Oral Argument Requested

NO. PD-1214-11

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

JASON THAD PAYNE,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

On Discretionary Review in Cause No. 12-10-00027-CR
From the Twelfth Court of Appeals
Tyler, Texas

BRIEF FOR THE PETITIONER

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IDENTITY OF PARTIES AND COUNSEL

Since this case is an appeal from a criminal conviction, the only parties are the Appellant, JASON THAD PAYNE, by and through his attorneys of record in the trial court, DOUGLAS H. PARKS, 321 Calm Water Lane, Holly Lake Ranch, Texas 75765; and LARRY P. KING, 115 E. Goode Street, P. O. Box 1029, Quitman, Texas 75783, his attorney on appeal, DOUGLAS H. PARKS, and THE STATE OF TEXAS, by and through JAMES PATRICK "JIM" WHEELER, Criminal District Attorney of Wood County, Texas, P. O. Box 689, Quitman, Texas 75783, along with Special Assistant District Attorney HENRY WHITLEY.

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NO. PD-1214-11
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COURT OF CRIMINAL APPEALS
OF TEXAS
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JASON THAD PAYNE,
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VS.

THE STATE OF TEXAS,
RESPONDENT

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Jason Thad Payne, Petitioner herein, respectfully submits this Brief in the above-styled and numbered cause. Appellant presently stands convicted in Cause No. 20,529-2008 for the offense of capital murder, a capital felony, in the 402nd Judicial District Court of Wood County, Texas, the Honorable G. Timothy Boswell, presiding. His conviction was affirmed in Cause No. 12-10-00027-CR by the Twelfth Court of Appeals, Tyler, Texas.

STATEMENT OF THE CASE

Appellant was charged by indictment with capital murder in violation of TEX. PENAL CODE §19.03(a)(5)(A). The indictment alleged that Appellant, on or about December 11, 2007, in Wood County, Texas, did then and there intentionally and knowingly cause the death of an individual, namely, AUSTIN TAYLOR WAGES, by shooting him, and did then and there intentionally and knowingly cause the death of another individual, namely, NICHOLE PAYNE, by shooting her, and both murders were committed during the same criminal transaction;

it was further alleged that a deadly weapon, to-wit: a firearm, was used and exhibited during the commission of the offense or during immediate flight following the commission of the offense. (CR - 14)[1] Appellant entered a plea of not guilty. (RR5 - 21) He was afforded a trial on the merits, in the presence of a jury who found him guilty of the offense as charged. (CR2 - 223). The State did not seek the death penalty and Appellant's punishment was fixed at life confinement in the Institutional Division of the Texas Department of Criminal Justice, pursuant to TEX. PENAL CODE § 12.31(a). Sentence was pronounced on January 28, 2010. (RR10: 51; CR2: 225). Notice of appeal was timely given and perfected. (CR2: 227).

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[1] As used in this Brief, the record citation CR1 and CR2 refers to the clerk's record. RR1 through RR12 designates, in chronological order, volumes one through twelve of the court reporter's record. Exhibits are designated at DX (Defendant's Exhibits) and SX (State's Exhibits). Op. refers to the opinion of the Appellate Court.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 71.3, TEX. R. APP. PROC., Appellant requests oral argument and states that it would be helpful to the Court to hear argument, as the Court recognized when granting Petitioner's petition for discretionary review.

POINTS FOR REVIEW

POINT OF ERROR NO. 1

THE APPELLATE COURT ERRED IN FINDING THAT THE EVIDENCE IS LEGALLY SUFFICIENT TO JUSTIFY A FINDING OF GUILTY OF THE OFFENSE OF CAPITAL MURDER, AS CHARGED IN THE INDICTMENT.

POINT OF ERROR NO. 2

THE APPELLATE COURT ERRED IN HOLDING THAT INADMISSIBLE, PREJUDICIAL AND INFLAMMATORY HEARSAY ADMITTED BY THE TRIAL COURT WAS HARMLESS.

