[165] The Missouri priest-penitent privilege thus applies and renders

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[160] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 35–36, 50, 103.
[161] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 103:4–9.
[162] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 64.
[163]See Second Supplemental RR1 @35; Defendant's Exhibit 1. at 55.
[164] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 55.
[165] MO. ANN. STAT. § 491.060(4).

Tacheney's testimony inadmissible.

B. The Texas priest-penitent privilege also encompasses Appellant's alleged confession to Tachney, and is held by the penitent.

The Texas priest-penitent privilege rule provides:

> A communicant has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication by the communicant to a clergy member in the clergy member's professional capacity as spiritual adviser.[166]

A "communicant" is considered anyone "who consults a clergy member in the clergy member's professional capacity as a spiritual adviser," while a "clergy member" can be "a minister, priest, rabbi . . . or other similar functionary of a religious organization or someone whom a communicant reasonably believes is a clergy member."[167] Again, there can be no dispute that Tachney was a "clergy member" within the meaning of the privilege at the time of the discernment sessions.[168]

Texas Rule of Evidence 505 defines "confidential communication" to extend to any private conversations Appellant had with Tachney that were "not intended for

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[166] TEX. R. EVID. 505(b) (2016) Nicholson v. Wittig, 832 S.W.2d 681, 687 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("This privilege belongs to her [*i.e.*, the communicant], not to Rev. Shirl."); In Texas, courts have held that the communicant owns the privilege.

[167] TEX. R EVID. 505(a); *see also* Snyder v. State, 68 S.W.3d 671, 674 (Tex. App.—El Paso 2000, pet. ref'd) (noting that priest-penitent privilege does not require minister to be ordained).

[168] TEX. R. EVID. 505(b) (2016). *See* Second Supplemental RR1 @35; Defendant's Exhibit 1 a. at 35.

further disclosure."[169] Texas courts have recognized this definition is broad, and communications "need not be strictly 'penitential' to qualify for protection."[170] For example, in *Simpson v. Tennant*, the Fourteenth Court of Appeals held the priest-penitent privilege protected the identity of a person who made an informal confession to a Methodist minister.[171] The court noted that because the confession was "given to the minister in confidence" and "came to me as a burden and a pain," it qualified for "total and absolute" protection.[172]

Conversely, the priest-penitent privilege does not generally extend to statements made as part of a disciplinary hearing, or in response to a confrontation prompted by a desire to protect others from the communicant.[173] For example, in *Kos v. State*, the Dallas Court of Appeals held the priest-penitent privilege did not protect Kos's communications with his fellow priest, Father Killian Broderick.[174] Broderick testified regarding statements Kos made after Broderick confronted him

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[169] TEX. R. EVID. 505(a)(3).
[170] *Simpson v. Tennant*, 871 S.W.2d 301, 310 (Tex. App.—Houston [14th Dist.] 1994, no writ).
[171] *Simpson*, 871 S.W.2d at 306–09.
[172] *Id*.
[173] *See Gutierrez v. State*, No. 01-09-00939-CR, 2010 WL 4484350, at *3 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. ref'd) (mem. op.) (not designated for publication) (Father Minifie's phone call confronting Gutierrez with sexual assault allegations was not privileged where "motive was concern for the children at his church"); *Maldonado v. State*, 59 S.W.3d 251, 253 (Tex. App.—Corpus Christi 2001, pet. ref'd) (holding privilege did not protect Bishop Jordon's meeting with Maldonado which was conducted for the explicit purpose of confronting Maldonado with allegations of inappropriate behavior because "statements made during a disciplinary/administrative meeting are not communications made for the purpose of obtaining spiritual guidance or consolation and do not fall under the privilege.").
[174] *Kos v. State*, 15 S.W.3d 633, 638 (Tex. App.—Dallas 2000, pet. ref'd).

with allegations of sexual abuse.[175] Father Broderick was part of an internal disciplinary committee that intervened when the allegations were discovered, and confronted Kos to question him about the allegations.[176] Broderick testified "he was not concerned about the 'state of [Kos's] soul'; rather, he described the meeting as a 'disciplinary intervention.'" Thus, the communication was not privileged.[177]

Tachney's discernment sessions with Appellant were strikingly different from the situation discussed in *Kos*. As a postulant, Appellant was in the process of becoming a monk.[178] Tachney's role was to "help the young people become full monks" and ensure it was the proper vocation for the men by guiding and counseling the postulants as they "renounced worldly pursuits" and "devoted themselves fully to spiritual work."[179] Appellant thus confided in Tachney as a spiritual counselor, and Tachney was single-mindedly focused on his task of discerning Feit's fitness for the monastic life; *not* protecting others.[180] Indeed, Tachney stated he felt no moral obligation to go to authorities because "it wasn't my responsibility"—his responsibility was to discern Appellant's fitness.[181] Tachney thus did not disclose the alleged confession to anyone other than the abbot.[182] Thus, Tachney's

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[175] *Id.* at 639.
[176] *Id.*
[177] *Id.*
[178] *See* Second Supplemental RR1 @35; Defendant's Exhibit 1 39–40, 88.
[179] See Second Supplemental RR1 @35; Defendant's Exhibit 1 40, 88.
[180] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 88.
[181] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 67.
[182] See Second Supplemental RR1 @35; Defendant's Exhibit 1 at 63.

descriptions of the discernment sessions clearly indicate Appellant confided in Tachney in his professional capacity, and both parties understood the communications to be confidential. The discernment sessions are protected under Texas's priest-penitent privilege.

IV. Section 139 is satisfied

As the above case law and analysis show, Appellant's conversations with Tachney qualify for the priest-penitent privilege under both Missouri *and* Texas law. Both states' laws apply in criminal cases; both states clearly consider Tachney a clergyman; both states protect communications made to the clergyman in his official capacity rather than limiting the privilege to the confessional.[183]

V. The priest-penitent privilege is not waived by Tachney's alleged disclosure of Appellant's discernment sessions to his superiors at the Abbey.

The State may argue the priest-penitent privilege was waived by Tachney's communication of Appellant's discernment sessions to his superiors.[184] Texas has not addressed this precise issue—*i.e.*, whether a clergyman's consultation with his superiors regarding the confidential communications destroys the privilege. However, Texas courts *have* acknowledged the plain language of the priest-penitent privilege statute allows third parties to be present during a confidential conversation without destroying the privilege, so long as their presence is "to further the purpose

[183] TEX. R. EVID. 505(b); MO. ANN. STAT. § 491.060.
[184] See Second Supplemental RR1 @35; Defendant's Exhibit 1at 46–47.

of the communication."[185] For example, in *Nicholson v. Wittig* the First Court of Appeals held that intermittent presence of nurses and a surgeon during the chaplain's discussions with the plaintiff did not waive the priest-penitent privilege.[186] Several other states have held similarly, recognizing the privilege is not waived by disclosure to or the presence of a third party, if that third party is a member of the clergy, a spouse, or a similar individual whose presence does not indicate a lack of intent that the communication remain confidential.[187] This is particularly true in light of the fact that the privilege belongs to the *penitent*—not the priest. For example, in *State v. Martin* the Washington Supreme Court held a clergyman did not waive the privilege by disclosing the defendant's communications to the clergyman's colleagues at Youth for Christ.[188] The court emphasized that the relevant third parties were fellow members of the clergy, while also noting the defendant—the holder of the privilege—did not authorize the disclosure.[189]

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[185] TEX. R. EVID. 505(a)(3); *Nicholson v. Wittig*, 832 S.W.2d 681, 685 (Tex. App.—Houston [1st Dist.] 1992, no writ).
[186] *Nicholson*, 832 S.W.2d at 685.
[187] *See, e.g.*, *State v. Archibeque*, 223 Ariz. 231, 234–36, 221 P.3d 1045, 1048–50 (Ariz. Ct. App. 2009) (applying privilege that prohibits witness testimony from "[a] clergyman or priest, without consent of the person making the confession, as to any confession made to the clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs," and holding that privilege was not waived by presence of spouse at confession because "the presence of [the] third party does not indicate a lack of intent to keep the communication confidential"); *State v. Martin*, 137 Wash. 2d 774, 787–88, 975 P.2d 1020, 1026–27 (Wash. 1999) (en banc).
[188] *Martin*, 137 Wash. 2d at 787–88, 975 P.2d at 1026–27.
[189] *Id.* (applying privilege statute that provided, "[a] member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the

Similarly here, Tachney's testimony indicates he discussed some of Appellant's confidential communications with the abbot, but there is no evidence he revealed the communications to non-clergymen.[190] At one point, Tachney vaguely referenced having to make disclosures to "the voting members of the community" at the time of the simple vows, but Appellant did not reach this stage and neither made nor agreed to make the disclosures.[191] Moreover, Tachney neither clarified what precisely needed to be disclosed at the time of the simple vows, nor who qualified as a member of the community.[192]

Additionally, there is no evidence Appellant knew Tachney was discussing his confidential information with the abbot, or that he consented to the disclosure. Ultimately, this is *the State's* burden to prove; while Appellant bears the burden to establish that his communication is privileged, it is the State's burden to establish waiver.[193]

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church to which he or she belongs," and holding that "[t]he privilege is not vitiated when the presence of the third person is necessary for the communication to occur, or, as the Court of Appeals stated, when the third person is another member of the clergy").

[190] See Second Supplemental RR1 @35; Defendant's Exhibit 1at 63.
[191] See Second Supplemental RR1 @35; Defendant's Exhibit 1at 47.
[192] See Second Supplemental RR1 @35; Defendant's Exhibit 1at 47.
[193] *Campbell v. State*, No. 11-06-00121-CR, 2008 WL 616141, at *3 (Tex. App.—Eastland Mar. 6, 2008, no pet.) (mem. op.) (not designated for publication) ("The party seeking to benefit by a finding of waiver has the burden to show waiver.").

CONCLUSION

Dale Tachney's testimony regarding Appellant's statements during the discernment sessions should have been excluded. The communication was privileged and the admissibility of that testimony was error. Appellant prays this court sustain this Point of error and reverse the judgement of the trial court.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING HEARSAY TESTIMONY OF FORMER DALLAS MORNING NEWS REPORTER BROOKS EGERTON REGARDING HIS CONVERSATIONS WITH FATHER JOSEPH O'BRIEN, NOW DECEASED, WHERE EGERTON TESTIFIES ABOUT STATEMENTS O'BRIEN MADE TO HIM DURING THAT INTERVIEW.

Brooks Egerton, a former reporter with the Dallas Morning News, was called by the State to share a conversation he had with Father Joseph O'Brien prior to O'Brien's death. The substance was replete with hearsay, containing within the statements, assertions Appellant admitted he'd killed Irene Garza.[194]

Prior to Egerton's testimony, Appellant objected, requesting a hearing outside the presence of the jury.[195] Appellant argued Egerton's testimony would violate not only the hearsay rule but would further violate Appellant's constitutional right to

[194] RR7
[195] RR7@6, 8

confront and cross examine.[196] The State offered an exception to the hearsay rule, namely - statement against penal interest– suggesting to the trial court:

> We believe the testimony of Brooks Egerton when he picked up Father O'Brien from a nursing home and interviewed him, that he was sane, he was competent, made certain statements to him, admissions that Father Feit had told O'Brien he had killed Irene Garza, and that he had not come forward.
>
> ……I believe Egerton will testify that they almost came to blows, into a fist fight, over these statements. They were not made in a confession setting. They were, in fact, statements against his penal interest. Subjecting him – and not only that – subjecting him to hate, contempt and ridicule for covering up this crime.[197]

The trial court learned outside the presence of the jury[198] Egerton was a reporter with the Dallas Morning News and in such capacity, wrote an article about the Irene Garza murder case in November 2004.[199] In researching, he interviewed Father Joseph O'Brien but could not remember when or where.[200] It was during this interview, O'Brien said Appellant admitted killing Irene Garza - after repeatedly confronting Appellant. O'Brien said they nearly "came to blows."[201]

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[196] RR7@6
[197] RR7@7; TEXAS RULE OF EVIDENCE 803(24); Note this proffer illustrates no statements which could be interpreted as statements against the *declarant's* penal interest.
[198] RR7@9-26
[199] RR7@10, 33-34
[200] RR7@14, 20
[201] RR7@13, 16-17, 34-37

The State claimed Egerton's article - ultimately written and published - *must be true*.[202] However, Egerton admitted when writing the article, there were things provided by O'Brien and there were things he relied upon from a TV show he watched regarding the disappearance of Irene Garza.[203] In fact, Egerton further admitted he wasn't sure *what* was attributed to O'Brien and what was attributed to the television show.[204] Further still, Egerton admitted he could not testify whether alleged statements made by Appellant to O'Brien were made in a confessional capacity.[205]

On some level, the State relied on the suggestion that O'Brien somehow steered the investigation away from the Church and Appellant, most likely to support the proposition O'Brien made statements against his penal interest. However, Egerton admitted *that* information which he included in his article actually came from the television show he watched – *not* O'Brien:

> Q. Did Father O'Brien say that he had steered attention away from the Church as recently as a few years before that?
>
> A. I remember that being in the article, yes. But actually I don't remember him saying it so much as, I believe I wrote words to that effect based on a cable television broadcast, if I'm remembering correctly, there had been some –

[202] RR7@15; The State elicited testimony that the article, once written, was "fact-checked" and asked Egerton to confirm there were no calls for corrections or claims that the article contained false information.
[203] RR7@15-16
[204] RR7@17
[205] RR7@18-19

Q. Do you recall him making an admission to you that quote, focused too much on the church and Ms. Garza's friends?

A. I don't recall whether that was to me or whether that was something that was in that cable television broadcast that I reported.

Q. But if your article says, he said the original investigation may have focused too much on the Church and Ms. Garza's friends, would that be a true statement?

A. Based on the information that was available to me. I'm just saying, I don't – I don't remember whether he was saying it to me or whether that was my summary.

Q. Summary?

A. Summary of what was in the cable television broadcast.[206]

Counsel for the State relied on this testimony to support a finding of reliability/admissibility pursuant to the exception to the hearsay rule found in Texas Rule of Evidence 803(24).[207] However, the proffered testimony revealed nothing upon which the trial court could have relied in so finding. There was no indication O'Brien was an object of hate, contempt or ridicule at the time the statements were made. There was nothing to support his penal interests were exposed at the time the statements were made. The State relied on the notion that O'Brien was complicit in

[206] RR7@15-16; the witness would clarify on cross examination during the proffer that this statement about steering the investigation away from the church was not attributed to O'Brien. Rather it was a summary of what the witness had seen and heard on the cable TV news shows about this murder. RR7@ 20-22

[207] RR7@7

the "cover-up."[208] However, no evidence was elicited during the proffer to support that finding. The State failed to satisfy their burden accordingly.[209]

Texas Rule Evidence of 803(24) defines a statement against interest as:

> A statement which was at the time of its making so far ... tended to subject the declarant to ... criminal liability ... or to make the declarant an object of ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[210]

Texas Rule of Evidence 803(24)[211] requires that for a statement against interest tending to expose the *declarant* to criminal liability[212] to be admissible, there must be corroborating circumstances clearly indicating the trustworthiness of the statement. There was no corroborating evidence indicating the statement(s) were clearly trustworthy as to both Appellant *and* O'Brien, rather than O'Brien alone.[213] In other words, *assuming arguendo*,[214] this Court finds there was some sort of

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[208] The State's theory at trial was that the Catholic Church "covered-up" the culpability of the church in the disappearance and murder of Irene Garza by "making a deal" with the Hidalgo County District Attorney at the time.

[209] Based upon Appellant's objection and the State's response, clearly the trial court and the parties were aware Egerton's testimony was being proffered as an exception to the hearsay rule as a statement against O'Brien's penal interest. The trial court was called upon to determine whether that exception applied. Appellant preserved error - the burden then became the State's to show that the evidence was admissible pursuant to some exception to the hearsay rule. *Long v. State*, 800 S.W.2d 545, 548 (Tex.Cr.App.1990)

[210] TEXAS RULE OF EVIDENCE 803(24), O'Connor's Texas Criminal Codes Plus (2017-18)

[211] TEXAS RULE OF EVIDENCE 803(24), O'Connor's Texas Criminal Codes Plus (2017-18)

[212] Note, Appellant does not concede that O'Brien was exposed to criminal liability.

[213] *Cofield v. State*, 857 S.W.2d at 805

[214] Appellant concedes nothing here

"cover-up" and/or that O'Brien participated in some way by diverting attention away from the church during this investigation, this in and of itself does not make O'Brien's statements regarding Appellant's alleged confession to the murder reliable such that they rise to the level of an exception as contemplated by Texas Rule of Evidence 803(24).

