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 APPEAL FROM THE COURT OF APPEALS FOR THE 12TH JUDICIAL DISTRICT (TYLER), CAUSE NUMBER 12-10-00027-CR, AND FROM THE 402nd JUDICIAL DISTRICT COURT OF WOOD COUNTY, TEXAS, NO. 16,940-2001

BRIEF ON DISCRETIONARY REVIEW FOR THE RESPONDENT, THE STATE OF TEXAS

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ORAL ARGUMENT IS REQUESTED ONLY IF REQUESTED BY PETITIONER

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IDENTITY OF PARTIES AND COUNSEL

As this is an appeal from a criminal conviction, the only parties and counsel are the Petitioner, the Appellant's attorney, and the State of Texas by and through the District Attorney of Wood County, Texas. The names of those persons are:

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JASON THAD PAYNE,
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vs.

THE STATE OF TEXAS,
RESPONDENT

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Respondent, the State of Texas, respectfully submits this brief in reply to the brief of Petitioner, Jason Thad Payne. This is an appeal from a conviction for the offense of Capital Murder in the 402nd Judicial District Court of Wood County, Texas, the Honorable Timothy Boswell, judge presiding.

STATEMENT OF THE CASE

The Charges .....Capital Murder

The Plea.....Not Guilty

The Verdict.....Guilty

The Sentence.....Life Confinement T.D.C.J.-I.D. (Judge)

On Appeal to the 6th Court of Appeals.....Affirmed

As above summarized Petitioner was charged with the offense of Capital Murder, conduct proscribed by Tex. Penal Code, art. 19.03 (a)(7)(a), a capital felony, alleged to have occurred on or about December 11, 2007. An indictment charging Petitioner with

the commission of the offense was filed on December 23, 2008. (CR 14). On January 19, 2010, a jury was selected and the trial on the merits commenced on January 20, 2010, on Petitioner's plea of Not Guilty. (CR 4; RR V. 1). On January 28, 2010, the jury returned its verdict finding him guilty of Capital Murder as charged in the indictment. (CR 5, 223; RR X. 46-48). As the State did not seek the death penalty punishment was thereafter assessed pursuant to Tex. Penal Code §12.31(a)(2) at Life confinement in the TDCJ-ID by the court. Petitioner appealed to the Court of Appeals for the 12th Judicial District (hereinafter called the Tyler Court) alleging that the trial court erred in five (5) points of error. The Tyler Court affirmed and Petitioner now seeks review by this Court complaining in two (2) grounds of error, i.e. that the evidence is legally insufficient to sustain the conviction beyond a reasonable doubt and that the court below erred in holding that the admission of hearsay statements by the victim was harmless. The State will demonstrate that neither ground has merit and that the jury's verdict and the trial court's judgment should be upheld.

STATE'S COUNTERPOINTS

COUNTERPOINT NO. 1

THE EVIDENCE IS SUFFICIENT TO ESTABLISH PETITIONER'S GUILT BEYOND A REASONABLE DOUBT UNDER THE JACKSON V. VIRGINIA STANDARD OF REVIEW.

COUNTERPOINT NO.2

THE TRIAL COURT'S ADMISSION OF CERTAIN HEARSAY STATEMENTS OF THE DECEASED DID NOT AFFECT PETITIONER'S SUBSTANTIAL RIGHTS AND WAS , THEREFORE, HARMLESS AND MUST BE DISREGARDED.

STATEMENT OF FACTS[1]

[1] The facts set forth herein have been copied and modified in part from the brief filed in the Court of Appeals for this court's convenience rather than having to refer to the State's brief below.

Petitioner was charged and convicted of killing his wife, Nicole Payne, and his stepson, Austin Taylor Wages.[2] On December 11, 2007, Wood County Sheriff's Department dispatcher, Lee Elmore, received a 911 call from the Petitioner reporting that his wife and son had been shot. (RR V. 28-29, SX 56).[3] Lt. Miles Tucker, Wood County Sheriff's Office (hereafter WCSO), an officer who had worked in law enforcement for 15 years, was in his office around 9:18 A.M. when he received a call from dispatch advising of a death on Highway 37 north of Quitman.[4] Tucker left immediately and instructed dispatch to start sending other units to the location, identified as 1146 Highway 37 North. On arrival, approximately 5 minutes later, he noticed a man and a small child walking down the drive. The man pointed toward the house. Tucker instructed the man to remain where he was; however, when about to enter the house he observed the man was still approaching the residence. He instructed Deputy Misti Burns who had just arrived on scene to keep the man away from the house for everyone's safety. (RR V. 87-94). Tucker approached the house carefully and quickly as he did not know if there were additional victims or whether the shooter was still inside. Entering from the front door (See SX 6 & 2 [front views of house]; SX 1 [house diagram]) he worked with gun drawn straight in through the living room (SX's 8 & 9) and to his left into the bedroom where he observed a victim (SX's 11, 12, 14). On closer examination of the victim he determined her to be a female who had suffered a massive head injury to the back part of the skull. (RR SX's 15-20).[5] He