STATEMENT OF FACTS

The Wood County Sheriff's Office received a 911 call from Petitioner (hereinafter "Mr. Payne") at about 9:11 a.m. on December 11, 2007, advising that his wife, Nicole Payne, and his step-son, Austin Taylor Wages, had been shot. (RR5 - 28-29) Law enforcement personnel responded to the scene and found Mr. Payne and his daughter, Remington, outside

the house, waiting. (RR5 - 91) Officers located the body of Nicole Payne in a downstairs bedroom (RR5 - 96-99) and the body of Austin Taylor Wages in his bedroom in the garage. (RR5 - 109-10)

Nicole Payne was found in bed, under bedclothes, having suffered a massive head wound. Lieutenant Miles Tucker, of the Wood County Sheriff's Office, found Mrs. Payne to be warm to the touch. (RR5 - 98/136)

Lt. Tucker found no sign of forced entry and noted that Mr. Payne had not armed himself while he waited for officials. (RR5 - 95)

Austin Taylor Wages was found lying on his bed with a gunshot wound to his face and a rifle between his legs. (DX5) That rifle, a Winchester Model 94, .30-30 lever action, was admitted into evidence. (RR5 - 115; SX64) Lt. Tucker found Austin Wages to be cold to the touch and his arm stiff when he moved it. (RR5 - 110-11)[2]

An interrogation of Jason Payne by Lt. Tucker and Ranger Philip Kemp revealed that the household had awakened at or shortly before 7:00 a. m. Appellant was awakened by Remington about 7:00 a. m. and Austin Wages was already up. Mrs. Payne was awake, but still in bed. The Payne's other son, Jackson, was in bed with his mother. Appellant and Remington took Jackson to school, arriving about 8:00 a.m. (SX66, SX65) (see also SX74, a transcription of SX66, admitted for record purposes only).

Austin Wages was upset that morning about his mother's failure to furnish him with

[2] Yet, Texas Ranger Philip Kemp found no sign of rigor mortis when he examined the body of Austin Wages. (RR9 - 78)

a cell phone and refused to go to school. (SX66,74) Appellant and Remington returned home after dropping Jackson off at school and puttered around the property for a while before Appellant went into the house and found the bodies of his wife and stepson and called 911. (SX66,74) Throughout his interrogation Appellant denied knowing what had happened at his house that morning or having anything to do with the deaths of his wife and stepson.

Ranger Kemp recommended that Deputy Noel Martin, of the Smith County Sheriff's Department, an expert crime scene investigator, be called to the scene. (RR5 - 114)

The bullet that killed Nicole Payne passed through her body and the wall and was never found. (RR5 - 126) However, a spent .30-30 cartridge was found on the floor in Austin's room and there was a spent cartridge in the chamber of the rifle. (RR6 - 236-37) A copper jacket for a .30-30 bullet was also found on the garage/bedroom floor. (RR6 - 236)

Tests determined that Austin Payne had gunshot residue on his right hand. Tests for gunshot residue on Appellant were negative. (RR6 - 155-57)

The medical examiner determined that Nicole Payne died as a result of a gunshot wound to the head with a high powered rifle at either close or contact range. (RR6 - 123-24) The manner of her death was homicide. (RR6 - 142) The doctor determined that Austin Wages died as a result of a gunshot wound to the head. He found stippling and soot around the entrance wound. (RR6 - 130;139) The manner of death was undetermined. (RR6 - 142-43)

There were no identifiable fingerprints found on the rifle. (RR7 - 21) No hair or fibers

were found on the rifle. (RR7 - 30-31) There was no evidence offered by the State indicating that there was blood on the clothes worn by Mr. Payne at the time officers arrived on the scene.. Tests on clothes taken from the clothes dryer in the house were negative for blood. (RR7 - 54-56)