To be admissible under this rule then, the out-of-court statement must be *self-inculpatory* with corroborating circumstances indicating the trustworthiness of the statement.[215] The proponent of such a statement is required to show that it exposes the *declarant* to criminal liability and is trustworthy and reliable under corroborating circumstances.[216] Only those statements that are *wholly self-inculpatory* are trustworthy enough to be admissible under the rule.[217] A reviewing court may also look to the existence of independent, corroborating facts that tend, either directly or circumstantially, to establish the truth of the matter asserted by the statement.[218] Appellant urges this Court to recognize O'Brien's statements were *not* wholly self-inculpatory and the State did not offer corroborating circumstances to clearly show the trustworthiness of his statements.[219]

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[215] *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999)
[216] *See Cofield v. State*, 891 S.W.2d 952, 953 (Tex. Crim. App. 1994)
[217] *Id.* at 956
[218] *See Dewberry*, 4 S.W.3d at 751
[219] *See Id.*

The focus of the inquiry in determining the existence of corroborating circumstances should be verifying, to the greatest extent possible, the trustworthiness of the statement so as to avoid the admissibility of fabrication.[220] There's no definitive test by which to gauge the existence of the corroborating circumstances for purposes of Rule 803(24).[221] As examples, some factors which have been considered are whether the guilt of the *declarant* is inconsistent with the guilt of the defendant, whether the *declarant* was so situated that he might have committed the crime, and the relationship between the *declarant* and the party to whom the declaration was made.[222] Evidence which undermines the reliability of the statement as well as evidence corroborating its trustworthiness may be considered.[223] The party seeking to introduce the hearsay statement into evidence has the burden, and the evidence of corroborating circumstances must *clearly* indicate trustworthiness.[224]

Here, there was nothing in Egerton's recollection suggesting O'Brien recognized himself culpable for the murder of Irene Garza or that he was complicit in any cover-up as alleged by the State. In fact, when asked about steering the investigation away from the Church, Egerton plainly told the State that information

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[220] *Davis v. State*, 872 S.W.2d 743, 748 (Tex.Cr.App.1994); *See also Cofield*, supra at 955
[221] *Id.* at 749.
[222] *Id.*
[223] *Id.*
[224] *Id.*

regarding a "cover-up" came from a TV show. Even assuming arguendo these statements exposed O'Brien to criminal liability, the statements also exposed *appellant* to criminal liability.[225] The United States Supreme Court has said, "The fact that a person is making a broadly *self*-inculpatory confession does not make more credible the confession's *non-self*-inculpatory parts."[226] The concern is a declarant may be attempting to shift blame to another or curry favor with the State.[227] This Court should take care and consider that the *non*-self-inculpatory parts of O'Brien's statements – if they were made - were meant to curry favor, to spread or shift blame to Appellant, or that he was merely attempting to avenge himself or divert attention away from *his own* culpability.[228]

Although there is no definitive test for determining the sufficiency of corroborating circumstances, some of the factors applicable to this case are (1) the timing of the statement and its spontaneity; (2) the relationship between the declarant and the party to whom the statement was made; and (3) the existence of independent corroborating facts which, either directly or circumstantially, tend to establish the truth of the matter asserted by the statement.[229]

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[225] Clearly, O'Brien's alleged statements that Appellant confessed to the murder exposed Appellant to criminal liability. *See* Cofield, 891 S.W.2d at 956

[226] *Williamson v. United States*, 512 U.S. 594, 599 (1994) emphasis added

[227] *See Id.* at 603; *see also* *Lilly v. Virginia*, 527 U.S. 116, 139 (1999) (non testifying accomplice's confession, in which he incriminated himself as well as defendant, was not sufficiently reliable because accomplice may have been attempting to shift blame to defendant).

[228] *See* Cofield, 891 S.W.2d at 956.

[229] *See* *Davis v. State*, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994).

It should be noted as significant to the reliability requirement that O'Brien's out-of-court statements were the product of an interview which would no-doubt lead to his own notoriety and clearly shift blame away from himself and/or the church. Moreover, when a statement is made spontaneously, it is thought to be much more trustworthy.[230] Here, the record shows the statements were not made spontaneously; O'Brien's claims came to this witness in 2004, some forty-four (44) years after the fact. Certainly the timing of the statement(s) weighs heavily against reliability.

When considering the relationship of the declarant and the party to whom the statement(s) were made, one can easily assume O'Brien saw an opportunity for notoriety – to once again be an important part of the Irene Garza investigation. Given Egerton's position as a news reporter, given the notion these statement(s) made by O'Brien would be published in the Dallas Morning News, certainly a well-circulated and well-respected news source, and given that O'Brien's statement(s) would no doubt be an integral part of the "the story," clearly this factor weighs heavily against reliability. Of course, O'Brien had carte blanche to say *whatever he wanted*; his statement(s) would be taken as true.

As for the existence of independent corroborating facts which, either directly or circumstantially, tending to establish the truth of the matter asserted by the statement, Appellant avers the State failed in their burden. First, there were no

[230] *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004)

statement(s) made to Egerton suggesting O'Brien inculpated himself in the disappearance and/or murder of Irene Garza. There were no statements made to Egerton suggesting O'Brien inculpated himself in any cover-up. According to Egerton, O'Brien injected himself into the *original* investigation back in 1960 and confronted Appellant over and over again until he somehow "broke" and admitted guilt.[231] No statements were made to Egerton that O'Brien purposely covered it up or that he diverted attention away from the Church. Rather, it would appear O'Brien played an active role in attempting to "out" the perpetrator. The State will likely argue O'Brien's simply hiding the fact that Appellant confessed and not reporting it to the authorities is enough to satisfy and/or corroborate the statements, as contemplated by 803(24). That, however, requires this Court to believe there indeed was a cover-up and it requires this Court to believe that Appellant indeed made the statement to O'Brien. Even assuming arguendo this Court believes there was a cover-up and O'Brien participated in that cover up, only those statements made to Egerton which were *self*-inculpatory are reliable enough to satisfy 803(24).

The United States Supreme Court addressed a co-actor's hearsay statement inculpating himself and the defendant. In *Williamson v. U.S.*,[232] the Supreme Court clarified the scope of the hearsay exception for statements against penal interest

[231] RR7@13-14, 36-37
[232] *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)

pursuant to the Federal Rules of Evidence. It discussed the general principle of hearsay inadmissibility being based upon the theory that out-of-court statements are subject to particular hazards, *e.g.* that the declarant might be lying, or might have misperceived the events which he relates, or might have faulty memory, or that his words might have been misunderstood or taken out of context by the listener; and that the ways in which those dangers are minimized for in-court statements, *e.g.* the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and the right of cross-examination, are generally absent for things said out of court.[233] It interpreted Federal Rule 804(b)(3), which involves the exception for statements against the declarant's interest, and concluded that it did not allow the admission of *non*-self-inculpatory statements even if made within a broader narrative that is generally self-inculpatory.[234] It points out that "the fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's *non*-self-inculpatory parts," and that "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."[235] The Supreme Court previously recognized that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those

[233] *Id.*, 512 U.S. at ——, 114 S.Ct. at 2434, 129 L.Ed.2d at 481–82
[234] *Id.*, 512 U.S. at ——, 114 S.Ct. at 2435, 129 L.Ed.2d at 482–83
[235] *Id.*

passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."[236]

Though the Supreme Court in *Williamson* was interpreting the federal rule, Texas Rule of Evidence 803(24) contains very similar language, and the Texas Court of Criminal Appeals has found the *Williamson* reasoning and analysis persuasive.[237] Applying this reasoning and analysis, O'Brien's hearsay statement(s) do not meet the Rule 803(24) hearsay exception. Accordingly, Appellant avers the trial court abused its discretion in admitting O'Brien's hearsay statement(s), which inculpated Appellant.

What about "corroborating factors?" The State will likely argue there was evidence independent of O'Brien's statement(s). Appellant avers that evidence independent of O'Brien's statements does not sufficiently establish the necessary corroboration to support reliability/trustworthiness. During the trial, insinuations and allegations regarding a cover-up were made; there were assertions made that O'Brien found "evidence" in the basement of the Church rectory which affirmatively linked Appellant to this crime. Yet, Egerton never testified that O'Brien admitted finding evidence in the basement of the church. Further, none of *that* physical

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[236] *Lee v. Illinois*, 476 U.S. 530, 545, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514, 529 (1986)

[237] *See Cofield v. State*, 891 S.W.2d 952 (1994); *See also Cunningham v. State*, 877 S.W.2d 310 (1994); 4 David W. Louisell and Christopher B. Mueller, Federal Evidence § 489 at 1152 (1980). The overriding consideration is that the requirement of corroboration should be utilized and construed in such a manner as to effectuate its purpose of circumventing fabrication. Fed.R.Evid. 804, Advisory Committee's Note.

evidence was produced. Nothing was produced to show that evidence was analyzed. There simply was no evidence to corroborate the notion that evidence was found which affirmatively linked Appellant to the murder; there simply wasn't any evidence produced that O'Brien participated in the secretion of the "evidence found." Further, as it relates to the "theory" that there was a cover-up, there was no evidence linking O'Brien to any such cover-up.

State's witness Victor Rodriguez testified as a surrogate for the McAllen Police Investigators of 1960, suggesting the investigation in 1960 was a "thorough one." He testified he *believed* Appellant accosted Irene Garza at 7 p.m. in the rectory, bound her, gagged her and ultimately killed her.[238] Yet, he admitted no physical evidence was recovered to support his belief that the rectory at the Sacred Heart Church was the crime scene.[239] No physical evidence was analyzed to support that belief.[240] And although he "believed" Irene Garza was accosted by Appellant at 7 p.m. when she arrived at the rectory, he admitted the Sacred Heart Church campus in McAllen that night was crowded;[241] there were many people waiting to go to confession. There were four (4) confessionals operating simultaneously to handle the crowd.[242] Yet, there was no evidence that anyone heard or saw anything

[238] RR6@82-85
[239] RR6@82
[240] RR6@82-83, 98
[241] RR6@93
[242] RR6@88-89

suspicious or that could be interpreted as an abduction.[243] There were people present inside the rectory that evening before, during and after Irene Garza arrived at 7 p.m.; none of them reported anything suspicious or which could be interpreted as a kidnapping.[244] In fact, Irene Garza was seen inside the church kneeling and praying as late as 8:15 p.m. that same night![245] Ultimately, Chief Rodriguez admitted there was no evidence recovered and/or analyzed affirmatively linking Appellant to this crime.[246]

Rodriguez' testimony served to further attempt to convince the jury there was a "cover-up" by testifying there were statements made by deceased persons to the effect that "items belonging to Irene" were found and disposed. Yet, these "statements made by other persons" were not attributed to O'Brien. There was nothing indicated by Rodriguez that O'Brien was somehow complicit in any "cover-up" that could serve to corroborate the statements made by O'Brien, such that would satisfy the State's burden as contemplated by 803(24).

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[243] RR6@89
[244] RR6@89-91
[245] RR6@80
[246] RR6@82-105; It should be noted that Chief Rodriguez mentioned the "slide viewer" was evidence linking Appellant to the canal bank where she was found. However, he admitted that although the slide viewer was found prior to the evidence being sent for analysis in 1960, the slide-viewer was not considered evidence at the time. Further, the only documentation of the slide-viewer in the police file was an old newspaper article. No police documentation of the viewer being found was generated. RR6@97-98, 105-107; RR11@ State's Exhibit 91, 100

What about Darryl Davis? Again, Davis speaks of a "plea deal" reached by the Hidalgo District Attorney's office.[247] During his testimony, nothing was elicited to corroborate O'Brien's statement(s) such that would satisfy the State's burden as contemplated by 803(24).

Assuming *arguendo*, the trial court believed there was a "cover-up" by the Catholic Church, Appellant avers there was no evidence of it. Rather, there were allusions and insinuations the Church played a role in a cover-up, but to make findings there existed corroborative evidence to support the 803(24) exception here was an abuse of discretion on the part of the trial court.

Accordingly, Appellant prays this Court sustain Appellant's hearsay complaint finding Egerton's testimony regarding O'Brien's statements did not meet the trustworthiness requirement under the declaration-against-interest exception to the hearsay rule. Further, Appellant prays this Court finds the trial court abused its discretion in so finding and reverse the judgement of the trial court.[248]

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[247] RR4@103

[248] *See Id.*; *Cofield*, 891 S.W.2d at 956; Tex. R. Evid. 803(24), O'Connor's Texas Criminal Codes Plus (2017-18)

Harm Analysis[249]

Appellant avers the introduction of this evidence resulted in reversible error under Texas Rule of Appellate Procedure 81(b) (2). The Texas Court of Criminal Appeals has recognized that Rule 81(b)(2) was the rhetorical and semantic equivalent of the harmless error standard announced by the Supreme Court for constitutional errors in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[250] The CCA observed this rule to be a ternary standard of review where reversal is mandated unless the appellate court concludes beyond a reasonable doubt the error did not contribute to the conviction or the punishment assessed.[251] The function of the harmless error analysis is not to determine how this Court would have decided the facts, but to determine to what extent, if any, an error contributed to the conviction or the punishment. In other words, Rule 81(b) (2) mandates that the appellate court focus upon the error and determine whether it contributed to the conviction or the punishment. Appellant recognizes the impact of the error cannot be properly evaluated without examining its interaction with other evidence. Appellant avers that after calculating probable impact of the error on the jury in light of the existence of the other evidence, this Court will agree the error is harmful.

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[249] An appellate court may not reverse if, after examining the record as a whole, it has fair assurance the error did not influence the jury or had but a slight effect. Tex. R. App. P. 44.2(b), O'Connor's Texas Criminal Codes Plus (2017-18) (non-constitutional errors that do not affect substantial rights must be disregarded); *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)
[250] *Mallory v. State*, 752 S.W.2d 566 (Tex.Cr.App.1988),
[251] *Id.*; *See also* *Harris v. State*, 790 S.W.2d 568, 584 (1989)

That said, it is not the propriety of the outcome, but rather the integrity of the process leading to the conviction. Considering the source of the error, the nature of the error, whether and to what extent it was emphasized by the State, and its probable collateral implications, it's clear Egerton's testimony prejudiced the jurors' decision-making. The question to be answered here is not whether the jury reached the correct result, but whether they were able to properly apply law to facts to reach a verdict. A reviewing court must always examine whether the trial was an essentially fair one. If the error was of a magnitude that it disrupted the juror's orderly evaluation of the evidence, no matter how overwhelming it might have been, then the conviction is tainted. Again, it is the effect of the error and not the other evidence that must dictate the reviewing court's judgment.

All of *that* being said, a procedure for reaching a harm determination should: first, isolate the error and all its effects, using the considerations set out above and any other considerations suggested by the facts of an individual case; and second, ask whether a rational trier of fact might have reached a different result if the error and its effects had not resulted.

The record here reflects O'Brien's alleged out-of-court statements go right to the heart of the State's case – Appellant's alleged confession to the murder of Irene Garza:

Q. "In this conversation did he tell you anything about the admissions that Father – that John Feit had made to him with respect to the Irene Garza murder?"

A. "Yes, he did."

Q. "What did he say?"

A. "He said that after he repeatedly pressed John Feit about the case that John Feit admitted to killing Irene."

Q: "Did he admit he had killed Irene?"

A: "Yes."[252]

Then, during closing argument, the State emphasized this evidence:

> "You heard from Brooks Egerton…sat in here under oath and told you what Father O'Brien told him. That Father O'Brien had told him that John Feit killed Irene Garza."[253]
> ……..
>
> "Well what about Brooks Egerton who told you what Father O'Brien said that John Feit had killed Irene Garza…."[254]

In reviewing the record, there was not merely a passing reference to this evidence. Clearly the State's intention was to convince this jury that John Feit murdered Irene Garza. How better to accomplish this than to elicit evidence of a confession. Clearly, this Court cannot be assured the admission of the complained of evidence did not influence the jury or had but a slight effect.[255]

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[252] RR7@36
[253] RR9@34
[254] RR9@43
[255] *See* *Solomon v. State*, 49 S.W.3d at 365

Because the trial court erred in admitting the hearsay testimony of Brooks Egerton regarding O'Brien's statements under Rule 803(24) and because this Court cannot be assured the error did not influence the jury or had but a slight effect on its deliberations, Appellant prays this Court reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

POINT OF ERROR NUMBER FOUR

THE TRIAL COURT ERRED BY ADMITTING EXTRANEOUS-MATTER EVIDENCE IN VIOLATION OF TEXAS RULES OF EVIDENCE 404(B)

> The trial court reversibly erred by admitting the testimony of Clotilde Sanchez regarding extraneous matters and unrelated events where Appellant was identified as having made lewd and/or menacing comments to her, violating the proscriptions of the Relevancy Rules, specifically, 401, 404(b) and 403.
>
> The trial court reversibly erred by admitting the testimony of Beatrice Castro Garcia regarding extraneous matters and an unrelated events where Appellant was identified as having made lewd and/or menacing comments to her, violating the proscriptions of the Relevancy Rules, specifically 401, 404(b) and 403.
>
> The trial court reversibly erred by deeming evidence surrounding the America Guerra case and Appellant's plea, violating the proscriptions of the Relevancy Rules, specifically 401, 404(b) and 403.