[2] Austin Taylor Wages is referred to throughout the record as "Taylor". As the court of Appeals refers to him as "Austin", the State will do likewise in its brief.
[3] Petitioner stated to dispatch that his wife and son had been shot; however, in a later interview he denied that he had checked on the bodies. (RR VIII. 44).
[4] Lt. Tucker was the lead investigator and in charge of the investigation. (RR V. 114).
[5] The bullet penetrated the outside wall and was never recovered. (RR V. 126-127).

noted the body was in a semi-fetal position, was warm to the touch, and there was a pronounced odor of gun powder in the room. (RR V. 95-100, 136). From the bedroom, Tucker, now joined by Deputy Mark Miller, conducted a cursory search of the rest of the house to determine whether anyone else was present. No other victims or persons were found. (RR V. 123-124). At this point, believing the house to be clear, he allowed EMS personnel to enter; however, only one victim had been found. Recalling the 911 dispatch, he sent Sgt. Miller to talk with the Petitioner. Miller reported that Payne stated that he had one son in school, another one in Chicago, and all were accounted for. (RR V. 104-106). By this time other officers had arrived at the scene. Sgt. William Burge was instructed by Tucker to photograph the scene. Deputy Randall Lain was ordered to conduct a cursory search of the grounds and the property around the house. Captain Joe Blair sealed off the road to keep out unauthorized personnel. Dep. Misty Burns continued watching the Petitioner. He also instructed Lain to contact the Petitioner again to insure that all victims had been located. This time Lain reported that Petitioner stated that Austin Taylor Wages was in the attached sunken garage. (RR V. 106-109). Tucker immediately went to the garage where he found the body of Austin Taylor Wages lying on his back on a blood soaked twin bed, head back, with the rifle leaning on his leg. The body was cold to the touch and his arm was stiff on movement. (RR SX's 40, 50-54) There was no odor of gunpowder. On closer inspection Tucker found an entry wound to the front of the face and an exit wound on the back of the head. He noted stippling on the face indicating the wound was a non-contact wound. (RR SX's 55-56). Tucker found the presence of stippling to be odd as he had never seen a self inflicted gun shot wound to the head or face that was a non-contact wound. (RR V.

109-113, 122). He further found it odd that there was no odor of gun powder and that there was no blood or material on the floor in front of the body or on the ceiling. (RR V. 118-121).[6] Tucker testified he was familiar with the rifle found leaning on Austin's leg and described it as a Winchester 94 .30-.30 lever action rifle. Activating the lever is required to chamber a live round and to eject a spent round. It also requires the shooter to squeeze the lever against the stock (a safety feature) while pulling the trigger in order to fire the rifle. (RR V. 115-117). There were no signs of forced entry or of a struggle. (RR V. 95, 99). While processing the scene Lt. Tucker determined that he needed the assistance of the Texas Rangers and a crime scene reconstruction expert. Texas Ranger Phillip Kemp arrived on scene during processing and Deputy Noel Martin, Smith County Sheriff's Department, arrived later that evening to reconstruct the scene. (RR. V. 114: VI. 23-24, 26,). Petitioner was interviewed by Lt. Tucker and Ranger Phillip Kemp on the afternoon of December 11, 2007. (RR SX 66, 74). In that interview he stated that he took his son General Jackson Payne to school arriving on time at 8:00 A.M., and returning home at 8:15.[7] (RR SX 74 at 16, 19). He explained that after he left the school he had two short detours: first, he decided they needed pigeon food, but abandoned that believing he needed to explain to Nicole what they (his daughter Remington was with him) would be doing; and, secondly, that Remington then wanted to go to the park so he started in that direction, but again abandon that in favor of explaining to Nicole what they would be doing. During this in-decision about explaining

[6] Texas Ranger Phillip Kemp found the lack of biological material on the floor (blowback) or behind the body (forward spatter on ceiling or gravity fall on the floor) inconsistent with Austin's suicide. He also found the position of the rifle inconsistent with suicide because of recoil's effect and the angle of the rifle at the time of firing. (RR VIII. 37-40).