Deputy Martin came to the scene at the request of Ranger Kemp and conducted a through investigation on the day of the alleged offense. He took photographs and did a bloodstain analysis in Nicole's bedroom and concluded that day that she was shot while she was asleep and concluded that the weapon used was the .30-30 found in Austin's room. (RR9 - 40-45)

Deputy Martin then repeated the process in Austin's room. He applied Bluestar and found latent blood on the carpet next to the bed. He later conducted gunpowder residue tests on the same model rifle as SX64. He conducted tests to determine the length of time for blood to dry on various surfaces as well as testing blood patterns for blood dropping on blue denim at different angles. (RR9 - 46-49)

As a result of his investigation and testing it was his opinion that Austin Taylor Wages died as a result of a self-inflicted gunshot. (RR9 - 49) He testified in detail what evidence brought him to that conclusion and that it would have been impossible for another person to have staged the scene as he found it. (RR9 - 50-57) Based upon his later range of fire tests, it was his opinion the muzzle to target distance was four (4) to eight (8) inches. It was his further opinion that the soot patterns found on Austin's face were more important to range

of fire determination than the stippling found. (RR9 - 64-70) He had his findings peer reviewed by Texas Rangers Kenny Ray and Brent Davis, as well as Bobby Henderson of Henderson Forensics and Joe Brasco, an experienced crime scene investigator. (RR9 - 78) He then presented his findings to the Wood County District Attorney and to Lieutenant Miles Tucker at a meeting in the District Attorney's office. (RR9 - 79-80)

Other experts also testified during the trial. A State's witness, Tom Bevel, testified that he did an "event analysis", which was based, in part, upon subjective and ancillary information and that he relied a good deal upon what he was told, via reports, by Lt. Tucker. (RR7 - 110) Based upon what he called the "holistic" view he determined that Austin was killed before Nicole. (RR7 - 90)[3] He made no attempt to reconcile evidence of "early stages of rigor mortis and discoloration associated with decomposition (being) visible on the fingerprints of Nicole Payne in crime scene photographs" (RR9 - 126) and no signs of rigor mortis found in Austin, as reported by Ranger Kemp (RR9 - 78), with his opinion of the order of death.

Another State's witness, Richard Ernest, conducted range of fire experiments and concluded, based upon pattern analysis of the stippling that the range of fire was twelve (12) inches, give or take two (2) inches. (RR7 - 193) He admitted he did not consider the soot deposit in his analysis, but considered only the stippling pattern. (RR7 - 203)

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[3] In his written report Mr. Bevel stated that Austin was "long dead" before the children were taken to school but decided he might not include "long" in that conclusion now but was still of the opinion Austin was killed before Nicole. (RR7 - 122-23)

Finally, a defense expert, Edward Hueske, conducted range of fire experiments using three different Model 94 Winchester rifles, including SX64, and determined that the maximum range of fire from the muzzle to target was ten (10) inches. He also testified that his wife, who has an arm length shorter than that of Austin Wages, could dry fire the weapon with her left hand at a distance of six (6) inches from muzzle to mouth. (RR9 - 140) He also testified that the soot pattern gives a better picture of muzzle to target distance than the stippling pattern and was critical of Mr. Ernest for ignoring the soot. (RR9 -144-49)

SUMMARY OF THE ARGUMENTS

1. THE APPELLATE COURT ERRED IN FINDING THAT THE EVIDENCE IS LEGALLY SUFFICIENT TO JUSTIFY A FINDING OF GUILTY OF THE OFFENSE OF CAPITAL MURDER, AS CHARGED IN THE INDICTMENT: In overruling the factual insufficiency standard applied in *Clewis v. State*[4], this Court, in *Brooks v. State*[5], found a rigorous and proper application of the *Jackson v. Virginia*[6] legal sufficiency standard to be as exacting as a factual-sufficiency standard. Such a rigorous and proper application requires a reviewing court to give deference to a jury's verdict by viewing the evidence in the light most favorable to the verdict. However, the reviewing court is given the authority, as well

[4] 922 S.W.2d 126 (Tex. Cr. App. 1996).