On November 29, 2017, a hearing was had to determine the admissibility of extraneous/bad acts evidence.[256] During that hearing, the State took the position the extraneous matters were in fact *not* subject to the proscriptions of Texas Rule of

[256] RR3; CR1@1018-1044

Evidence 404.[257] The State argued these extraneous matters were necessary to prove "malice aforethought," an element of the charged offense and therefore not subject to a 404(b) analysis.[258]

Clotilde Sanchez and Beatrice Castro Garcia testified at that November 29, 2017 hearing.[259] The State also offered a judgment from the America Guerra case, clearly indicating an obvious intent to use *that* case and the facts surrounding its resolution.[260] Appellant urged the trial court to find these extraneous matters were not relevant for any purpose making facts more or less probable regarding alleged acts on the part of Appellant on April 16, 1960. Further, these matters were neither admissible pursuant to TRE 404(b) nor 403.[261]

Clotilde Sanchez testified she was 21 years old in March of 1960, cooking and cleaning for the priests of the Sacred Heart Catholic Church in Edinburg, Texas.[262] She talked about the attack of America Guerra, which occurred there in March of 1960. She was familiar with priests living there and visiting priests – specifically a

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[257] RR3@16-17; Note, the State *did* provide a notice of its intent to offer extraneous matters listing several areas they intended to elicit before the jury in this case, suggesting a concession these matters were indeed subject to 404(b); CR1@972, 989

[258] RR3@17-18

[259] RR3@43, 50.

[260] On March 23, 1960, America Guerra was assaulted at the Sacred Heart Catholic Church in Edinburg, Texas. Appellant was the alleged perpetrator; his first trial ended in a mistrial. Later, Appellant would plead no contest to those charges. *See* RR3@25, 45, 54-55; *See also* RR11@State's Exhibit 66 (State's Exhibit 66 (Judgment) was offered and admitted as Exhibit 2 at the November 29, 2017 pre-trial hearing, however was not included as an Exhibit in RR3)

[261] RR3@19

[262] RR3@44-50

visiting priest named Father John Feit.[263] Sanchez identified a likeness of Father Feit as he appeared back then.[264]

There was a time when she went to the basement there at the Sacred Heart Church in Edinburg, while the priests, including Appellant, were present.[265] When she went to the basement, Appellant is alleged to have said, "how about closing the door and make Tilley, you know, disappear." This happened in March of 1960.[266] Sanchez also testified about a phone call Appellant supposedly made where he was reported to have said to her, "Tilley, you're next, honey."[267] Sanchez' testimony during trial was consistent with her pre-trial testimony.[268]

Beatrice Castro Garcia was also called to testify at the pre-trial hearing on the 29th.[269] She was 20 years old and working downtown close to the Sacred Heart Church in McAllen in 1960. On April 10, 1960, she was walking to work and a car approached her as she crossed the street. She remembers and identified Appellant having driven the car, saying to her, "I would love to take a picture of you dressed

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[263] RR3@45-46
[264] RR3@46
[265] Sanchez testified she would go down to the basement at times for supplies. RR3@47-48
[266] RR3@48-49
[267] RR3@45, 49; This was elicited in the context of the America Guerra case – "you're next, honey."
[268] RR5@67-78
[269] RR3@50

in black by the cemetery." Garcia's testimony during trial was consistent with her pre-trial testimony.[270]

After the witnesses testified, the State offered Exhibit 2 – a judgment from the America Guerra case, documenting its resolution.[271] It shows Appellant entered a "nolo contedere" plea to aggravated assault with intent to commit rape. Thereafter he was assessed a $500 fine.[272]

The Court overruled Appellant's objections pursuant to 401, 404(b) and 403 and deemed the extraneous-evidence admissible. The trial court found these matters "relevant as they go to the elements of the offense." The Court made the same ruling, albeit implicitly, regarding evidence surrounding the America Guerra case.[273]

Appellant contends the trial court abused its discretion, violating Texas Rules of Evidence 401, 404(b) and 403 when it admitted the testimony of Clotilde Sanchez and Beatrice Garcia and evidence surrounding the case of America Guerra. This extraneous evidence had no relevance apart from its tendency to prove Appellant's character and to show Appellant's conformity therewith. Assuming arguendo this evidence had some small "vestige of relevance," the trial court abused its discretion

[270] RR5@57-66
[271] RR3@54-55; RR11@ State's Exhibit 66.
[272] RR3@54-55; This Exhibit would later be referred to in order to document a plea agreement reached.
[273] RR3@58-59;

by admitting the extraneous matter evidence, finding the probative value of the evidence outweighed the danger of unfair prejudice.

I. Standard of Review

The admission of extraneous-offense evidence under Texas Rule of Evidence 404(b)[274] is reviewed for abuse of discretion.[275] A trial court does not abuse its discretion if the decision to admit or exclude the evidence is within the "zone of reasonable disagreement."[276] A trial court's determination typically falls within the zone of reasonable disagreement if the evidence shows the extraneous transaction is relevant to a material, non-propensity issue.[277] A trial court's ruling under Texas Rule of Evidence 403 is also reviewed for an abuse of discretion.[278]

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[274] Rule 404(b) of our Texas Rules of Evidence provides "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...," provided the State gives the requisite notice. When a defendant makes a timely objection that such evidence is *in*admissible under Rule 404(b), the State must satisfy the trial court that the evidence has relevance apart from its tendency "to prove character ... to show action in conformity therewith.

[275] *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex.Crim.App. 2009); *Knight v. State*, 457 S.W.3d 192, 201 (Tex.App.–El Paso 2015, pet. ref'd)

[276] *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990) (op. on reh'g); *Knight*, 457 S.W.3d at 201

[277] *Montgomery*, 810 S.W.2d at 389

[278] *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex.Crim.App.2013); *see also Montgomery*, 810 S.W.2d at 391

II. **Admissibility Under Rules 401, 404(b) and 403**

As a general rule, all relevant evidence is admissible.[279] Evidence is generally admissible if it has "any tendency" to make a fact of consequence *to the case* "more or less probable than it would be without the evidence."[280] Texas Rule of Evidence 404(b) provides an exception to this general rule: although relevant, "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[281]

In a criminal case, evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[282] A party may introduce extraneous-offense evidence that has relevance apart from its tendency to prove character conformity (1) where it logically serves to make more probable or less probable an elemental fact or an evidentiary fact that inferentially leads to an elemental fact, (2) where it serves to make more probable or less probable defensive evidence that undermines an elemental fact, or (3) where it rebuts a defensive

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[279] Tex.R.Evid. 402, O'Connor's Criminal Codes Plus (2017-18) (making all relevant evidence admissible unless otherwise provided)

[280] Tex.R.Evid. 401, O'Connor's Texas Criminal Codes Plus (2017(18) (defining "relevant" evidence)

[281] Tex.R.Evid. 404(b)(1), O'Connor's Texas Criminal Codes Plus (2017(18)

[282] Tex.R.Evid. 404(b)(2), O'Connor's Texas Criminal Codes Plus (2017-18); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex.Crim.App. 2004); *Moses v. State*, 105 S.W.3d 622, 626 (Tex.Crim.App. 2003); *Knight*, 457 S.W.3d at 202

theory.[283] Admissibility is subject to the trial court's discretion to exclude it if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403.[284]

III. **Rule 404(b) Analysis**

First, a determination must be made whether the evidence was relevant. In other words, before the evidence can be admitted, it must appear the extraneous evidence has some legal relevance to the case being prosecuted.[285] Appellant objected arguing the extraneous matters indeed were not relevant.[286] Because Rule 401 is limited by Rule 404(b), it should be determined whether the use of this relevant extraneous-offense evidence serves a relevant purpose—whether listed in Rule 404(b) or not—other than to show character conformity.[287]

In the instant case, Sanchez' and Garcia's testimony and evidence surrounding the America Guerra case do not support a finding Appellant had a *motive* for killing Irene Garza; this evidence does not support a finding Appellant had the *opportunity*

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[283] *Montgomery*, 810 S.W.2d at 387, 388

[284] *Id.* at 389; *Knight*, 457 S.W.3d at 204; Tex.R.Evid. 403, O'Connor's Texas Criminal Codes Plus (2017-18) (allowing the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence)

[285] *See Hodge v. State*, 506 S.W.2d 870, 873 (Tex. Crim. App. 1974) (op. on reh'g)

[286] RR3@19

[287] If the trial court determines the evidence has no relevance apart from character conformity, then the evidence is absolutely inadmissible. The trial court has no discretion to admit it. *See* 22 Wright & Graham, Federal Practice and Procedure: Evidence §§ 5249 & 5250 (1978), at 540 & 544.

to commit the murder of Irene Garza, nor does it support a finding of a *plan* Appellant had in place for the purposes of killing Irene Garza.[288]

IV. MOTIVE

Motive is *defined* in Black's Law Dictionary as the *reason* why one committed the crime - the inducement, reason, or willful desire and purpose behind the commission of an offense.[289] "'*Motive*' refers to an emotion that would provoke or lead to the commission of a criminal offense.'"[290] One of the 404(b) exceptions cited by the State in support of the admissibility of these extraneous matters was to show "motive."[291] However, appellant avers the admission of the extraneous evidence – for purposes of proving motive - did not and could not have tended to show an evidentiary fact necessary to prove the elements of the instant offense. The facts surrounding the assault of America Guerra did not serve to make any fact of consequence more or less probable. Neither did the recollection of Appellant's comments and/or behavior as testified to by Garcia and Sanchez. None of the extraneous matters, even if taken as true beyond a reasonable doubt, could be used by the State as motive for the murder of Irene Garza. Again, even if taken as true,

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[288] These were the exceptions cited by the State in support of an exception to the 404(b) proscriptions. RR3@57; *See also* Tex. R. Evid. 404(b), O'Connor's Texas Codes Plus (2017-18)
[289] Black's Law Dictionary 435 (9th ed. 2009).
[290] *Casterline v. State*, 736 S.W.2d 207, 211 (Tex.App.-Corpus Christi 1987, pet. ref'd) (emphasis added).
[291] RR3@19

repetition of the same/similar act or same/similar crime does not equal a "motive."[292] It equals the repeated commission of the same or similar behavior offered indirectly to show bad character and conduct in conformity with that bad character.

V. OPPORTUNITY

The issue of opportunity, or lack thereof, was not raised in this case. In fact, contrary to claiming he lacked opportunity, appellant arguably conceded he had opportunity to commit the offense by acknowledging in his written statements he was alone with Irene Garza in the rectory on the evening of April 6, 1960. Appellant remembered Irene Garza arriving at the rectory that evening; she arrived reportedly seeking absolution without having to wait in the long lines inside the Church, where hundreds of people were waiting to give confession. Thus, the extraneous conduct was not relevant to the uncontested issue of opportunity.[293]

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[292] *See* United States v. Krezdorn, 639 F.2d 1327 (5thCir.1981). In *Krezdorn,* the government offered evidence of 32 extraneous offenses of forgery to prove the defendant committed the charged offense of forging four documents. *Id.* at 1330. The court stated that [t]he thirty-two additional forgeries do not tend to establish the existence of a larger goal of which the four charged forgeries were only a part. The four forgeries for which Krezdorn was indicted show that Krezdorn was engaged in forgery. That there were thirty-six instead of only four forged I–190's does not establish anything different. It would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating Krezdorn's propensity to commit this crime. Evidence of other crimes is not admissible for this purpose. *Id.* at 1331.

[293] Evidence of an extraneous offense may be admissible under Rule 404(b) to rebut a defense of "lack of opportunity" or "impossibility." *See, e.g.,* *Wheeler v. State*, 67 S.W.3d 879, 887–88 (Tex.Crim.App.2002)(extraneous offense involving another child "with family members in the immediate vicinity" admissible to rebut claim of lack of opportunity and impossibility where defense was that defendant was never alone with child victim); *Powell v. State*, 63 S.W.3d 435, 438 (Tex.Crim.App.2001) (extraneous sexual offenses admissible in sexual abuse case where defense claimed lack of opportunity to commit offense because he was never alone with victim

VI. PLAN

When used properly, the "plan" exception allows admission of evidence to show steps taken by the defendant in preparation for the charged offense.[294] For example, if a defendant steals a car on Monday, buys a machine gun on Tuesday, pastes together a robbery note on Wednesday, parks illegally in front of the Wells Fargo building on Thursday while casing out the bank, and then robs the bank on Friday using the machine gun and driving off in the stolen car, all of the extraneous acts are relevant to prove each step of the defendant's ultimate plan to rob the bank.

Unfortunately, courts frequently admit evidence of extraneous acts under this exception not to show acts the defendant took in preparation for the ultimate charged offense, but to show repeated acts that are similar to the charged offense. Repetition of the same or similar act or same crime does not equal a "plan."[295] It equals the

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and many other children were always present); *Abshire v. State*, 62 S.W.3d 857, 860 (Tex.App.-Texarkana 2001, pet. ref'd) (extraneous-offense evidence admissible in child sexual assault case where defense was lack of opportunity and all of defendant's family members testified that he never had opportunity to commit offense in his home because no room was ever locked and people were always in position to see what transpired in house).

[294] *See Boutwell v. State*, 719 S.W.2d 164, 181 (Tex.Crim.App.1986)(op. on reh'g.) ("Central to the common plan or scheme exception is that there be a plan or scheme and the extraneous offenses are steps taken towards the accomplishment of the plan."); *see also Haley*, 209 S.W. at 678. In *Haley*, the Court explained: [w]hen the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. To render them admissible, there must be not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.... To show a plan to rob a safe, the stealing of the key would be relevant; or to show a plan to murder a whole family and obtain their insurance money, the killing of other insured members of the family would be admissible. *Id.* at 678 (quotations omitted).

[295] *See United States v. Krezdorn*, *supra*.

repeated commission of the same behavior offered obliquely to show bad character and conduct in conformity with that bad character. This bad-character-conformity purpose, whether express or not, is precisely what is barred by Rule 404(b). Here, since the State failed to articulate exactly how this extraneous evidence tends to prove a step toward an ultimate goal or overarching plan, the evidence is not admissible to prove part of a "plan."

VII. ELEMENT OF THE OFFENSE

The State in response to counsel's 404(b) objection suggested the "extraneous matters" were not subject to the proscriptions of 404(b) "because they are not 404." Instead, the State argued it had a duty to prove the elements of the offense as charged in the indictment. Specifically, the State argued it had to prove malice aforethought, intending to use extraneous matters to do so, claiming "404 goes only to notice."[296]

It should be noted here the murder statute in 1960 was the controlling penal code statute for purposes of this prosecution. In other words, the State had to prove "murder" as defined in the 1948 Penal Code. On April 16, 1960, the Texas Penal Code considered any intentional killing to be a "murder," defining it as follows:

> "Murder - Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide[297] by the absence of circumstances which

[296] RR3@16-18

[297] "Homicide" encompassed every "destruction of the life of one human being by the act, agency, procurement, or culpable omission of another." TEX. PENAL CODE art. 1201 (1948) (*in effect in 1960*). *Historical Texas Statutes*, TEXAS LAW LIBRARY (Jan. 20, 2016), https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/#1960.

> reduce the offense to negligent homicide or which excuse or justify the killing."[298]

The elements of a 1960 murder claim were thus:

(1) voluntary, *i.e.*, intentional;[299]
(2) killing;
(3) of a person;
(4) within Texas;[300]

After proving these four elements, murder was separated into two categories: murder *with* malice aforethought, and murder *without* malice aforethought.[301] However, these were not two separate offenses; malice was simply seen as a

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[298] Tex. Penal Code art. 1256 (1948) (*in effect in 1960*). *Historical Texas Statutes*, TEXAS LAW LIBRARY (Jan. 20, 2016), https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/#1960. The relevant 1948 statutes defining homicide, murder, and its related defenses were not altered between 1948 and 1960. See TEX. PENAL CODE, Table of Articles Affected by Legislation from 1949 to 1959 (Supp. 1960) (showing that the only change in Articles 1200 *et. seq.* addressing homicide in the 1948 Penal Code was the addition of art. 1260a in 1950); TEX. PENAL CODE art. 1260a (Supp. 1950) (addressing lynching).

[299] *Baylor v. State*, 208 S.W.2d 558, 560 (Tex. Crim. App. 1948) (defining voluntary as intentional under art. 1256); *Crutchfield v. State*, 10 S.W.2d 119, 121 (Tex. Crim. App. 1928) (defining voluntary as "done by design, with intent").