[7] According to Tucker it is about a 5 minute drive from the school to the house. (RR V. 131-132).

to Nicole he admitted he had a cell phone, but did not call because he believed that Nicole probably would not have answered the phone. However, on home arrival instead of entering the house and explaining to Nicole as was his stated intention, Petitioner stated that he and Remington first went to the creek to throw acorns and then up the hill to where the birds were housed.[8] (RR SX 74 at 17-22). The 911 call came at 9:08, some 53 minutes after Petitioner arrived at the house. (RR V. 129-134). In addition to Petitioner's quizzical account of his mornings activities Lt. Tucker's investigation revealed other facts which he found inconsistent with the murder/suicide scenario, to wit: no forced entry (RR VI. 98); no sign of a struggle anywhere in house (RR VI. 52); Petitioner's initial statements indicating everyone was accounted for when the 911 call indicated there were two bodies in the house (RR VI. 109-113); Nicole's warm body temperature and the presence of the gun powder odor as opposed to Austin's cold body temperature, arm stiffness indicating rigor mortis, and no gun powder odor; (RR V. 110-113, VI. 51, 86-91); the fact that Nicole was on medication for depression apparently caused by extreme financial difficulties brought on by Petitioner's injury and being off work (RR VII. 11, 14; SX 98); a recently purchased $100,000 life insurance policy on Nicole and a $10,000 policy on Austin with Petitioner as the beneficiary (RR VI. 169-170, SX 71 – application dated June 27, 2007); Petitioner's refusal to give a recorded statement about the event to the insurance company (RR VI. 172); a non-contact wound being called a suicide (RR VI. 178); his belief that Austin's scene appeared to have been staged (RR VI. 105-06); a white wash cloth containing Nicole's fresh blood found in Petitioner's pickup on the day of the murders (RR VII. 45); and, what appeared to be

[8] Nicole had a business furnishing doves (actually pidgeons) for weddings and funeral. At a time in the ceremony the doves would be released. After being released they would return to where they were housed. She was paid $150.00 per event. (RR VI. 205, 208).

blood on the door post of Petitioner's pickup (RR V. 55-57). He was also aware of the fresh holes resembling graves and the path leading to the Payne residence.[9] Tucker was aware of Payne's statements that there were no problems in his marital relationship and that he had no financial problems when his investigation had revealed otherwise.[10] The forensic evidence was limited, except for the washrag containing Nicole's bright red blood found in Petitioner's truck on the day of the murder. The firearms examiner from the DPS lab in Austin testified that there was no indication that the murder weapon had been handled which was inconsistent with Petitioner's statement that he had fired it the day before. He stated he would expect to find some evidence that the weapon had been handled, but the lack of evidence could result from many factors including the weapon being wiped down. (RR VII. 21). The trace evidence examination produced no incriminating or exonerating evidence. (RR VII. 29-32). According to the medical

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[9] The holes were found Thanksgiving week and had been recently dug as they were not seen by a family member who had been in the area within the last 2 months. (RR VIII. 193-194).

[10] In March 2007, due to the stated cause of extreme financial hardship, Nicole was treated for depression. (RR XI. SX 98). On 4/24/2007, Petitioner received a personal injury settlement check in the amount of $331,195.19. (RR XI. SX 67). In May 2007, Petitioner and his wife purchased their home in Quitman for $215,000 plus closing costs, taxes, and sale's commission. (RR VI. 220). They also made several other large purchases, i.e. three 2-3 year old automobiles, i.e. a Dodge 4 wheel drive pickup for Petitioner, a Toyota 4-Runner for Nicole, a Ford Expedition for Petitioner's mother, and a 20 ft. 2001 single consol Ranger boat and trailer with a 200 hp Yamaha motor with a loan value of approximately $18,000 which was later sold for $13,000 to raise money. (RR VIII. 72, 125). In July/August 2007 an attempt to purchase an additional 14 acres adjoining their property failed because they could not make any type of payment until after the first of the next year. (RR VIII. 189). During the last couple of months of her life Nicole communicated with her ex-husband, Austin's father, by post card saying they needed money. (RR VIII. 202). Additionally, the December, 2007, bank statement for Petitioner's primary bank account showed a negative balance of - $271.45. (RR XI. SX 68).