[5] 323 S.W.3d 893 (Tex. Cr. App. 2010).

[6] 443 U. S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

as the duty, to take into account **all** the evidence in determining whether a jury was rationally justified in finding guilt beyond a reasonable doubt. The issue, then, is not whether there is some evidence in the record in support of every element of the offense charged but, rather, whether the evidence in support of the verdict, viewed in the context of all the evidence, logically and necessarily leads a rational jury to a finding of guilt beyond a reasonable doubt. If the reviewing court does not act as a "thirteenth juror" in the exercise of its duty it certainly acts as a "gatekeeper" to prevent manifest injustice. Here, the reviewing court failed in applying a rigorous and proper application of the legal sufficiency standard as contemplated by the *Brooks* plurality.

2. THE APPELLATE COURT ERRED IN HOLDING THAT INADMISSIBLE, PREJUDICIAL AND INFLAMMATORY HEARSAY ADMITTED BY THE TRIAL COURT WAS HARMLESS: The Twelfth Court of Appeals did not fairly evaluate the harm of the inadmissible hearsay statements of complainant Nicole Payne's sister that Mr. Payne had threatened to kill her, and to burn the house down with her in it and that she should avenge her death if she were killed. The decision in *Dorsey v. State*, 24 S.W.3d 921 (Tex. App. - Beaumont 2000, no pet.) conflicts with the disposition in this case.

POINT OF ERROR NO. ONE, RESTATED

THE APPELLATE COURT ERRED IN FINDING THAT THE EVIDENCE IS LEGALLY SUFFICIENT TO JUSTIFY A FINDING OF GUILTY OF THE OFFENSE OF CAPITAL MURDER, AS CHARGED IN THE INDICTMENT.

ARGUMENT AND AUTHORITIES

In *Brooks v. State* this Honorable Court emphasizes that "a rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard is as exacting a standard as any factual-sufficiency standard".[7] In dispensing with the *Clewis* factual-sufficiency standard, the Court did not intend that the inquiry be one of determining if there is a "scintilla of evidence" supporting the jury's verdict. The reviewing court must take into account *all* the evidence, viewed in the light most favorable to the jury's verdict, to determine if the evidence supports a *rational and reasonable* finding of guilt, beyond a reasonable doubt. *See Brooks v. State*, at n.26. When taking all the evidence into account, the reviewing court must not misstate the evidence to reach a desired result. The appellate court here recognized that it had a duty to ensure that the evidence presented actually supports a conclusion that Mr. Payne committed the murders with which he was charged. *(See* Op. 1), relying upon *Williams v. State*.[8] However, it failed in that duty.

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[7] *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim.. App. 2010)(plurality opinion).

[8] 235 S.W.3d 742, 750 (Tex. Cr. App. 2007).

In this case there is no physical evidence connecting Mr. Payne to the deaths of either his wife, Nicole, or his stepson, Austin. There is no admission of guilt by Mr. Payne. There is no flight to indicate consciousness of guilt. There was no witness to the alleged offense. The State's case rested entirely upon circumstantial evidence of marginal evidentiary value and the inadmissible testimony of Nicole Payne's father and sister-in-law, admitted over Mr. Payne's objections.[9]

The appellate court recognized that the "circumstantial" evidence relied upon by the State:

1. a rag found in Mr. Payne's truck with a spot of Nicole's blood on it (which was described by all the State's witnesses and the prosecutor as "fresh" or "bright red" when it clearly was not, as found by the appellate court);

2. holes found on the property of a neighbor, which the State's witnesses supposed could been intended as graves;[10]

3. that Mr. Payne had taken out life insurance policies on himself, Nicole and Austin some months before the offense;

4. that there were allegations of financial distress in the family; and

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[9] The appellate court took as direct evidence the inferences drawn from the physical evidence by the expert witnesses while recognizing all the evidence in the case to be indirect to a greater or lesser degree. *See* Op. n.2.