[300] TEX. PENAL CODE art. 1256 (1948); A representative jury charge, approved by the Court of Criminal Appeals, is as follows:

> As to the charge of the court, it is also suggested that it should define murder as now defined in article 1256 . . . Some reasonably accurate definition of the word "voluntarily" should be given, at least if asked, or if failure to give same be excepted to. Such definition may be found in the standard lexicons or in the opinions of the courts. Also the jury should be told that, if they find and believe from all the evidence, beyond a reasonable doubt, that the defendant at the time and place and in the manner set out in the indictment voluntarily killed the deceased (and in an appropriate case that the killing was not reduced to negligent homicide, and was not excused or justified under the circumstances in evidence), they should find him guilty of murder. *Crutchfield*, 10 S.W.2d at 123.

[301] *Galloway v. State*, 420 S.W.2d 721, 724 (Tex. Crim. App. 1967).

punishment enhancement.[302] When bifurcation became the new procedure in Texas,[303] the Court of Criminal Appeals reaffirmed malice was still a *punishment enhancement*, holding juries should be instructed to determine whether a crime was committed *with* or *without* malice *at the punishment phase*.[304] Yet, while malice was not an element of the underlying crime of murder, it had to be pleaded in the indictment if the State sought the corresponding range of punishment.[305]

Appellant avers counsel for the State was being intellectually dishonest by suggesting extraneous-matter evidence was admissible in order to prove malice aforethought at the guilt-innocence portion of Appellant's trial.[306] Malice

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[302] Id. ("The statute (Article 1256, V.A.P.C.) provides different punishments for murder with and without malice aforethought, but does not create two offenses, only the single offense of murder.").

[303] Criminal trials were unitary proceedings in 1960. Murphy v. State, 777 S.W.2d 44, 54 (Tex. Crim. App. 1988) (en banc) (Onion, J., dissenting) (discussing the history of the bifurcated trial system). The amended rules passed in 1965 introduced bifurcated proceedings. Id.

[304] The trial court was required to provide a definition of malice to aid the jury, and to instruct regarding murder without malice if such issue was raised by the evidence. TEX. PENAL CODE art. 1257b (1948). The definition widely accepted by the courts of appeals was as follows:

> "[M]alice, in a legal sense, means that condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, which is evidenced by the intentional doing of wrongful acts without legal excuse."

Crutchfield, 10 S.W.2d at 121. *See also* Brazile v. State, 497 S.W.2d 302, 304 (Tex. Crim. App. 1973) ("it would appear proper to submit the issue of malice *only* during the punishment stage.").

[305] Wright v. State, 527 S.W.2d 859, 875 (Tex. Crim. App. 1975) ("in a prosecution for murder the presence or absence of malice relates only to punishment, and any punishment in excess of five years (for murder) is illegal unless the indictment alleges that the killing was done with malice aforethought, said element being indispensable for a greater penalty").This is consistent with the general rule for punishment enhancements, which must be pleaded in the indictment but are not determined until the punishment phase. *See* Wright v. State, 527 S.W.2d 859, 875 (Tex. Crim. App. 1975) (discussing the need to give the defendant notice of the accusation against him by including intended punishment enhancements in the indictment).

[306] RR3@16-18

aforethought, as discussed in the older statutes and applicable here, was a *punishment enhancement* and therefore not admissible at the guilt-innocence portion of Appellant's trial.

Appellant avers the trial court abused its discretion finding extraneous-offense evidence offered by the State served a relevant purpose under Rule 404(b).[307] Accordingly, Appellant prays this Court sustain these points of error and remand this matter to the trial court for a new trial.[308]

VIII. Rule 403 Analysis

Without waiving any of the foregoing and assuming arguendo the extraneous-evidence complained about had any *scintilla* of relevance apart from showing character conformity, Appellant complains any probative value was greatly outweighed by its unfair prejudice. Appellant avers the trial court abused its discretion in finding, *albeit implicitly*, the probative value outweighed its unfair prejudice.[309]

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[307] *See* Tex. R. Evid. 404(b), O'Connor's Texas Criminal Codes Plus (2017-18)

[308] Evidence is "relevant" that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Evid. 401, O'Connor's Texas Criminal Codes Plus (2017-18). "All relevant evidence is admissible, except as otherwise provided by ... these rules.... Evidence which is not relevant is inadmissible." Tex.R. Evid. Rule 402; Tex.R. Evid. Rule 404 generally prohibits "the circumstantial use of character evidence." *Goode, Wellborn & Sharlot*, Texas Practice: Texas Rules of Evidence: Civil and Criminal § 404.2 (1988), at 106. Thus, although relevant, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

[309] RR3@57; *See Green v. State*, 934 S.W.2d 92 (Tex.Crim.App.19960 (Appellant claimed the trial court erred in failing to articulate a Rule 403 analysis following his objection to the introduction of the letter on that ground. When ruling on the admissibility of evidence, the trial

Under Rule 403, even if evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value.[310] In particular, Rule 403 provides the court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."[311]

A trial court must balance (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative.[312]

Appellant argues the proffered extraneous evidence had no probative value and the State had no need for it. "Probative value" of evidence means more than

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court implicitly makes findings of fact and conclusions of law. *McFarland v. State*, 845 S.W.2d 824, 842 (Tex.Crim.App.1992), *cert. denied*, 508 U.S. 963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993). Appellant did not ask the court to make oral or written findings and the court is not mandated to *sua sponte* put these findings or conclusions on the record. *Id.*; *Theus v. State*, 845 S.W.2d 874, 880 n. 6 (Tex.Crim.App.1992); Where a proper Rule 403 objection is made, the trial court must conduct a balancing test. *Rojas v. State*, 986 S.W.2d 241, 250 (Tex.Crim.App. 1998); *Williams v. State*, 958 S.W.2d 186, 195 (Tex.Crim.App. 1997)(holding trial court has no discretion whether to conduct balancing test under Rule 403); *Knight*, 457 S.W.3d at 204

[310] Tex.R.Evid. 403, O'Connor's Texas Criminal Codes Plus (2017-18); *Montgomery*, 810 S.W.2d at 389; *Knight*, 457 S.W.3d at 204

[311] Tex.R.Evid. 403, O'Connor's Texas Criminal Codes Plus (2017-18)

[312] *See Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex.Crim.App. 2006) *Knight*, 457 S.W.3d at 204

simply relevance.[313] Rather, it refers to how strongly the evidence serves to make more or less probable the existence of a fact of consequence to the instant litigation, coupled with the proponent's need for that item of evidence.[314] In other words, when the proponent of the evidence "has other compelling or undisputed evidence," the probative value of the evidence "will weigh far less than it otherwise might in the probative-versus-prejudicial balance."[315]

Here, there is "other" evidence in the record negating the State's need for the extraneous-offense evidence. For example, the State offered evidence of inconsistencies between Appellant's statements given in 1960, noting a concession to opportunity, given Appellant acknowledged he was alone with Irene Garza that night. The State offered Appellant's inconsistent explanations for wounds to his hands later in the evening after Irene Garza was alleged to have gone missing. The State offered inconsistencies in Appellant's explanation of his whereabouts in and around the time Irene went missing and when her body was ultimately found. The State offered Chief Victor Rodriguez' *speculation* regarding what "must've been on his mind" that night – attempting to explain Appellant was thinking about how to "cover his tracks." The State offered evidence of the recovery of physical evidence, demonstrating with maps, Appellant's probable route from the Sacred Heart Church

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[313] *Gigliobianco*, 210 S.W.3d at 641
[314] *Id.*
[315] *Id*. *quoting* *Montgomery*, 810 S.W.2d at 390)

in McAllen to the Pastoral House in San Juan the night Irene Garza went missing. The State offered evidence of a "slide-viewer" and its recovery at the scene where Irene Garza's body was found – including Appellant's admission he owned it.

The suggested similarities between the charged-offense and the extraneous-offense evidence made the extraneous-offense probative of nothing. Rather, the alleged extraneous matters served no purpose but to inflame the minds of the jurors and mislead them into believing Appellant acted in conformity with the extraneous behavior. Accordingly, Appellant avers the trial court could not have reasonably determined the probative value of the proffered evidence versus the State's need for that evidence weighed in favor of admission.

Unfair prejudice under Rule 403 refers to a tendency to suggest decisions on improper bases, commonly, though not necessarily, emotional ones.[316] For example, evidence might be unfairly prejudicial if it arouses jury hostility or sympathy for one side without regard to the logical probative force of the evidence.[317] The extraneous-offense evidence in the instant case bore no relation to the instant charged offense. Nothing about the extraneous evidence made a fact in *this case* more or less probable. There wasn't any motive, plan or opportunity associated with the murder of Irene Garza revealed in the extraneous evidence. Rather, the extraneous matters

[316] *Gigliobianco*, 210 S.W.3d at 641; *Montgomery*, 810 S.W.2d at 389
[317] *Id*.

were offered to inflame the minds of the jury and mislead them into believing Appellant must've murdered Irene Garza *because* he committed the extraneous matters as the State's final argument unduly emphasized.

Portions of the State's summation reminded the jury about the America Guerra case:

> "Irene was murdered. John Feit was moved out. And sure enough he was. But as a part of that John Feit also pled guilty or pled nolo contendere and was found guilty of aggravated assault of America Guerra. *America Guerra was the lucky one*. She was terrorized. He put a cloth over her mouth, threw her to the floor. He pled guilty or he pled nolo contendere, no contest, and was found guilty of that aggravated assault on her. But he didn't stop there. *The wolf in priest's clothing went on*."[318]

Here, the State calls on the jury to remember America Guerra and how *lucky* she was – presumably to get away. Note, Appellant is referred to as a "wolf in priest's clothing." Clearly, the intention is to strike fear in the hearts of the jury and convince them Appellant was a predator. The State implores the jury – "he didn't stop there:"

> "Tilley Sanchez. Another one of the lucky ones. What did Ms. Tilley tell us? She told us that she was a young lady, that was the cook, the one that took care of the priests there at the rectory at Sacred Heart in Edinburg. And that there was a basement there. A basement similar to the basement at the Sacred Heart rectory that McAllen has. And as Tilley would go down into the basement to get the things that she needed to take care of people like John Feit and Father Moran. He told the other priests, how about we make Tilley disappear?"

[318] RR9@23

"We find out later that Irene Garza was found in the basement of another rectory. Coincidence or is this a predator? Is this somebody preying and looking for his victim?"[319]

"You were asked to sacrifice a lot of things but you were told not to leave your common sense behind. And you are armed with that common sense. And that common sense exists right down deep. Some people call it your gut. I say it's the eyes of your heart. And I have asked you to open the eyes of your heart, to use that common sense. And one thing that will just be so glaring in this case that should offend your common sense is, man, in the short time that John Feit was here, he sure did cause a lot of trouble."

"Guilty of aggravated assault against America Guerra. Rude comments about Tilley Sanchez. What did he do right after that? After America had been attacked in the church he calls Tilley Sanchez. The person who said, Sacred Heart rectory. Tilley you're next honey."

"But what did he do with Irene Garza? He took her down to the basement. The same place he told he was going to lock Tilley Sanchez and make her disappear there, so he could hold her there. To do what? To continue to have his way? To maybe take her to the cemetery to take pictures of her? To try to maybe put a cloth in her mouth and gag her and throw her to the ground? And then took the body like a cat plays with a lizard. Keeps it alive, torturing it, taking it over to another place where he could hold it while he goes back and says mass."[320]

Pleading further, the State continued its summation:

"Yet, People like Beatrice Garcia, beautiful young lady, who came in here and told you that as she was walking to work right by Sacred Heart Church, John Feit drove up in a car, stopped her and said, hey, I want to take a picture of you by the cemetery. She took off. Her dad had to escort her to work ever since that day. A wolf in priest's clothing."

"Ask yourselves, is this the type of behavior you would expect from a priest? Somebody who is supposed to be committed to God seeking

[319] RR9@23-25
[320] RR9@23-25, 80

> salvation for your soul. Soliciting women. Telling them, I'd like to take pictures of you by the cemetery. Making jokes or maybe it wasn't a joke about locking somebody down in the basement. Calling somebody and saying, you're next. Coming up from behind and attempting to strangle, asphyxiate, suffocate, America Guerra. These ladies were the lucky ones."
>
> "….These ladies are the proof that John Feit was released from his cage and was ready to attack. Irene Garza was not so fortunate. Irene Garza took the fall for each one of these ladies."[321]

Clearly, the State led the jury down the proverbial "dark alley" in an attempt to influence their impression of Appellant's *character*. The State emphasized Appellant as a predator, calling upon the jury to trust "their gut" and find similarities in order to believe that if Appellant did *those* things to America Guerra, Tilley Sanchez and Beatrice Garcia – then he must have murdered Irene Garza. Undoubtedly, the extraneous evidence fueled the State's mantra, "John Feit is a wolf in sheep's clothing."

Confusion of the issues refers to a tendency to confuse or distract the jury from the main issues in the case.[322] Misleading the jury refers to a tendency of evidence to be given undue weight by the jury on other than emotional grounds.

A review of the record, and the relevant Rule 403 criteria, *must* lead to a conclusion the probative value of the extraneous-offense evidence was substantially outweighed by its prejudicial impact. It must be concluded this evidence had a

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[321] RR9@26-27
[322] *Gigliobianco*, 210 S.W.3d at 641

tendency to mislead or confuse the jury, and such tendency was not substantially outweighed by its probative value, if any. Accordingly, Appellant prays this Court find the trial court abused its discretion when it admitted this evidence over Appellant's 401, 404 and 403 objection(s), and sustained this point of error. Appellant further prays, this judgment be reversed and remanded to the trial for a new trial.

POINT OF ERROR NUMBER FIVE

APPELLANT SUFFERED EGREGIOUS HARM BY THE ERRONEOUS INCLUSION OF "MALICE AFORETHOUGHT" AT GUILT-INNOCENCE SINCE "MALICE AFORETHOUGHT" IS A PUNISHMENT ENHANCEMENT AND SHOULD NOT HAVE BEEN CONSIDERED BY THE JURY IN DETERMINING GUILT-INNOCENCE.

Included within the Charge of the Court at Guilt-Innocence was an instruction to the jury to consider whether or not the murder of Irene Garza was committed with or without Malice Aforethought. Consequently, the jury was called upon to consider Malice Aforethought – the condition of mind showing a heart regardless of social duty and fatally bent on mischief. The jury was further instructed to consider acts committed and/or words spoken by the defendant in determining the existence of Malice Aforethought. This was error. The degree of harm required for reversal depends on whether this error was preserved in the trial court - defense counsel did not object to the jury charge. When, as here, error was not preserved in the trial court by timely objection, unobjected-to charge error requires reversal only if it

resulted in "egregious harm." "Harm is egregious if it deprives the appellant of a 'fair and impartial trial.' "

Charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. Egregious harm is a "high and difficult standard" to meet, and such a determination must be "borne out by the trial record." On appeal, neither party bears the burden of showing harm or a lack thereof under this standard. A conviction will not be reversed unless the defendant has suffered "actual rather than theoretical harm." In examining the record to determine whether charge error has resulted in egregious harm to a defendant, a reviewing court should consider (1) the entirety of the jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the arguments of counsel, and (4) any other relevant information revealed by the trial record as a whole.

I. <u>Entirety of the Jury Charge</u>

Here, the murder statute in 1960 was the controlling penal code statute. The State was required to prove "murder" as defined in the 1948 Penal Code. On April 16, 1960, the Texas Penal Code considered any intentional killing to be a "murder," defining it as follows:

"Murder - Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by

the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."

The elements of a 1960 murder claim were thus:

(1) voluntary, i.e., intentional;

(2) killing;

(3) of a person;

(4) within Texas;

After proving these four elements, murder was separated into two categories: murder with malice aforethought, and murder without malice aforethought. However, these were not two separate offenses; malice was simply seen as a punishment enhancement. When bifurcation became the new procedure in Texas, the Court of Criminal Appeals reaffirmed malice was still a punishment enhancement, holding juries should be instructed to determine whether a crime was committed with or without malice at the punishment phase. Malice was not an element of the underlying crime of murder, it had to be pleaded in the indictment if the State sought the corresponding range of punishment.

Because the applicability of the law of the case did not authorize the jury to be instructed on the existence of malice aforethought until the punishment phase, the included instruction deprived appellant of a fair and impartial trial.

II. State of the Evidence

With respect to the state of the evidence, it should not be lost on this Court that the extraneous/bad acts-evidence complained of herein and at trial, was one of the "primary contested issue at trial." It was the admissio0n of the extraneous-evidence which supported the State's theory that Appellant was a "predator" and a "wolf in priest's clothing." This factor weighs in favor of a finding of egregious harm.

a. Testimony by Clotilde Sanchez

There was a time when she went to the basement there at the Sacred Heart Church in Edinburg, while the priests, including Appellant, were present. When she went to the basement, Appellant is alleged to have said, "how about closing the door and make Tilley, you know, disappear." This happened in March of 1960. Sanchez also testified about a phone call Appellant supposedly made where he was reported to have said to her, "Tilley, you're next, honey." Sanchez' testimony during trial was consistent with her pre-trial testimony.

b. Testimony of Beatrice Garcia

She was 20 years old and working downtown close to the Sacred Heart Church in McAllen in 1960. On April 10, 1960, she was walking to work and a car approached her as she crossed the street. She remembers and identified Appellant having driven the car, saying to her, "I would love to take a picture of you dressed

in black by the cemetery." Garcia's testimony during trial was consistent with her pre-trial testimony.

c. <u>America Guerra Case</u>

The evidence in this case included Darryl Davis' testimony regarding a plea agreement reached in 1963 and a judgment from the America Guerra case documenting its resolution. This evidence shows Appellant entered a "nolo contedere" plea to aggravated assault with intent to commit rape. Thereafter he was assessed a $500 fine.