Family interviews established that Petitioner did not want Nicole to have a relationship with her parents; that she was afraid of him; that she wanted a divorce; that he had threatened to kill her; that he had threatened to burn her alive in the house; and, that she was the most unhappy she had ever been and was getting a divorce. (RR VI. 40; VIII. 81, 103-104, 108-109, 183). He was also concerned that a sixteen (16) year old boy with no issues would have had to have gone from not being angry to killing his mother and himself within about a 15-minute time span. (RR VI. 36-37, 40-44).

examiner Nicole died as a result of a close or contact gunshot wound to the back of the head. (RR VI. 124-128). Austin died as a result of a gun shot wound entering at the left upper lip and exiting the back right side of the head. There was stippling on his face indicating a non-contact wound. Austin's right arm measured 23 ½ " from the armpit to the tip of the right thumb and 26" from the armpit to the tip of the right middle finger. Corresponding left arm measurements were 23" and 25 ¾ ", respectfully. (RR VI. 130-132). Nicole's drug screen indicated the presence of norepinephrine (a prescription pain medication), citalopram (an antidepressant), diphenhydramine (Benadryl and antihistamine), and tramadol (a muscle relaxant type of drug). Austin's was negative. (RR VI. 136-137, 139-140). Gunshot residue tests on Nicole produced sources on her left hand that were consistent with gunshot residue. The same tests on the back of Austin's right hand were positive for gunshot residue. The same tests on Petitioner were negative.[11] (RR VI. 153-157).

Although he had not received Deputy Martin's crime scene reconstruction report Tucker was preparing to file a murder charges against Petitioner based on his investigation; however, when informed by Martin that his conclusion was the event was a murder/suicide he abandoned filing the case. (RR VI. 96-97). Lt. Tucker questioned Martin's murder/suicide opinion and was not satisfied with Martin's explanation that he had just seen it many, many times. However, he did not feel qualified to reject Dep.

[11]The trace evidence examiner for the Southwestern Institute of Forensic Science (hereafter SWIFS) testified that GSR is contacted by discharging a firearm, handling a recently discharged firearm, or being in close proximity to a discharged firearm. When ask if one would expect to find GSR on a gunshot victim, she replied that it would not be uncommon. Also when advised that the Petitioner admitted firing the rifle the previous day, she stated she would expect to find GSR unless the shooter either wiped or washed their hands or it just wore off through incidental contact. Another possibility was that the weapon involved wasn't one that left high amounts of residue.

Martin's conclusion outright, felt the victim deserved a better explanation, and felt that it was deserving of a second look. (RR VI. 179-183). For reasons not revealed in the record except that he had been Dep. Noel Martin's instructor, Tucker selected Tom Bevel, a crime scene reconstruction expert, to do a crime scene reconstruction. Also, at Tom Bevel's suggestion Richard Ernest, a firearm's forensic expert, was retained by the State. (RR. VI. 44-46; SX 3 [Bevel's Curriculum Vitae]; SX 111 [Richard Ernest's Curriculum Vitae]). According to Bevel the procedure in an event analysis is to formulate viable hypotheses and attempt to falsify each hypotheses. His three hypotheses were (1) that Austin shot Nicole and then committed suicide by resting the rifle on the floor, positioning the rifle barrel with his right hand, and pulling the trigger with his left hand or toe as Deputy Noel Martin concluded, (2) Austin committed suicide and a third party shot Nicole, and (3) Petitioner shot and killed both Austin and Nicole. (RR VII. 70, 91, 92). Regarding (1) he falsified the position of Austin's right hand through blood pattern analysis. (RR VII. 70-80). Other factors included no blowback below the entry wound or forward spatter from the exit wound (RR VII. 80-82); the position of the rifle, i.e. considering the rifle resting on the floor at the required angle and the substantial kick or recoil of a .30-30, he would have expected the rifle to have been on the floor, not resting on Austin's hand as portrayed in the photographs (RR VII. 82-83); and, considering the length of Austin's arms, the difficulty of maintaining the bullet's trajectory from the 8" to 10" muzzle to target distance based on his test firing of the rifle (RR VII. 83-88). He considered the difference in body temperatures with the cravat that they were not absolutes, but they were consistent with the other data and findings. (RR VII. 90-92). He considered the smell of gunpowder in Nicole's bedroom and the lack of