[10] The appellate court did not address the testimony of Mr. Payne's mother that Nicole had previously impaled her finger with a fish hook and had been taken to the hospital in Mr. Payne's truck and that her other son, Billy, and Austin Wages had dug the holes.

5. that there was discord in the marriage between Mr. Payne and Nicole had little or no evidentiary value.

The appellate court then found "the question (to be) whether the jury could have concluded that the forensic evidence showed that Austin did not shoot himself". (Op. 2) In finding that a reasonable jury could have reached that conclusion, it relied upon three parts of the physical evidence.

First, it decided that the theory posited by Mr. Payne is implausible because Austin would have to point the rifle at his face, engage the safety and fire the rifle while looking down the barrel. In taking this position the appellate court credited expert testimony that in most suicides involving gunshot wounds the muzzle touches or is near the body as well as the expert testimony that it is rare for a person to shoot themselves while looking down the barrel. That Austin Wages was looking down the barrel of the rifle when he shot himself is **pure speculation** by the experts. He could have had his eyes averted or, perhaps even closed when the weapon was fired. Such speculation could not be credited as reliable evidence by any reasonable jury. Yet, the appellate court does just that.

A reasonable jury would think of the alternative. If Austin did not shoot himself, he must have allowed someone else to shoot him in the face while holding the rifle just inches away, even as he was holding the barrel of the rifle himself.[11]

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[11] Deputy Martin found a void (a space where there was no blood where blood should be) on the rifle barrel consistent with the blood pattern on Austin's right hand, leading to the conclusion that Austin was holding the rifle barrel with that hand when he was shot.

The angle of fire would have made it very difficult, if not impossible, for someone other than Austin to have fired the rifle unless Austin was lying on his back.[12] There was no forensic evidence that Austin was lying on the bed when he was shot. A reasonable juror would find this theory much more implausible than the one the appellate court finds implausible.

Second, the appellate court found the State's forensic expert's testimony to be compelling. The court credited Bevel's testimony that what he described as pooled blood on one of Austin's hands could have only gotten there if his body had been moved. This is in line with Bevel's belief that the scene was staged and that Austin was killed before his mother.[13] The appellate court's conclusion regarding Bevel's testimony was buttressed by the fact that no biological material was found on the floor where it should have been if Austin shot himself. **Except that there was biological material on the floor where it should have been if Austin shot himself.** [14]

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[12] Dr. Pinkard, the medical examiner, testified that the path of the bullet was front to back, upward and slightly left to right. (RR6 - 131)

[13] Bevel based his belief that Austin was shot first because she was warm when found and Austin was cold. Mrs. Payne was found in bed, in a heated house, under bed clothes. Austin was found in the unheated garage, lying on top of the bed. Bevel also ignored beginning signs of rigor mortis in Mrs. Payne, while Ranger Kemp found none in Austin. Bevel is not one to let facts interfere with a "holistic" opinion, even if innocent people are convicted.

[14] Deputy Noel Martin testified as follows:

[DEFENSE ATTORNEY]: Now, Tom Bevel, as far as you know, did not go to the crime scene?

[MARTIN]: As far as I know, he did not.

***

Additionally, despite the court accepting the opinion of Bevel that the scene was staged, there is no evidence of any kind, other than Bevel's opinion, that any such staging occurred. In addition to Deputy Martin testifying it is impossible to stage a spatter scene, not one witness suggested an alternative location for the shooting. Deputy Martin was through in his investigation, there were Texas Rangers and Wood County Deputies at the scene, yet there was no testimony or other evidence to suggest Austin was shot anywhere but where he was found. Staging is a figment of Bevel's imagination and no reasonable jury could credit such a notion in the absence of any physical evidence to support it. Bevel bases his theory of staging on his determination that there was no biological material on the floor where Austin was found and the reviewing court accepts that as fact. In fact, it is a **falsehood.** Bevel never went to the scene and came to his judgment solely on the basis of looking at photographs. This is a product of Bevel's "holistic" reconstruction of the scene without ever having been to the scene.[15] It should be noted that Deputy Martin, **who was called to the scene by the Texas Rangers because he is a respected expert, is in law enforcement, and was expected to be a State's witness in the event a crime had been committed**, testified

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[Q]: You actually saw blood on the floor at the crime scene at the position just in front of where the corpse is shone (sic) in the photographs?