III. Arguments of Counsel

Examination of the State's arguments suggests "malice aforethought" was a great part of the State's theory that Appellant was guilty of murder. The erroneously-included instruction touched upon a "vital aspect" of the State's case:

"Irene was murdered. John Feit was moved out. And sure enough he was. But as a part of that John Feit also pled guilty or pled nolo contendere and was found guilty of aggravated assault of America Guerra. America Guerra was the lucky one. She was terrorized. He put a cloth over her mouth, threw her to the floor. He pled guilty or he pled nolo contendere, no contest, and was found guilty of that aggravated assault on her. But he didn't stop there. The wolf in priest's clothing went on."

"Tilley Sanchez. Another one of the lucky ones. What did Ms. Tilley tell us? She told us that she was a young lady that was the cook, the one that took care of the

priests there at the rectory at Sacred Heart in Edinburg. And that there was a basement there. A basement similar to the basement at the Sacred Heart rectory that McAllen has. And as Tilley would go down into the basement to get the things that she needed to take care of people like John Feit and Father Moran. He told the other priests, how about we make Tilley disappear?"

> "We find out later that Irene Garza was found in the basement of another rectory. Coincidence or is this a predator? Is this somebody preying and looking for his victim?"
>
> "You were asked to sacrifice a lot of things but you were told not to leave your common sense behind. And you are armed with that common sense. And that common sense exists right down deep. Some people call it your gut. I say it's the eyes of your heart. And I have asked you to open the eyes of your heart, to use that common sense. And one thing that will just be so glaring in this case that should offend your common sense is, man, in the short time that John Feit was here, he sure did cause a lot of trouble."

> "Guilty of aggravated assault against America Guerra. Rude comments about Tilley Sanchez. What did he do right after that? After America had been attacked in the church he calls Tilley Sanchez. The person who said, Sacred Heart rectory. Tilley you're next honey."
>
> "But what did he do with Irene Garza? He took her down to the basement. The same place he told he was going to lock Tilley Sanchez and make her disappear there, so he could hold her there. To do what? To continue to have his way? To maybe take her to the cemetery to take pictures of her? To try to maybe put a cloth in her mouth and gag her and throw her to the ground? And then took the body like a cat plays with a lizard. Keeps it alive, torturing it, taking it over to another place where he could hold it while he goes back and says mass."

Pleading further, the State continued its summation:

> "Yet, People like Beatrice Garcia, beautiful young lady, who came in here and told you that as she was walking to work right by Sacred Heart Church, John Feit drove up in a car, stopped her and said, hey, I want to take a picture of you by the cemetery. She took off. Her dad had to escort her to work ever since that day. A wolf in priest's clothing."

> "Ask yourselves, is this the type of behavior you would expect from a priest? Somebody who is supposed to be committed to God seeking salvation for your soul. Soliciting women. Telling them, I'd like to take pictures of you by the cemetery. Making jokes or maybe it wasn't a joke about locking somebody down in the basement. Calling somebody and saying, you're next. Coming up from behind and attempting to strangle, asphyxiate, suffocate, America Guerra. These ladies were the lucky ones."
>
> "…. These ladies are the proof that John Feit was released from his cage and was ready to attack. Irene Garza was not so fortunate. Irene Garza took the fall for each one of these ladies."

Because the included "malice aforethought" instruction calls for a determination of the existence of malice aforethought and because malice aforethought was at the center of the State's arguments, this Court should conclude that this factor weighs in favor of a finding of egregious harm.

IV. Entirety of the Record, Including Any Other Relevant Information

Considering the record on appeal, a cursory reading of the testimony reveals the State's case was supported by hearsay, conjecture, speculation and emotion. No evidence of foul play was found. Although the pastoral house and the rectory were

identified as “crime scenes,” there was no evidence of foul play collected from either of them. There were reports of a number of people on the church campus the day Irene Garza went missing. These witnesses accounted for her at different times and places in and around the church during that day/evening. Witnesses’ accounts corroborated Irene Garza’s arrival at the rectory at 7 p.m. and further corroborated she was seen inside the church at 8:15p.m. kneeling and praying in one of the pews. There were no photos taken of the rectory, its basement, or the church and confessionals back in 1960. No photos were taken of the priests’ quarters upstairs ether. There were no photos taken of the retrieval of the slide viewer when it was supposedly recovered from the canal bank, making reference to State’s Exhibit 40 - the retrieval of the body. In fact, nothing in the police file documented the retrieval of the slide viewer from the canal, even as “thorough” as the investigation was. Although it was believed the crime scene was in the rectory – the office area and the basement –there was no physical evidence recovered supporting this belief. There was no evidence recovered from the rectory in 1960 which was analyzed then or recently which supported any belief the crime scene was the rectory.

Chief Victor Rodriguez testified, “We believe she was accosted and restrained somehow.” “We believe she was bound and restrained at the rectory and at the pastoral house.” “There is nothing in the police file to support the theory that she was bound.” There was no evidence recovered from the rectory to support this belief.

Trace evidence was recovered from the vehicle alleged to have been used by Appellant on the days and nights surrounding the disappearance of Irene Garza. Although analyzed, no evidence came back consistent with the clothing she was wearing. "There was nothing of evidentiary value in the sweepings of the car. We found nothing related to Irene Garza in that car. We found nothing in that car related to John Feit."

The Sacred Heart Church campus was crowded that afternoon/evening of April 16, 1960 – it was the highest catholic holiday. There were four confessionals working at the same time to accommodate a crowd seeking absolution. The line of people poured out the door of the church; there was a lot of people there. No evidence was reported to support a belief Irene Garza was pulled out of the confessional that evening. No one reported screaming. No one reported seeing or hearing a vehicle speed away. In fact there were people inside the rectory throughout the evening, none of whom reported anything suggestive of a struggle.

Chief Victor Rodriguez admitted, "I know of no physical evidence recovered from the rectory that affirmatively links John Feit to the disappearance of Irene Garza." "I know of no physical evidence recovered from the basement of the rectory that affirmatively links John Feit to the disappearance of Irene Garza." "I know of no evidence recovered from the pastoral house that affirmatively links John Feit to the disappearance of Irene Garza." "I know of no evidence recovered from the

vehicle believed to be driven by John Feit at that time that affirmatively links John Feit to the disappearance of Irene Garza." "I know of no eye witnesses to the disappearance of Irene Garza."

Conclusion

Appellant was egregiously harmed by the inclusion of the malice aforethought instruction to the jury at the guilt innocence phase of this trial. Accordingly, the judgment of the trial court should be reversed and the matter remanded to the trial court for further proceedings and a new trial.

POINT OF ERROR NUMBER SIX

THE TRIAL COURT ERRED BY ALLOWING EXPERT TESTIMONY BY THOMAS PATRICK DOYLE

1) State's Notice of Experts was insufficient
2) Testimony was *not* relevant
3) The State did not satisfy the Reliability requirements of TRE702

Thomas Patrick Doyle was called as an "expert witness" in this case. He was called upon to testify about the existence and possibility of a cover-up and collusion between the ecclesiastical Church authorities and civil authorities as well as criminal behavior and antisocial behavior in individuals. Ultimately the State would rely on him to testify there was a cover-up in this case, and that the Catholic Church had a

habit of cover-ups to protect members of the clergy and the Church.[323] Over insufficient notice objections, relevancy objections, objections to speculation and objection to the witness' testimony pursuant to the State's failure to satisfy TRE 702, this witness was allowed to testify.[324]

I. Thomas Doyle's testimony should not have been admitted, and the error was harmful.

Doyle's "expert" testimony in this case failed to satisfy the reliability requirements for admission of expert opinion testimony.[325] The trial court should not have allowed this testimony before the jury. The error was harmful and requires reversal.

Texas Rule of Evidence 702 allows a witness to provide expert testimony *only* if it assists the jury in understanding the evidence or determining a fact in issue outside the training and experience of an average juror.[326] At trial, Doyle's testimony was offered in the area of Canon Law,[327] but he was called upon to testify about his work with victims of sexual abuse – mostly victims of the Catholic Church.[328]

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[323] The State specifically reminded the Court in deciding whether to admit this witness' "expert" testimony the testimony already admitted, namely facts about the America Guerra case and the plea deal reached between Lattimore and the "church." The State also asked the Court to be mindful of documents which didn't exist and what *that* means to this witness.
[324] RR7@55
[325] *See* TEX. R. EVID. 702.
[326] TEX. R. EVID. 702; Yount v. State, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993); *see also* Naivar v. State, No. 12-02-00171-CR, 2004 WL 1192691, at *3-4 (Tex. App.—Tyler, May 28, 2004, no pet.) (mem. op.; not designated for publication).
[327] RR7@41 (proffered outside the presence of the jury); RR7@43-44
[328] RR7@42 (In this capacity, Doyle testified he worked as a counselor and consultant in civil and criminal cases as an expert for a number of years)

Ultimately, Doyle was asked his opinion in this case regarding Canon law and the Church's involvement in moving people accused of committing crimes.[329] In support of his conclusions, Doyle advised the Court he became familiar with the issue of sexual abuse of children in the Church[330] and then testified he was "here to testify" about the existence of a cover-up and collusion between the ecclesiastical Church authorities and civil authorities in criminal behavior, antisocial behavior of individuals.[331]

This testimony *not* should have been allowed, as it is nothing more than Doyle's endorsement of law enforcement's investigation and the credibility of the State's case of a "cover-up."

Further, Appellant objected on the basis that he was not provided sufficient notice of this expert's anticipated testimony – the State designated this witness merely as an expert in the area of Canon Law and the policies and procedures of the Catholic Church. The Court overruled these objections; the Court further overruled relevancy objections and objections calling this witness to speculate. [332] Doyle was then called to testify before the jury.[333]

Doyle began by testifying that oftentimes, "in his experience,"

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[329] RR7@7@45
[330] RR7@46
[331] RR7@48
[332] RR7@52-56
[333] RR7@56

> "…..priests who were charged with civil crimes were not prosecuted. Oftentimes the officials of the church would attempt to enter into some sort of an official or unofficial agreement with ecclesiastical authorities whereby the church would take care of it and priests were not prosecuted."[334]
>
> "In my experience dealing with sexual assaults, which is a felony, very often, Church authorities would enter into some sort of unofficial or even an official agreement with local authorities, and rather than prosecute the priest, he would be sent to a monastery, or an a retreat, or sent to some other country to get him out of the picture."[335]

However, here, Doyle likened this case to his experience with priests accused of sexual assault.[336] He went on to discuss the legion of priests who were guilty of sexual offenses and in fact testified about how those priests were often targeted because they used the confessional to pick their sexual assault victims.[337]

Then Doyle is specifically called upon to comment about "testimony in this trial that Irene Garza was pulled out of a confessional:"

> Q: Now, we've heard testimony, from a witness that Irene Garza went into a confessional with John Feit and he pulled her out of the confessional. Is that a violation of Catholic principle?
>
> A: Absolutely. I mean, that's completely inappropriate and forbidden.
>
> …..

[334] RR7@63-64
[335] RR7@64
[336] RR7@64-66
[337] RR68-72

Q: And how about the solicitation of a person to meet in the rectory…?

A: To - - It's the same thing.

"Expert testimony is unreliable if it is not grounded in the methods and procedures of science and is no more than subjective belief or unsupported speculation."[338] It is well established an expert cannot directly opine on the credibility of other witnesses.[339] Such testimony does not assist the trier of fact to understand the evidence or to determine a fact in issue; it impermissibly *decides* credibility issues for the jury.[340]

Similarly, an expert cannot merely recite witness testimony and call it "expert testimony."[341] For example, in *Viterbo v. Dow Chemical Co.*, the Fifth Circuit Court of Appeals addressed medical expert testimony that the plaintiff's health problems arose from exposure to a toxic chemical.[342] The expert testified that the plaintiffs' symptoms could have numerous causes, and without any support except the plaintiff's oral history, he "simply pick[ed] the cause that is most advantageous to [the plaintiff's claim]."[343] In other words, the expert's testimony was inadmissible

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[338] *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904 (Tex. 2004); *see also* *Walker*, 2016 WL 6092523, at **14–16 ("Putting a scientific gloss over that speculation does not make the evidence more certain.").
[339] *Duckett v. State*, 797 S.W.2d 906, 914–16 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993).
[340] *Id.*; *Yount*, 872 S.W.2d at 709–10 (citations omitted).
[341] *Vela v. State*, 209 S.W.3d 128, 134 (Tex. Crim. App. 2006).
[342] 826 F.2d 420, 421 (5th Cir. 1987).
[343] *Id.* at 424.

because it was "no more than [a party's] testimony dressed up and sanctified as the opinion of an expert."[344] Similarly here, Doyle merely regurgitated testimony from Darryl Davis, where the jury learned of the "off the record" meeting which divulged a "deal" and plea bargain reached between the State of Texas and Appellant. In doing so, Doyle was allowed to bolster Davis' credibility and therefore the "veracity" of the State's theory of this case – that the Church covered up Appellant's guilt. Clearly this testimony mislead the jury by not only bolstering Davis' testimony but further misleading them to believe Appellant was "moved" because he was guilty of Murder. In other words, the "expert" conclusion reached by Doyle was based on speculative testimony and conjecture of other witnesses. Such opinions are inadmissible" under rules similar to Rule 702.[345]

Additionally, Doyle's testimony was inadmissible because he speculated on his research and review of the records provided. "The proponent of the scientific evidence bears the burden of demonstrating, by *clear and convincing evidence*, that the evidence is reliable."[346] Reliability requires a basis in "sound scientific

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[344] *Id.*; *Vela*, 209 S.W.3d at 135 (citing *Viterbo* with approval).

[345] RR7@75-77; *State v. Tyler*, 867 N.W.2d 136, 156 (Iowa App. 2015) (surveying numerous cases); *State v. Vining*, 645 A.2d 20, 21 (Me. 1994); *see also Ariz. v. Sosnowicz*, 270 P.3d 917, 921–25 (Ariz. Ct. App. 2012); *People v. Eberle*, 265 A.D.2d 881, 882 (N.Y. Sup. Ct. 1999); *Maxwell, v. State*, 414 S.E.2d 470, 473–74 (Ga. 1992), *overruled on other grounds by Wall v. State*, 500 S.E.2d 904 (Ga. 1998); *Bond v. Commonwealth of Virginia*, 311 S.E.2d 769, 771–72 (Va. 1984).

[346] *Jenkins v. State*, 493 S.W.3d 583, 601–02 (Tex. Crim. App. 2016) (emphasis added).

methodology," which "demands a certain technical showing."[347] It is not enough for the proponent to show that the method is customarily used by others in the relevant field—use of the particular methodology must be reasonable in relation to the case.[348]

This speculation led Doyle to admit he could neither *confirm nor rule out* whether he was provided the necessary documents to reach his "expert conclusions." He could only testify he reviewed what the State provided him to review. This is important to know because Doyle admitted he wasn't sure whether certain documentation existed or not – yet, his expert opinions were based on the documentation he *was* provided.[349] In fact, when asked, Doyle speculated on why there were no records at all of Appellant's violation of civil law and/or canon law; nor was there any record of the Church's investigation into this case.[350] Then, when commenting on the concept of excommunication, Doyle testified that occurs where he is alleged to have broken canon law and/or civil law. There was no record of *that* in Appellant's files with the church. Doyle further confirms no investigation was done regarding the allegations against Appellant in this case, finding it "very

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[347] *Id.* at 133.
[348] *Leonard v. State*, 385 S.W.3d 570, 582 (Tex. Crim. App. 2012).
[349] RR7@61, 117; Doyle testified he personally did not gather any documentation – rather, he only reviewed what the State provided him.
[350] RR7@98-99

unusual" there was no evidence and/or documentation of any investigation into the allegations of this case. [351]

A. The erroneous admission of Doyle's testimony was harmful.

When a trial court erroneously admits evidence, the error must be disregarded unless it affects a substantial right. TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict."[352]

Expert testimony on a complex issue can be extremely prejudicial, as jurors are prone to irrationally credit an expert's testimony.[353] "Because expert evidence can be hard to evaluate, it can be both powerful and misleading. Consequently, some commentators believe that 'ostensibly scientific testimony may sway a jury even when as science it is palpably wrong.'"[354]

Doyle's testimony was unreliable and he should not have been allowed to speculate. Or, Doyle should have testified he was unable to determine the reasons for the lack of records, rather than use *that* as the basis for his conclusions. It is impossible to determine how much weight the jury gave Doyle's testimony regarding Appellant's various transfers and whether the transfers were a result of a cover-up or not. This unreliability clearly casts a dark cloud on the conviction.