same in Austin's again with the cravat that the bedroom was a tighter room than the garage. Bevel also drew on his experience. Out of the thousands of homicides he has worked approximately one-half were suicides and out of that one-half, excluding inner oral and underneath the chin, he could remember only two non-contact frontal face wounds. (RR VII. 62, 87). By falsifying the suicide hypothesis he also partially falsified the second hypothesis that Austin committed suicide and a third party killed Nicole. There was no physical evidence of a third party being present. There is no evidence of forced entry or a struggle. (RR VII. 91). The defense did not inject a third party defense, rather its theory of the case and its defense was that Austin killed Nicole and then committed suicide. There is no evidence to support the conclusion that Nicole's death was the result of outside third party action, thus hypothetical number two is falsified leaving number three as the logical producing event. Bevel concludes, "That all of the physical evidence, in concert and holistic view, in my opinion, it is inconsistent that this is a suicide or a firing by Austin. This is an, excuse me, a firing by some other person." (RR VII. 89).

Richard Ernest, the State's firearms expert and the lab director for Alliance Forensic Laboratory, a firearm forensic laboratory certified by the Texas Department of Public Safety and the American Society of Crime Lab Directors, Laboratory, and Accreditation Board, agreed with Tom Bevel that it would be very difficult and not likely that Austin Wages committed suicide based on the arm and rifle measurements and the muzzle to target distance. (RR VII. 149, 194-195,197). In his 33 years experience and hundreds of cases he had never seen a case where a person shot themselves in the face while looking at the end of the barrel. (RR VII. 209-210). In his forensic testing

Ernest first determined that SX 64, the rifle, was the same weapon that fired both of the fatal shots that killed Nicole and Austin. He did this by test firing the rifle with the identical ammunition and microscopically comparing the spent cartridges with the spent cartridges found at the scene, SX 95 & 96. (RR VII. 162-170). Ernest next determined the muzzle to target distance, i.e. distance from rifle muzzle to entry wound on Austin's face, using the density method, an approved methodology. The method requires first obtaining a 1:1 photograph (actual size of victim's face) then test firing the rifle using identical ammunition at distances of 6", 8", 10", 12", 14", 16", and 18" using 5 mil plastic sheeting for targets. A 2" x 2 ⅞" template is then centered over the target's entrance wound and the particles within the template are counted to get a density count. The density count closest matching a like density count on the photograph is the muzzle to target distance, in this case twelve inches plus or minus 2 inches. (RR VII. 172-192). Noting that the distance from the muzzle to the rear of the lever is 28 inches with an additional 12 inches muzzle to target distance, the shooter would have had to have an arm reach of forty inches to have fired the rifle with his hand. Further noting Austin's arm length, Ernest concluded that he would have to have used his feet to fire the weapon, a feat he deemed "not very likely".[12]

Although the State was prepared to rebut the defense's suicide theory through lay opinion testimony pursuant to Rule 701, by showing that Austin Wages was a well adjusted young man who had a good, loving relationship with his mother, the trial court limited the State to reputation testimony. It was only permitted to show that Austin's reputation for being a peaceful and non-violent person was good and that his school

[12] Austin's right arm measured 23 ½ " from the armpit to the tip of the right thumb and 26" from the armpit to the tip of the right middle finger. Corresponding left arm measurements were 23" and 25 ¾ ", respectfully. (RR VI. 130-132).

performance and attendance were good. (RR VIII. 19-26, 91-92, 114-115, 143, 159-161, 165-166).

Petitioner called three lay witnesses, i.e. Petitioner's mother, Faye Payne who testified mostly about the family routine, attempted to explain Nicole's blood in Appellant's truck as resulting from getting fish hooked the preceding October, and attributed the holes/graves on the adjoining property to Austin and her oldest son digging for arrowheads. (RR IX. 7-12,12-14, 15-17). His main defensive thrust was to show that Austin Wages committed suicide through expert testimony. Deputy Noel Martin, a criminalist with the Smith County Sheriff's Department, opined that based on his blood spatter analysis and test firing (both dry & live firing) it was his opinion that the muzzle to target distance was 4" to 8" plus or minus two inches and that Austin Wages committed suicide.[13] (RR IX. 49, 66). Edward Hueska who teaches criminalistics at the University of North Texas and whose main area of expertise is crime scene reconstruction with a specialty area of shooting reconstruction testified that based on his test firing (both dry and live firing) the muzzle to target distance was 4 to 10 inches. He further opined that Austin Wages shot himself while seated on the bed with this feet on the floor. (RR IX. 136, 141). The jury accepted the State's theory of double murder and rejected the defense's theory of murder-suicide. After hearing all the evidence and receiving the law in the court's charge, the jury found the Petitioner guilty of Capital Murder as charged in the indictment. Punishment was assessed pursuant to Tex. Penal Code, § 12.31 at Life confinement in the T.D.C.J.-I.D. and no fine. (CR II. 223, 225; X.