[A]: Sure. Not only did I see it, I tested it with the presumptive chemical Bluestar which was positive. It's a chemical to look for micro images of blood, presumptive test, which is standard operating procedure when you're using illuminance materials because of the false reaction. (RR9-124-25)

[15] Mr. Bevel testified that in conducting a "holistic" review one is allowed to take into consideration the opinions and suppositions of the prosecutor in reaching his conclusions.

that it is **impossible** to stage a spatter scene and that there was no evidence of attempted staging. (RR9 - 53,57)

Third, the appellate court surmises that the jury could have found that the barrel was at least ten inches from Austin's head when he was shot, which would have allowed the conclusion that it was "essentially impossible for Austin to have shot himself." The appellate court does not address the testimony of the medical examiner that Austin was shot at close or contact range. (RR6 - 124) If the medical examiner cannot distinguish between a close or contact range at autopsy, if is highly unlikely the rifle barrel was ten inches away. The soot in the wound belies that theory. This conclusion is also contrary to the testimony of Deputy Martin that a person smaller than Austin could activate the lever and pull the trigger at eight inches and the rifle could be easily manipulated and fired with one foot. (RR9 - 60-61) Another defense expert, Edward Hueske, testified that his wife, with an arm length about two inches shorter than Austin Wages' could dry fire the rifle at six inches. This is part of "all" the evidence the appellate court was bound to consider.

Contrary to the conclusion reached by the appellate court, no rational jury could have found, beyond a reasonable doubt, that Mr. Payne shot his wife and step-son. An impartial review of all the evidence, even when viewed in the light favorable to the jury's verdict, could only conclude that a reasonable jury could not have believed Mr. Payne killed his wife and step-son, beyond a reasonable doubt, and that a manifest injustice has been done.

POINT OF ERROR NO. 2, RESTATED

THE APPELLATE COURT ERRED IN HOLDING THAT INADMISSIBLE, PREJUDICIAL AND INFLAMMATORY HEARSAY ADMITTED BY THE TRIAL COURT WAS HARMLESS.

ARGUMENT AND ARTHORITIES

Facts

Nicole Payne's sister-in-law, Teresa Hawthorne, was allowed to testify, over Petitioner's objections, that Nicole had told her the night before her death that Petitioner had threatened to kill her. She also testified that Petitioner had threatened to burn her alive in the house and begged her to "avenge" her if anything happened to her.

The reviewing court correctly found that this was error and the statements were inadmissible hearsay. However, the appellate court then reasoned that "...if the jury concluded that it was possible that Austin could have shot himself-that is that the scene of his death was not staged-it would be very difficult for the jury to have reached its verdict in light of the State's burden of proof." (Op. 4)

It then found the error to be harmless.

Analysis

Under TEX. R. APP. 44.2(b), a judgment of conviction must be reversed if the non-constitutional error had a substantial and injurious effect or influence on the jury's verdict. See *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United*

States, 328 U.S. 750, 776 (1946)). In making this determination, the Court must review the record as a whole to determine whether the error had such an influence on the jury's verdict. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

The logic of the appellate court would seem to be that if there is evidence which would justify a guilty verdict then inadmissible, prejudicial hearsay is *per se* harmless. Of course that is not the case, but that is the way this case was resolved during the appellate court's harm analysis.

Petitioner relied upon *Dorsey v. State*, 24 S.W.3d 921 (Tex. App. - Beaumont 2000) in the court below and continues to do so.