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[351] RR7@117-119
[352] *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)
[353] *Robinson*, 923 S.W.2d at 553; *see, e.g., Walker*, 2016 WL 6092523, at *16.
[354] *Robinson*, 923 S.W.2d at 553 (internal citations omitted).

Given Doyle's role as the "expert" in Canon Law, it cannot be doubted he influenced the jury's verdict. Any doubt in this regard must be resolved in Appellant's favor. When "the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, that is, as having a substantial and injurious effect or influence in determining the jury's verdict."[355] This Court should hold Doyle's improperly admitted testimony prejudiced Appellant's substantial rights, and reverse the judgment of the trial court .

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ERRED BY ALLOWING EXPERT TESTIMONY BY THOMAS PATRICK DOYLE

Richard Sipe's testimony was proffered outside the presence of the jury as an expert for the State in the area of human sexuality and sexual behavior of Roman Catholic Priests. Pursuant to the Defense' Motion to voir dire experts, a hearing was had for the trial Court to perform its gatekeeping function.[356] Sipe advised he's been studying sexual behavior of Roman Catholic Priests since 1960 – the celibate sexual behavior of Roman Catholic Priests and how they "act out sexually.[357] Ultimately, Sipe advised the Court he intended to testify in this case regarding sexuality in the Roman Catholic Church and Catholic priests and their sexuality.[358] He further

[355] *Lopez v. State*, 288 S.W.3d 148, 178 (Tex. App.—Corpus Christi 2009, pet. ref'd); *see also Kotteakos*, 328 U.S. at 776
[356] RR7@126
[357] RR7@129; Any and all sexual behavior is forbidden – it is a sin.
[358] RR7@131-132

advised the Court he intended to educate the jury regarding the percentage of priests who actually engage in sexual behavior, in his experience and documentation.[359]

Q: And your testimony to the Ladies and Gentlemen of the Jury would be to apply statistics over the years of practice to the documentation that you were provided by the State?
A. Yes, sir.
Q. And in doing so, sir, what thing is it that you intend to give the Ladies and Gentlemen of the Jury?
A. In terms of Father Feit's involvement?
Q. Yes.
A. There's -- I think that there's a clear picture of involvement from what I know psychosexually about Roman Catholic priests and their behavior.[360]

…….

Q: And when you say, from what I know about Catholic priests and the psychosexual behaviors, you are talking about other Catholic priests and their psychosexual behavior that you have been involved with over the years?
A: Yes, his participation in this group, this training, and his behavior as recorded, yes.
Q. His participation in which group?
A. Of Roman Catholic priests.
Q. So, simply by virtue of him being a Roman Catholic priest at one point in time, do I understand you to say that you will incorporate his mere membership as a Catholic priest as being susceptible to your statistics?
A. Well, he's very specific in terms of his involvement in terms of religious orders, religious training. There is a tremendous amount of information that is given about him and his participation in Church organizations, priest organizations.
Q. You haven't studied or observed any sexual behavior on the part of John Feit?

[359] Note, Sipe admitted he had not studied, recorded and/or evaluated Appellant. He reached his conclusion about Appellant's sexual behavior based on documents he received for review. RR7@132-133
[360] RR7@133

A: I have not met him.[361]

At this point, the State offers him to "allow the jury to assess that based on his training, education and experience - he is the world's foremost authority on sexual behavior of priests and celibacy. And in this case he has reviewed certain instances of conduct, he has reviewed transcripts, he has reviewed the file, the background of John Feit, and based on his 60-year study, it is consistent with the behavior and the acting out, if you will, for lack of a better term, of priests who are committed by the Roman Catholic Church to a vow of celibacy."[362] Note that even the trial court could not understand the relevance of this proffer.[363] Appellant objected citing unreliability of the expert testimony, relevance and an insufficient basis upon which to reach a conclusion and/or generate an expert opinion.[364] Note that Appellant further objected to insufficient expert notice, relevance and further asked for a 404(b) ruling and 403 balancing.[365] Interestingly, the State relied on, among other things, the specific acts argued about previously – the extraneous conduct, again arguing the State's

[361] RR133-34
[362] RR7@134-135
[363] RR7@134; Even after an explanation by counsel for the State, the trial Court is still unsure… RR7@142, 145
[364] *See* TRE 401, 403, 702 and 705(c); RR7@136-137, 144-145
[365] RR7@137-138, 147; Note Appellant also objected on the basis of insufficient notice as this expert was only designated to testify in the area of forensic psychology. RR7@136

obligation to prove malice aforethought.[366] These objections were overruled and Sipe was allowed to talk to the jury.[367]

Sipe testified consistently with his proffered testimony, with more detail obviously. In fact at one point in order to bolster his testimony, the State elicited that his studies were used as the basis for the recent movie, "Spotlight," a movie which highlighted and exposed the chronic sexual abuse of children among Roman Catholic Priests over the years.[368]

> Q: Now, in this case, in the items that you have reviewed, specifically relating to John Feit,did you find that his behavior was consistent with what you studied throughout these years have shown?
>
> A. Yes. The documents, I believe, shows a man, at least in terms of the documents that I saw, was character logically a man who would fit into immature psychosexual development, and also a socio-pathological tendency in terms of sexuality. Well, sexuality is a very, very tough thing to study because there's self-informing and then there's observation of people, and then there's the consequence of this. And I, in a sense, backed into this, and it was an area given to me. And, of course, one of the areas where we had very close association with the law and with criminality as in the sexual activity with children because that is sex with a minor. It is a criminal act. And we had such a great amount of that behavior within the priesthood. And in -- from the crime point of view, from the criminal 2:15:48:18PM point of view from the State, the average number of victims of sexual abuse when I started out, of those that came through the legal system, was 157

[366] *See* Extraneous Evidence Argument regarding Beatrice Garcia's and Tilley Sanchez' testimomny; Evidence of Malice aforethought is inadmissible at the guilt/innocence stage of this trial.
[367] RR7@148
[368] RR7@150-152

> victims for each abuser. And we had on record priests who have been accused of more that one murder.[369]

Sipe would ultimately rely on his review of Appellant's background in the Church and the extraneous evidence testimony – Beatrice Garcia, Tilley Sanchez and the America Guerra case – to conclude these were examples of Appellant breaking out into violent impulses which logically then led to murder.[370] However, Sipe was not present during the testimony of Tilley Sanchez or Beatrice Garcia – so he could not have had the benefit of that information in generating his conclusions. He could not even tell the jury who those ladies were, yet he included these instances in his opinions and conclusions. [371]

The admission of this expert testimony was error – it should not have been admitted. Given Sipe's role as an "expert", it cannot be doubted he influenced the jury's verdict. Any doubt in this regard must be resolved in Appellant's favor. When "the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, that is, as having a substantial and injurious effect or influence in determining the jury's verdict."[372] This Court should hold Sipe's

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[369] RR7@158-159
[370] RR7@165-167
[371] RR7@170
[372] *Lopez v. State*, 288 S.W.3d 148, 178 (Tex. App.—Corpus Christi 2009, pet. ref'd); *see also Kotteakos*, 328 U.S. at 776

improperly admitted testimony prejudiced Appellant's substantial rights, and reverse the judgment of the trial court .

POINT OF ERROR NUMBER EIGHT

THE TRIAL COURT ERRED BY ADMITTING THE HEARSAY TESTIMONY OF ANNA MARIA HOLLINSWORTH REGARDING COMMENTS ALLEGED TO HAVE BEEN MADE BY IRENE GARZA ABOUT APPELLANT PULLING IRENE OUT OF CONFESSIONAL AND TAKING TO RECTORY.

Hollingsworth testified regarding her relationship with Irene Garza but when called upon to testify about a *conversation* with her in April of 1960, Appellant objected, arguing the State was calling for hearsay responses.[373] The jury was excused and Hollingsworth was examined outside the presence of the jury.[374] The State relied on three (3) exceptions to the hearsay rule, arguing the expected hearsay testimony would be admissible as present sense impression, excited utterance and then existing mental, emotional, physical condition going to show the state of mind of the declarant.[375]

Outside the jury's presence, Hollingsworth said that during Holy Week 1960, she spoke with Irene Garza.[376] According to Irene Garza, she'd met a new priest who thought he was handsome and she couldn't complete a confession because "he pulls

[373] RR5@89-109
[374] RR5@82-90
[375] RR5@91; Tex.R. Evid. 803(3), O'Connor's Texas Criminal Codes Plus (2017-18)
[376] RR5@91

me out of the confessional and takes me over to the rectory." There were no more explanations. She ended by looking forward to the upcoming Saturday's confession.[377] This was the State's proffer in support of the three (3) hearsay exceptions upon which the State relied. Appellant had no questions and argued this proffer did not satisfy the State's burden supporting any hearsay exception.[378] The trial court agreed however allowed the State *another shot* at the witness.[379] Then the State *led* the witness to testify Irene Garza was "confused;" that she "didn't know what to expect anymore;" that "she didn't know what to do about it;" that "there was conflict in her mind."[380] At this point, Appellant objected and the trial court sustained an objection agreeing the State was leading the witness to answer accordingly - the State was testifying through this witness in order to satisfy their burden.[381]

On cross examination (outside the presence of the jury) Hollingsworth could not identify upon which of Irene's statement(s) she relied in describing her "mental state of mind" all those years ago. Rather, she described how she – *Hollingsworth* – felt.[382] Ultimately, the State relied on *this* record in support of admissibility.[383] The

[377] RR5@93
[378] RR5@94
[379] RR5@95-96
[380] RR5@97-98
[381] RR5@97-98
[382] RR5@101-105
[383] RR5@105-106

trial court found Texas Rule of Evidence 803(3) applied, ruling the hearsay testimony admissible.[384] Afterward, the jury was again seated and Hollinsworth's testimony was consistent with the out-of-the-presence proffer.[385]

Texas Rule of Evidence 803 (3) Then Existing Mental, Emotional, or Physical Condition:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.[386]

"Statements of intent by a declarant to prove future conduct are generally admissible when the future conduct is relevant to some aspect of the case."[387] Hollinsworth's testimony was void regarding any future intent. Likewise, there was no testimony describing Irene Garza's fear of Appellant which would have supported her emotional state or "mental feeling" at the time she made the statement.[388]

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[384] RR5@109
[385] RR5@111
[386] Tex.R. Evid. 803 (3), O'Connor's Criminal Rules Plus (2017-18)
[387] *Wilks v. State*, 983 S.W.2d 863, 865 (Tex.App.-Corpus Christi 1998, no pet.); *see also* *Vann v. State*, 853 S.W.2d 243, 250 (Tex.App.-Corpus Christi 1993, pet. ref'd) (Victim's statement that he was not happy in his marriage and wanted to find a way out was admissible as a statement of his emotional state and intent to act.)
[388] *Id*.

Further, inadmissible are Irene Garza's out-of-court statements that Appellant had previously pulled her out of the confessional and taken her to the rectory of the church to take her confessions. Such statements are not reflective of her state of mind or a belief, but simply recounting her memory of events.[389] They were not admissible under Rule 803(3).

Quoting Justice Cardozo, the Court of Appeals pointed out in *Gibbs v. State* that if the distinction between state of mind and a statement of "memory or belief to prove the fact remembered or believed" is ignored, "there would be an end, or nearly that, to the rule against hearsay."[390]

Here, Hollinsworth's testimony regarding the statements mentioned above does not reflect Garza's emotional state. Instead, the statements simply describe prior specific incidents - Appellant's pulling her out of the confessional and taking her to the rectory to hear her confession.

Appellant avers the trial court abused its discretion in admitting the hearsay testimony, since the statements do not fall within the exception to Rule 803(3). As a

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[389] *See* *Navarro v. State*, 863 S.W.2d 191 (Tex.App.-Austin 1993), *pet. ref'd*, 891 S.W.2d 648 (Tex.Crim.App.1994). (Deceased's statements to her mother that appellant put a gun to her head and threatened to kill her are statements of memory to prove the fact remembered and not admissible under Rule 803(3)); *Buhl v. State*, 960 S.W.2d 927, 932 (Tex.App.-Waco 1998, pet. ref'd) (Trial court was correct in excluding testimony by a witness, that defendant had said he was afraid of victim because victim pulled guns on him, since relevance of victim's out-of-court statement hinged on truthfulness of his assertion that victim had, in fact, pulled guns on him.).

[390] *Gibbs v. State*, 819 S.W.2d 821, 837 (Tex.Crim.App.1991), cert. denied 502 U.S. 1107, 112 S.Ct. 1205, 117 L.Ed.2d 444 (1992)

result, the trial court's decision to admit the evidence was *not* within the zone of reasonable disagreement.

Harm Analysis

Next, Appellant avers that, under Texas Rule of Appellate Procedure 44.2(b), this error is harmful. Under Rule 44.2(b), any error must be disregarded if it does not affect Appellant's substantial rights.[391] A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict.[392] The record as a whole should be reviewed to determine whether the error had such an influence on the jury's verdict.[393]

The appellate record in this case is void of any suggestion Appellant pulled Irene Garza out of the confessional. Rather, the evidence upon which the State relied was that Garza was accosted in the rectory and that she never reached the church or the confessional. There was no admissible evidence which had the specificity and directness, at least in terms of inculpating Appellant, as does the inadmissible hearsay evidence described herein. Clearly, Garza's memories of specific incidents, similar to the State's theory here would have a telling effect upon the jury.

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[391] Tex.R. App. Proc. 44.2(b), O'Connor's Texas Criminal Codes Plus (2017-18); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App.1998).
[392] *See King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).
[393] *Mosley*, 983 S.W.2d at 259.

It should be noted the evidence in this case was entirely circumstantial; there were no eyewitnesses who testified at trial. The defense maintained Appellant did not do it. Throughout the trial, the State relied upon hearsay statements, conjecture and assumption(s) to weave a story of fear, corruption and a "cover-up." Critical in the State's theory were the hearsay statements described herein; they were critical to support the notion that Appellant was a predator. Not only was the inadmissible hearsay evidence extremely prejudicial, given the State's theory of the case, it also tended to negate the defensive theory offered by appellant and to cause the jury to convict on the basis of inadmissible evidence.

This Court should have grave doubts about the effect of the erroneously admitted evidence and find its admission had a substantial and injurious effect on the verdict. Point of Error Five should be sustained, and the case should be remanded to the trial court for a new trial.

POINT OF ERROR NUMBER NINE

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING TESTIMONY OF CHIEF VICTOR RODRIGUEZ' OPINION(S)

Chief Victor Rodriguez' opinions were not rationally based on his perceptions as a witness.

Chief Victor Rodriguez' opinion(*s*) were misleading rather than helpful to a determination of a fact in issue

The trial court erred by admitting testimony by Chief Victor Rodriguez after allowing him to refresh his memory with affidavits of Consuelo Trevino and Estela Rodriguez and a newspaper article.

At trial, McAllen Police Chief Victor Rodriguez was called to testify about his "opinion(*s*)." Admittedly, he had nothing to do with the investigation into the disappearance and murder of Irene Garza; he first became involved in 2002.[394] Rodriguez testified Investigator Ray Brooks was the lead investigator at the time this case was investigated – *he* was long deceased.[395] Yet, Rodriguez was called to testify about evidence allegedly associated with *this* investigation – photos of the Sacred Heart Church at the corner of 15th and Chicago Streets in McAllen, Texas, old and new photos of Appellant, old photos of the canal where Irene Garza's body was found, various pieces of physical evidence found during the investigation – the purse, the shoe, etc.[396]

Ultimately, the State relied on Chief Rodriguez to speculate on Appellant's state of mind and ultimately Appellant's guilt in this case. His testimony was allowed over objection for speculation, hearsay and the right to confront and cross examine. This was error.

I. Appellant's State of Mind

After describing *the investigation* through evidence already admitted prior to his testimony,[397] Rodriguez was called upon to comment on Appellant's written

[394] RR6@11; in 2002 and 2003, Rodriguez "*guided*" the most recent efforts in this investigation.
[395] RR6@12
[396] RR6@51-53, 57-59
[397] Clearly, Appellant waives no right(s) and further objects to the admissibility of *that* evidence to which Rodriguez referred.

affidavits from the original investigation in 1960. He was led through the statements and probed to speculate on Appellant's state of mind at the time Appellant gave those statements in 1960.[398] Over objection, Rodriguez was allowed to speculate on Appellant's state of mind, testifying that Appellant "*felt the weight of the investigation growing*" and "*the dots are connecting for him*; *things are getting very hot for him*." This was his answer when asked what it meant to him that Appellant "*drove around aimlessly*."[399] The State further *zeroed* in on Appellant's written statements calling on Rodriguez to testify regarding what he "*thinks*." After reading Appellant's statements to the jury, Chief Rodriguez to testified, "*these are obvious lies*," and "*Feit was trying to hide something*."[400]

II. No Evidence

A. Irene Garza seen after alleged abduction

Rodriguez admitted the Sacred Heart Church and Rectory were searched in 1960 and *no evidence* of foul play was found. Although he identified the pastoral house and the rectory as "crime scenes," he admitted there was *no evidence* of foul play collected from either of them.[401] There were reports of a number of people on the church campus the day Irene Garza went missing. These witnesses accounted

[398] RR11@ State's Exhibit 89; RR6@21-51
[399] RR6@49-51; RR11@ State's Exhibit 89
[400] RR6@68-69
[401] RR6@94

for her at different times and places in and around the church during that day/evening.[402] Rodriguez admitted witnesses' accounts corroborated Irene Garza's arrival at the rectory at 7 p.m. and further corroborated she was seen *inside* the church at 8:15p.m. kneeling and praying in one of the pews. [403]

When pressed, Rodriguez admitted there were no photos taken of the rectory, its basement, or the church and confessionals back in 1960.[404] No photos were taken of the priests' quarters upstairs ether. There were no photos taken of the retrieval of the slide viewer when it was supposedly recovered from the canal bank, making reference to State's Exhibit 40 - the retrieval of the body.[405] In fact, Rodriguez admitted *nothing* in the police file documented the retrieval of the slide viewer from the canal, even as "*thorough*" as the investigation was.[406] Although he *believed* the crime scene to be in the rectory – the office area and the basement – he admits there was no physical evidence recovered supporting his belief. There was no evidence recovered from the rectory in 1960 which was analyzed then or recently which supported his belief the crime scene was the rectory.[407]

B. Rodriguez's Beliefs

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[402] RR6@78-80
[403] RR6@79-80; Note that Rodriguez admitted this corroboration even though he believed Ms. Garza was "abducted" at 7 p.m.
[404] RR6@80
[405] RR6@80-81; RR11 EXHIBIT Volume State's Exhibit 40
[406] RR6@80-82; RR11 EXHIBIT Volume State's Exhibit 39, 40, 51, 52, 53, 54,
[407] RR6@82-83

"I believe Feit accosted Irene at the 7 p.m. hour when she arrived."[408] There was *no evidence* recovered from the scene or elsewhere to support this belief.

"*We believe she was accosted and restrained somehow*."[409] "*We believe she was bound and restrained at the rectory and at the pastoral house*." "*There is nothing in the police file to support the theory that she was bound.*" There was no evidence recovered from the rectory to support this belief.[410]

C. The Vehicle

Trace evidence was recovered from the vehicle alleged to have been used by Appellant on the days and nights surrounding the disappearance of Irene Garza. Although analyzed, *no evidence* came back consistent with the clothing she was wearing. "*There was nothing of evidentiary value in the sweepings of the car*. *We found nothing related to Irene Garza in that car. We found nothing in that car related to John Feit.*" [411]

D. The Church Campus

The Sacred Heart Church campus was crowded that afternoon/evening of April 16, 1960 – it was the highest catholic holiday. There were four confessionals working at the same time to accommodate a crowd seeking absolution. The line of

[408] RR6@83
[409] RR6@83-84
[410] RR6@82-85
[411] RR6@86-88

people poured out the door of the church; there was *a lot* of people there. *No evidence* was reported to support a belief Irene Garza was pulled out of the confessional that evening.[412] *No one* reported screaming. *No one* reported seeing or hearing a vehicle speed away. In fact there were people inside the rectory throughout the evening, none of whom reported anything suggestive of a struggle.[413]

E. Route between Sacred Heart Church and The Pastoral House at the Shrine

Much ado was made about the route Appellant "*must've*" taken the night Ms. Garza went missing. "*495*" wasn't the only route one could've taken from the Sacred Heart Church to the pastoral house at the shrine. Rodriguez admitted he didn't know whether Appellant drove down *495* to the pastoral house that night or not; he couldn't say what route was taken.[414] This serves as an important note, given the State's theory that the person who dumped Irene Garza's purse and shoe were driving down "*495*" on their way from the Sacred Heart Church to the pastoral house.

F. Physical Evidence

[412] RR6@95
[413] RR6@88-90
[414] RR6@92

"*I cannot tell the jury Appellant is the one who left the shoe at Hackberry and McColl*."[415] Rodriguez further admitted he couldn't say Appellant was the person who dumped Irene's body.[416]

G. Evidence at the Canal

Although molds of apparent shoe prints were collected from the canal bank where it was alleged Irene Garza's body was dumped, the plaster casts did not come back belonging to John Feit.[417] In fact, none of Appellant's shoes were even collected for comparison.[418]

H. The Slide Viewer

The viewer was reported to have been collected Aril 29, 1960 at the canal where Irene Garza's body was discovered. *Then* McAllen Police Chief Mussey sent a list of evidence to DPS the next day – April 30; the viewer is *not on the list* of evidence. It wasn't even considered a piece of evidence in this case.[419]

I. Evidence from "Other Cases"

"*There were some black shoes in the evidence box associated with this case but I don't know how they got there or whether they're part of this investigation*."[420] In fact there was other evidence contained in the Irene Garza evidence box that didn't

[415] RR6@92-93
[416] RR6@93
[417] RR6@96
[418] RR6@97
[419] RR6@97-98
[420]RR6@98-99

have anything to do with this case. They were from a totally different case – a 1960 robbery case.[421]

J. No Evidence Recovered Linking Appellant

Chief Victor Rodriguez admitted, "I know of no physical evidence recovered from the rectory that affirmatively links John Feit to the disappearance of Irene Garza."[422] "I know of no physical evidence recovered from the basement of the rectory that affirmatively links John Feit to the disappearance of Irene Garza."[423] "I know of no evidence recovered from the pastoral house that affirmatively links John Feit to the disappearance of Irene Garza."[424] "I know of no evidence recovered from the vehicle believed to be driven by John Feit at that time that affirmatively links John Feit to the disappearance of Irene Garza."[425] "I know of no eye witnesses to the disappearance of Irene Garza."[426]

K. Improper Refreshing Recollection/Violation of Confrontation Clause

Over objection, and through Chief Rodriguez, the State elicited testimony from a newspaper article regarding the recovery of the slide viewer.[427] Further, the

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[421] RR6@98-99
[422] RR6@103
[423] RR6@103
[424] RR6@103
[425] RR6@103
[426] RR6@104
[427] RR6@106-107

State was allowed to refresh Rodriguez' recollection from *other people's affidavits* – witnesses whom have died – clearly unavailable for cross examination. Although an objection was made and a hearing was held outside the presence the jury, the trial court allowed the testimony.

Rodriguez was allowed to testify as to the statements of Consuelo Rodriguez and Estela Trevino; the Court ruled the defense "*opened the door*" regarding questions on cross examination about whether or not evidence was found in the rectory or the basement.[428]

Back on the record with the jury,[429] and after reviewing the affidavits of Estela Trevino and Consuelo Rodriguez, Chief Rodriguez testified there were items of clothing found in the basement which were "discarded" by members of the church.[430] Note, there was no evidence these "articles" of clothing belonged to Irene Garza.

Rodriguez admits that when he made reference to statements "by other people," he's referring to accounts told by persons who will not testify.[431] These people would not be available to testify and therefore would not be cross examined.

III. 701 Lay Witness Opinion

[428] RR6@121; Note that objections were made regarding the violation of the confrontation clause – overruled.
[429] RR6@125
[430] RR6@126-127; Note, these witnesses were dead at the time of trial and not subject to cross examination.
[431] RR6@129

Appellant asserts the trial court improperly admitted evidence of Chief Victor Rodriguez' opinion(s). Appellant contends Rodriguez' opinion(s) were inadmissible under Texas Rule of Evidence 701, which allows witnesses to give an opinion or inference testimony, provided the opinion is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. A "speculative opinion, such as what someone else is thinking at a specific time, does not help the jury."[432]

When conducting a Rule 701 evaluation,[433] the trial court must decide (1) whether the opinion is rationally based on perceptions of the witness and (2) whether it is helpful to a clear understanding of the witness's testimony or to determination of a fact in issue.[434] The initial requirement that an opinion be rationally based on the perceptions of the witness is itself composed of two parts. First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge.[435]

The perception requirement of Rule 701 is consistent with the personal knowledge requirement of Rule 602.[436] It requires the proponent of lay-opinion

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[432] *Fairow v. State*, 920 S.W.2d 357, 361 (Tex.App.—Houston [1st Dist.] 1996).
[433] Though Appellant did not invoke Rule 701 by name when objecting to Rodriguez' testimony, the trial judge overruled on the basis that defense counsel's question called "for speculation." Proper disposition of this case includes analysis under Rule 701.
[434] *See* Rule 701.
[435] *See* Wendorf, Schlueter & Barton, *Texas Rules of Evidence Manual*, § VII, p. 5, (4th ed.1995).
[436] Tex.R.Crim. Evid. Rule 602 provides that a witness may not testify to a matter unless "evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." To

testimony to establish that the witness has personal knowledge of the events upon which his opinion is based. Personal knowledge will often come directly from the witness's senses.[437] If the proponent of the opinion cannot establish personal knowledge, the trial court should exclude the testimony.[438]

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ensure only reliable evidence goes before the fact finder, witnesses must be competent. Tex.R.Crim. Evid. 601. Competency requires personal knowledge. Tex.R.Crim. Evid. 602 provides:

> *Lack of Personal Knowledge* A witness *may not testify to a matter unless* evidence is introduced sufficient to support a finding that *he has personal knowledge of the matter.*

To fulfill the personal knowledge requirement the witness must "have actually observed the fact" about which he will testify. Fed.R.Evid. 602 advisory committee's notes. Personal knowledge is required because testimony without personal knowledge is pure speculation and conjecture. Obviously, such testimony lacks probative value and should be excluded.

[437] *See e.g.* *Smith v. State*, 683 S.W.2d 393, 404 (Tex.Crim.App.1984)(police officer may give non-expert opinion regarding physical facts he has *observed*); *Doyle v. State*, 875 S.W.2d 21 (Tex.App.—Tyler 1994, no pet.) (prison guard allowed to give opinion testimony under Rule 701 based on "*what he saw* "); *State v. Welton*, 774 S.W.2d 341, 343 (Tex.App.—Austin, pet.ref'd)(police officer permitted to give non-expert opinion regarding intoxication based in part on *smelling* the odor of alcohol); *Lape v. State*, 893 S.W.2d 949 (Tex.App. Houston [14th] 1994) (abuse of discretion occurred when lay-witness not permitted to give an opinion on how *sound* traveled in her home)(all emphases added). It may, however, come from experience. *See e.g.* *Austin v. State*, 794 S.W.2d 408, 410–11 (Tex.App.—Austin 1990, pet. ref'd)(police officer permitted to testify that, based on his personal experience, it was his opinion that "Swedish deep muscle rub" was a code for prostitution); *Williams v. State*, 826 S.W.2d 783, 785 (Tex.App.—Houston [14th] 1992, pet. ref'd)(using past experience, a police officer was permitted to testify, as either a lay-witness or an expert, that he interpreted the defendant's actions to be a drug transaction); *Reece v. State*, 878 S.W.2d 320, 325 (Tex.App.—Houston [1st] 1994, no pet.)(based on training and experience, a police officer may testify under Rule 701 that a defendant's actions are consistent with someone selling cocaine).

[438] *See e.g.* *Bigby v. State*, 892 S.W.2d 864, 889 (Tex.Crim.App.1994)(holding that a lay witness may not testify as to his opinion on appellant's sanity when that opinion was based on the observation of others); *McMillan v. State*, 754 S.W.2d 422, 425 (Tex.App.—Eastland 1988, pet. ref'd)(holding that a lay-witness opinion based on hearsay was inadmissible).

Applying the personal knowledge requirement to culpable mental state clearly presents the impossibility for a witness to possess personal knowledge of what someone else is thinking.[439] The individual is the only one who knows for certain the mental state with which he is acting.[440] Therefore, if the trial court determines that a proffered lay-witness opinion is an attempt to communicate the actual subjective mental state of the actor, the court should exclude the opinion because it could *never* be based on personal knowledge. Likewise, if the witness's lack of personal knowledge yields testimony that amounts to "choosing up sides" or an opinion of guilt or innocence, his opinion should be excluded.[441]

Once the perception requirement is satisfied, a trial court must determine if the opinion is rationally based on that perception. An opinion is rationally based on

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[439] The concurring opinion claims that there should be a bright-line rule excluding all opinion testimony regarding culpable mental state because one can never have personal knowledge of another's mental state. The concurring opinion, however, fails to recognize that there is a difference between testifying to another's mental state and giving an *opinion,* based on perceived events, as to another's mental state.

[440] *See e.g.* Arnold v. State, 853 S.W.2d 543, 547 (Tex.Crim.App.1993). In Arnold, the defendants were charged with *willfully* engaging in prohibited conduct by participating in a sit-in protest of certain University of Texas business practices. The trial court excluded opinion testimony from non-protestors regarding relevant campus conditions leading up to the sit-in. The testimony was offered to give the jury "greater insight" into whether the defendant's acted willfully. Arnold at 546. In agreeing with the court of appeals, we held that only the defendants could have testified as to their state of mind. *Id.* We cited Ray's Texas Law of Evidence, Section 1428: "... It is said that since one person cannot possibly know another's state of mind, his testimony is necessarily based on conjecture. This argument really invokes the rule requiring the witness to have personal knowledge of the matter about which he is to testify." Since we agree that one cannot possess personal knowledge of another's mental state, our opinion today is in accord with our holding in *Arnold.*

[441] *See* Boyde v. State, 513 S.W.2d 588 (Tex.Crim.App.1974); Spaulding v. State, 505 S.W.2d 919 (Tex.Crim.App.1974); _, 691 S.W.2d 726, 730 (Tex.App.—Austin 1985, no pet.).

perception *if* it is an opinion that a reasonable person could draw under the circumstances.[442] An opinion not capable of reasonably being formed from the events underlying the opinion must be excluded.[443]

The second requirement for admissibility under rule 701 is that the opinion be helpful to the trier of fact to either understand the witness's testimony or to determine a fact in issue.[444] While there is no bright line indicating when an opinion is helpful, general evidentiary considerations of relevance and balancing will invariably assist the trial judge in making his determination. For example, a trial court properly acting within its discretion may determine that the confusing, misleading or cumulative nature of an opinion renders it not helpful to the trier of fact and thus improper under Rule 701.[445] This consideration is especially prudent when the opinion concerns culpable mental state. Terms typically used to describe mental state—such as "intentional", "reckless", and "negligent"—may have legal definitions different from their common usage. The trial court must carefully consider such differences

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[442] *See* Goode, Wellborn and Sharlot, 2 *Texas Practice Guide to the Texas Rules of Evidence: Civil and Criminal*, § 701.2, p. 5.

[443] *See e.g.* U.S. v. Cox, 633 F.2d 871, 875–876 (9th Cir.1980)(holding a witness's opinion that the defendant was involved in a car bombing was not rationally related to her underlying perceptions: (1) that defendant had twice told her he knew of someone who would bomb cars for money and (2) that defendant showed her a newspaper clipping of a car bombing). Texas Rule of Criminal Evidence 701 was adopted verbatim from Federal Rule of Evidence 701, thus cases interpreting the federal version are helpful in an evaluation of our own Rule.

[444] Tex.R.Crim. Evid. 701.

[445] *See* Rule 403.

when deciding whether an opinion will help the jury or confuse and mislead the jury.[446]

Another important factor in determining helpfulness will likely be the ability or inability of the witness to convey the events from which his opinion is drawn. For example, an opinion may not be helpful from a witness who is able to articulate his perceptions in great detail (thus increasing the likelihood that the jury could formulate its own opinion).[447] If the events are difficult or impossible to describe, however, an opinion is likely to be helpful. Texas courts before and after promulgation of Rule 701 have approvingly referred to such opinion testimony as a "shorthand rendition" of the facts. [448]

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[446] *See, e.g.* Lum v. State, 903 S.W.2d 365, 370 (Tex.App.—Texarkana 1995, pet. ref'd)(holding that a witness's testimony regarding whether the defendant behaved negligently was properly excluded because the witness was "not shown to be an expert on negligence or to know the legal definition or standard of negligence").

[447] *See* Cooper v. State, 23 Tex. 331, 342–343 (1859)(holding that no opinion is needed "for what any fool can plainly see"); *See also e.g.* Roberts v. State, 743 S.W.2d 708, 711 (Tex.App.—Houston [14th] 1987, pet. ref.)(holding that an officer's lay opinion about whether the police were harassing the defendant was unnecessary and inadmissible when the jury had the information before it and was able to draw its own inferences).