Dorsey is remarkably similar to the instant case. There, the defendant called 911 to report his wife had been accidently shot by their son, a toddler. The medical testimony indicated that the victim had been strangled or smothered before being shot. The expert testimony was that the toddler could not have fired the weapon. There was inadmissible testimony about domestic violence, that the complainant was afraid of her husband, that she wanted a divorce that he had threatened to kill her and had once held a knife to her throat and that he had previously held a gun to her head, under her throat and in her mouth. The *Dorsey* court noted that the case was entirely circumstantial, as there were no *eyewitnesses* who testified at trial. The conviction in *Dorsey* was reversed because the Court found the inadmissible hearsay testimony to be extremely prejudicial given the State's theory of the case and the fact that it tended to negate the defensive theory offered by the defendant, which

was that he didn't do it.

In reversing Dorsey's conviction the court stated:

> We note the evidence in this case was entirely circumstantial; there were no eyewitnesses that testified at trial. The defense proffered by Dorsey was that he did not do it; there was no claim that he accidentally shot Pamela or that he shot her in self-defense. While the evidence of Dorsey's guilt may have been compelling, it was not overwhelming. The State relied upon the hearsay statements of co-workers and friends to weave a story of abuse and fear. Critical in the plot were the hearsay statements described herein. Not only was the inadmissible hearsay 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.

Id. at 930.

The reviewing court distinguished *Dorsey* by finding that the evidence in *Dorsey* was wholly circumstantial and the verdict there rested on the inadmissible evidence.[16] In fact, a careful reading of *Dorsey* reveals a much stronger case against Dorsey, without the hearsay, than the State produced against Mr. Payne. Dorsey was at the scene when his wife was killed, there was unequivocal evidence that the victim was beaten with a blunt instrument around the left temple, there was evidence of trauma to the neck consistent with choking and there was petechiae in the whites of her eyes that were caused by asphyxia from choking,

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[16] The *Dorsey* court noted that the case was entirely circumstantial, as there were no *eyewitnesses* who testified at trial. The instant case is entirely circumstantial, just as *Dorsey* was, and the reviewing court here cannot change that fact by designating expert testimony as direct evidence. The testimony here was just as prejudicial as that in *Dorsey*, just as it is remarkably similar.

strangulation, ligature or smothering. *Id.* at 925. All this in the face of Dorsey's defense that his toddler son shot his mother.

Here, the only evidence the appellate court could conjure up to support Mr. Payne's conviction was the opinion of Tom Bevel that the scene was staged, although there was no actual evidence of staging other than Mr. Bevel's opinion.

The appellate court admits in the opinion that, "the circumstantial evidence in this case, as we will discuss, is not very helpful in resolving the case or in evaluating the jury's verdict. **And the conclusions to be drawn from the direct evidence are subject to considerable disagreement."** (emphasis added) This does little to distinguish *Dorsey*.

A reviewing court should not dismiss so easily the emotional impact of such testimony in a case where the circumstantial evidence is not very helpful and the direct evidence (expert testimony) is subject to considerable disagreement. Contrary to the reviewing court's conclusions, this verdict did not rest upon substantial grounds, it rested upon inaccuracies, falsehoods and junk science in the form of "holistic" scene reconstruction.

In the face of all the contradictory expert testimony it is just as likely, if not probable, that the jury of laymen could not decide the case on the forensic testimony and decided it on the prejudicial, inadmissible testimony of Ms. Hawthorne.

The inadmissible hearsay had a substantial and injurious effect or influence on the jury's verdict almost without question.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Court reverse the judgment of the appellate court and render a verdict of acquittal or remand the cause for a new trial.

Respectfully submitted,

ORIGINAL SIGNED BY
DOUGLAS H. PARKS

Douglas H. Parks

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief was sent to Henry Whitley, Special Assistant District Attorney for Wood County, Texas, by first class mail, on the 5th day of December, 2011

ORIGINAL SIGNED BY
DOUGLAS H. PARKS

Douglas H. Parks