[448] *See* Jackson v. State, 822 S.W.2d 18, 29 (Tex.Crim.App.1990)(allowing a police officer to testify that a defendant gave his confession voluntarily because it "was no more than a short rendition of the facts."); *See also* May v. State, 618 S.W.2d 333, 341 (Tex.Crim.App.1981)(a pre-Rules case allowing a police officer to give an opinion concerning an accused's mental attitude because it was "merely a shorthand rendition of the facts"); Wilson v. State, 854 S.W.2d 270, 276 (Tex.App.—Amarillo 1993, pet. ref.) (allowing officer's testimony regarding what a conversation "boiled down to" as a shorthand rendition of what the conversation was about).

These considerations are not exclusive. Countless other factors may contribute to the trial court's decision regarding helpfulness and, ultimately, the helpfulness of an opinion will be determined by the facts of the case.[449]

Whether an opinion meets the fundamental requirements of Rule 701 is within the sound discretion of the trial court and its decision regarding admissibility should be overturned only if it abuses its discretion.[450] Further, *if* there is evidence in the record supporting the trial court's decision to admit or exclude an opinion under Rule 701, there is no abuse and the appellate court must defer to that decision.[451]

These things considered, Appellant maintains the trial court erred by allowing Chief Rodriguez to give his opinion(s) as they should have been excluded under Texas Rule of Evidence 701. In the present case, Chief Rodriguez testified he was *not* the investigator in this case and he *did not* become involved until 2002. Clearly then, Chief Rodriguez did not "observe" anything with his own senses as it relates to the facts of this case – no personal knowledge. This was even more evident when

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[449] *See* Goode at p. 9–10.

[450] *Joiner v. State*, 825 S.W.2d 701, 708 (Tex.Crim.App.1992), cert. denied, 509 U.S. 925, 113 S.Ct. 3044, 125 L.Ed.2d 729 (1993); *See* *Montgomery v. State*, 810 S.W.2d 372, 379(Tex.Crim.App.1990). The concurring opinion ignores the solidly implanted, fundamental tenet of Texas jurisprudence that the trial court has discretion regarding the admission or exclusion of evidence. The concurring opinion makes the global assertion that lay-witness opinion testimony regarding culpable mental state is never helpful. Whether it is helpful is a decision within the trial court's discretion. While not every opinion regarding culpable mental state will be helpful, ultimately, some will. The trial court should be given wide latitude to make that decision using the guidelines set forth in this opinion.

[451] *See* *Carroll v. State*, 916 S.W.2d 494, 503 (Tex.Crim.App.1996); *Meek v. State*, 790 S.W.2d 618, 620 (Tex.Crim.App.1990).

he testified about his theory of what happened to Irene Garza but had to admit he knew of no evidence to support his beliefs. This should've supported the trial court's exclusion of Rodriguez' opinion on several grounds.

First, it supports the contention that the jury was in a position to form its own opinion, thus rendering Rodriguez' opinion(s) not helpful.[452] Further, Rodriguez' testimony should have been excluded on the basis that the opinion was confusing or misleading and thus not helpful within the meaning of Rule 701. Finally, because the trial's purpose was to determine guilt or innocence of Appellant, there is at least some support for exclusion on the basis that the opinion was based not on perceived events but on what turned out to be inadmissible hearsay.[453] Because evidence in the record supports excluding Rodriguez' opinion testimony under Rule 701, the trial court abused its discretion by admitting it.[454] The judgment should be reversed.

IV. 702 Expert Witness Testimony

Chief Victor Rodriguez did not testify in an expert capacity and therefore his opinion testimony should've been excluded.

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[452] *See e.g.* Steve v. State, 614 S.W.2d 137, 139 (Tex.Crim.App.1981)(a pre-Rules case holding that because (1) the jury was in possession of the same facts upon which a proffered opinion was based, (2) the jury could fully understand the matter and (3) the jury could draw the proper inferences and conclusions, the witness's opinion testimony was unnecessary and inadmissible).

[453] *See e.g.*, McMillan v. State, 754 S.W.2d at 425 (holding that the owner of a stolen diamond could not testify that her diamond weighed one carat because her testimony was based solely on hearsay and not upon her own personal observation); *See also e.g.* Nichols v. Seale, 493 S.W.2d 589, 594 (Tex.Civ.App.—Dallas 1973) *rev'd on other grounds, sub nom* Seale v. Nichols, 505 S.W.2d 251 (Tex.1974)("... an inference by a lay witness must be based on data he has personally observed, not on hearsay or speculation").

[454] Carroll v. State, 916 S.W.2d at 503; Meek v. State, 790 S.W.2d at 620.

Appellant complained Chief Rodriguez was being called to "speculate." The State responded arguing he was an expert and as such should be allowed to testify about his opinion. [455] It should be noted, there was no testimony and/or evidence supporting Chief Rodriguez' expert capacity such that would've qualified him to opine in the manner(s) which he did...

The decision on whether an expert witness is qualified to testify is a matter committed to the trial court's discretion.[456] A trial court enjoys wide latitude in determining whether expert testimony is admissible.[457] The trial court abuses its discretion when its decision is so clearly wrong as to fall outside the zone of reasonable disagreement and when the trial court acts so arbitrarily and unreasonably, without reference to any guiding rules or principles.[458]

Any non-constitutional "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[459] A substantial right is affected when an error has a substantial, injurious effect or influence in determining the jury's verdict.[460] If, on the record as a whole, it appears that the error "did not influence the

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[455] "This witness is an expert and should be allowed to rely on hearsay for his "opinions." RR6@108

[456] *Thomas v. State*, 915 S.W.2d 597, 600 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd); *Harris County Hosp. Dist. v. Estrada*, 872 S.W.2d 759, 762 (Tex.App.-Houston [1st Dist.] 1993, writ denied).

[457] *Hernandez v. State*, 53 S.W.3d 742, 750 (Tex.App.-Houston [1st Dist.] 2001, no pet.).

[458] *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App.1990).

[459] Tex.R.App. P. 44.2(b) (Vernon 2002).

[460] *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App.1997).

jury, or had but a slight effect," this Court must consider the error harmless and allow the conviction to stand.[461]

If "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified* as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[462] A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be *based on a reliable foundation*.[463]

It is the responsibility of the party seeking qualification of a witness as an expert to show the special knowledge of the specific matter on which the expert is to testify.[464] Special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things.[465] Expert testimony cannot be based

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[461] *Johnson v. State*, 967 S.W.2d 410, 417 (Tex.Crim.App.1998).

[462] Tex.R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590–9, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex.2001). There was no qualification of Chief Victor Rodriguez as an expert in any area that could be called upon to assist the jury here.

[463] Note how many times Chief Rodriguez admitted there was no evidence to support his beliefs/opinions. *Id.* at 499, *citing* *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549, 556 (Tex.1995); *Hartman v. State*, 946 S.W.2d 60, 62 (Tex.Crim.App.1997). Note, Chief Rodriguez admitted the evidence associated with this case did not support the "beliefs" were shared with the jury during his testimony.

[464] *Ventroy v. State*, 917 S.W.2d 419, 422 (Tex.App.-San Antonio 1996, pet. ref'd).

[465] *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex.Crim.App.2000); *Thomas v. State*, 915 S.W.2d 597, 600 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd).

upon mere guess or speculation, but must have a *proper factual basis*; opinions which are purely speculative or conjectural should be excluded.[466]

As a general rule, police officers are not qualified to render expert opinions simply based on their position as police officers alone.[467] However, police officers can be qualified to testify if they are trained in the science about which they will testify and possess the high degree of knowledge sufficient to qualify as an expert.[468] Appellant avers Chief Rodriguez *was not properly qualified* as an expert.

Here, the evidence shows Rodriguez is the current Chief of Police in McAllen, Texas; he did not become involved in *this* case until 2001 or 2002. There was no evidence regarding the extent, if any, he became involved. Rather, the record shows Rodriguez assigned current investigators to review the case file. He performed no tests, he conducted no interviews, and he evaluated no evidence. There was no evidence that Rodriguez applied any "specialized knowledge and/or experience" to *this* case. Nothing derived from specialized education, practical experience, and on-site inspection was applied here. The trial court acted without any guiding rule or

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[466] *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 741(Tex.App.-Houston [14th Dist.] 1993, writ denied).

[467] *Lopez v. Southern Pac. Transp. Co.*, 847 S.W.2d 330, 334 (Tex.App.-El Paso 1993, no writ); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex.App.-Corpus Christi 1990, writ denied)

[468] *Chavers v. State*, 991 S.W.2d 457, 460–61 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd); *Trailways, Inc.*, 794 S.W.2d at 483; *Gainsco County Mutual Ins. Co. v. Martinez*, 27 S.W.3d 97, 105 (Tex.App.-San Antonio 2000, pet. dism'd by agr.).

principle in admitting Rodriguez' testimony as an expert. This was an abuse of discretion.[469]

V. Harm analysis

This error is harmful. Under Rule 44.2(b), any error must be disregarded if it does not affect Appellant's substantial rights.[470] A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict.[471] The record as a whole should be reviewed to determine whether the error had such an influence on the jury's verdict.[472]

This Court should have grave doubts about the effect of the erroneously admitted evidence and find its admission had a substantial and injurious effect on the verdict. Point of Error Six should be sustained, and the case should be remanded to the trial court for a new trial.

POINT OF ERROR NUMBER TEN

THE TRIAL COURT REVERSIBLE ERRED BY ALLOWING HEARSAY TESTIMONY OF GEORGE SAIDLER REGARDING STATEMENTS MADE TO HIM BY DALE TACHENY.

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[469] *See* Montgomery v. State, 810 S.W.2d 372, 380 (Tex.Crim.App.1990).
[470] Tex.R. App. Proc. 44.2(b), O'Connor's Texas Criminal Codes Plus (2017-18); Mosley v. State, 983 S.W.2d 249, 259 (Tex.Crim.App.1998).
[471] *See* King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).
[472] Mosley, 983 S.W.2d at 259.

George Saidler was a retired police officer from San Antonio, Texas at the time of this trial and a member of the "cold case" unit from the year 2000 until he retired in 2007.[473] In April of 2012, Saidler received a phone call from Dale Tacheney. This phone call would lead to the re-opening of the Irene Garza cold case murder.[474]

Over hearsay and confrontation objections, Saidler was allowed to testify regarding hearsay statements made to him by Tacheney.[475] A summary of the hearsay testimony is as follows:

- Tacheney told Saidler he counseled a person whom had told him they'd committed a homicide.[476]
- Tacheney thought the homicide had been committed in San Antonio;
- Appellant bound her, gagged her and placed her in a cellophane bag;
- the body had been kept in a tub;
- the body was dumped in a levy or drainage ditch alongside a road;
- he was insistent that the cause of death was suffocation;
- Tacheney described the murder as being sometime between 1961 and 1963

[473] He spent 32 years with the San Antonio Police Department. RR6@153-154
[474] RR6@155
[475] RR6@156
[476] RR6@157

- Saidler was allowed to testify that what Tacheney told him on the phone was the same as what he wrote in the letter[477]
- The name of the suspect Tacheney gave Saidler was John Feit, a former priest;
- Tacheney said the young lady was in her 20s[478]
- Tacheney first met with Ranger Jaramillo in November 2002[479]
- Made a consensual call to Tacheney with Jaramillo[480]
- The questioning was done over the phone[481]

Saidler ultimately admitted he was called to testify about statements made to him by Dale Tacheney; this was the *only* reason he was called to testify.[482] The trial court erroneously admitted this hearsay.

I. Standard of Review

Whether a trial court erred in admitting evidence is examined for an abuse of discretion.[483] In order to reverse a trial court's decision, the reviewing court must find the trial "court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might agree."[484]

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[477] RR6@159-161; RR11 Exhibit Volume @State's Exhibit 102 State's Exhibit 102 was admitted over objection, representing the letter Tacheney sent to this witness.
[478] RR6@162-163
[479] RR6@165
[480] RR6@166
[481] RR6@167
[482] RR6@172
[483] *Zuliani v. State*, 97 S.W.3d 589, 595(Tex. Crim. App. 2003).
[484] *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[485] Hearsay is not admissible unless it meets one of the statutory exceptions pursuant to Rule 803 of The Texas Rules of Evidence.[486] Once the opponent of the hearsay objects, it is the burden of the proponent of the evidence to establish that there is an applicable exception to the hearsay rule which would make the evidence admissible.[487]

II. Application of the Law to the Facts

A. George Saidler

Saidler's testimony was hearsay because it consisted of out of court statement(s) offered for the truth of the matter asserted. The "matter asserted" was Appellant's involvement in the disappearance and murder of Irene Garza.[488] The State did not state an exception to the hearsay rule on the record nor does any apply in this situation. Therefore, these statements were inadmissible hearsay and it was

[485] TEX. R. EVID. 801(e).
[486] TEX. R. EVID. 803.
[487] *Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008) (*citing* TEX. R. EVID. 802).
[488] Saidler's sole purpose in testifying was to tell the jury about the statements made by Dale Tacheney implicating Appellant as the perpetrator in this case. RR6@172

error for the trial court to admit them as evidence. As such, this Court should grant Appellant a new trial.

POINT OF ERROR NUMBER ELEVEN

THE TRIAL COURT ERRED BY ADMITTING HEARSAY TESTIMONY OF DARRYL DAVIS WHEN HE RECOUNTED STATEMENTS MADE TO HIM BY *THEN* HIDALGO COUNTY DISTRICT ATTORNEY ROBERT LATTIMORE

Appellant contends Darryl Davis' testimony recounting the details of an "off-the-record-meeting" with several reporters and then Hidalgo County District Attorney Lattimore, including statement(s) that Lattimore knew that Appellant was guilty, that the Church was making a deal, that Lattimore knew Appellant was guilty of the America Guerra case, etc. was inadmissible hearsay.[489] The admission of such highly prejudicial statement(s) linking Appellant to the America Guerra case *and* ultimately to the disappearance and murder of Irene Garza was sufficiently damaging to warrant reversal.

In evaluating these contentions, it should first be determined the evidence was in fact hearsay. Since hearsay is, by definition, testimony of out of court statements introduced for the truth of the facts asserted, clearly these statements were offered for their truth. The most impartial and responsible juror could not have avoided drawing an inference that Lattimore's statements, as recited by Darryl Davis, had

[489] RR4@52, 132-133

great probative value. Accordingly, Appellant requests a finding these statements were hearsay:

> "He said he knew -- the way I remember him expressing it, that he knew that John Feit had -- I think he said Father Feit -- had killed Irene Garza and the church knew it and had agreed that he did it."[490]

> "That he was not going to prosecute it because he had reached an agreement with the church that he, that John Feit, would be placed in a monastery for disturbed priests and would remain there the rest of his life. They would keep him there for the rest of his life."[491]

To require a new trial, the prejudicial effect of improper matter, viewed in the context of a particular trial, must not be overwhelmed by evidence of guilt. A significant possibility must exist that, considering the other evidence presented by both the prosecution and the defense, the . . . statement had a substantial impact upon the verdict of the jury.[492]

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[490] RR4@133
[491] RR4@134
[492] *See* United States v. Kimbrell, 470 F.2d 280 (5th Cir. 1972); United States v. Ratner, 464 F.2d 169 (5th Cir. 1972), and Odom v. United States, 377 F.2d 853 (5th Cir. 1967).

This is the case here. There were no eye witnesses to corroborate the State's theory that Appellant was responsible. There was no physical, scientific, or forensic evidence obtained in the 56 years since the disappearance and murder of Irene Garza that somehow linked Appellant to this offense.

Appellant avers the trial court abused its discretion in admitting the hearsay testimony, since the statements do not fall within any exception to the hearsay rule. The trial court's decision to admit the evidence was not within the zone of reasonable disagreement. Thus, given the admission of Darryl Davis' hearsay testimony constituted error, and in light of the other evidence - or lack thereof, these hearsay statements *must* have had a "substantial impact" on the verdict of the jury.

In determining harm, it should be noted the evidence in this case was entirely circumstantial; there were no eyewitnesses who testified at trial. The defense maintained Appellant did not do it. Throughout the trial, the State relied upon hearsay statements, conjecture and assumption(s) to weave a story of fear, corruption and a "cover-up." Critical in the State's theory were the hearsay statements described herein; they were critical to support the notion that Appellant was guilty and everyone knew it.

This Court should have grave doubts about the effect of the erroneously admitted evidence and find its admission had a substantial and injurious effect on

the verdict. Point of Error Eight should be sustained, and the case should be remanded to the trial court for a new trial.

CONCLUSION & PRAYER

Appellant prays that this Court reverese and remand granting Appellant a new trial.

Respectfully submitted,

O. RENE FLORES, P.C.

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CERTIFICATE OF COMPLIANCE

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/s/ O. Rene Flores
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CERTIFICATE OF SERVICE

By my signature, I certify that a true and correct copy of this document was served on the following counsel by e-service l on December 8, 2019:

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