[13] It was established on cross examination that Martin used a different rifle and different ammunition in his test firing. Further, he did not have the autopsy report and photographs when he did his test firing and did not attempt to duplicate the 7 ¾ " stippling spread noted therein. (RR IX. 110-113).

50-51). Petitioner now seeks discretionary review of the jury's verdict and the Court of Appeals' judgment complaining in two (2) points of error that the evidence is legally insufficient, and (2) the Court of Appeals erred in holding that certain hearsay statements of the deceased were harmless error. The State will demonstrate that these complaints are without merit.

SUMMARY OF THE ARGUMENTS

COUNTERPOINT NO. 1: THE EVIDENCE IS SUFFICIENT TO ESTABLISH PETITIONER'S GUILT BEYOND A REASONABLE DOUBT UNDER THE JACKSON V. VIRGINIA STANDARD OF REVIEW.

The State presented direct evidence in the form of expert testimony, i.e. a crime scene reconstruction expert and a firearms expert whose testimony convinced the jury to reject Petitioner defense of murder/suicide. Having eliminated the murder/suicide theory, the cumulative force of the remaining circumstantial evidence including opportunity, motive, a bad marital relationship, Nicole's fear of Petitioner, misleading lies to investigators, a staged crime scene, and other circumstances convinced the jury beyond a reasonable doubt that Petitioner murdered his wife, Nicole, and his stepson Austin Taylor Wages.

COUNTERPOINT NO. 2: THE TRIAL COURT'S ADMISSION OF CERTAIN HEARSAY STATEMENTS OF THE DECEASED DID NOT AFFECT PETITIONER'S SUBSTANTIAL RIGHTS AND WAS , THEREFORE, HARMLESS AND MUST BE DISREGARDED.

The State has urged this Court to review the Court of Appeals curt dismissal of the State's preservation of error argument and its total failure to address the abuse of discretion argument. In the event the State fails to prevail on either of these arguments, it suggests that the testimony at issue is so insignificant in light of the record as a whole that their admission did not affect the outcome of the trial. The State presented expert

testimony which by the jury's verdict eliminated the defense's murder/suicide theory. Numerous other circumstance including but not limited to opportunity, motive, and a staged crime scene which when viewed independently are insufficient, but collectively and cumulatively were sufficient to convince the jury beyond a reasonable doubt that Petitioner is guilty as charged of Capital Murder.

STATE'S COUNTERPOINT NO. 1, RESTATED
(In Response to Petitioner's Point of Error No. 1

Petitioner, Jason Thad Payne, was charged and convicted of capital murder resulting from his shooting both his wife, Nicole Payne, and stepson, Austin Taylor Wages, in the head and face with a high caliber .30-.30 rifle. The defensive theory was that Austin Taylor Wages first shot his mother and then turned the rifle on himself committing suicide. In convincing the jury beyond a reasonable doubt that Petitioner was guilty as charged and it was not a murder-suicide as argued by the defense, the State produced expert testimony from a crime scene reconstruction expert and a forensic firearms expert. Additional circumstantial evidence and the reasonable inferences therefrom further convinced the jury that it was in fact a double murder and not a murder/suicide as urged by the defense.

Standard of Review

This court has opined the following when assessing the legal sufficiency of the evidence,

> In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court must give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate

> facts." In reviewing the sufficiency of the evidence, we should look at "events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. [i]t is not necessary that every fact point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances. Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. (citations omitted).

Hooper v. State 214 S.W.3d 9, 13 (Tex. Crim. App., 2007). See also Blackman v. State 350 S.W.3d 588, 595 (Tex. Crim. App., 2011); Isassi v. State 330 S.W.3d 633, 638 (tex. Crim. App., 2010); Guevara v. State 152 S.W.3d 45 (Tex. Crim. App., 2005). The court has further opined that,

> "Under the *Jackson* test, we permit juries to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions.....In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. (citations omitted).

Hooper, supra at 15 –16; See also Blackman, supra at 595. With the above guidance, the State will review the evidence that convinced the jury beyond a reasonable doubt that the Petitioner, Jason Thad Payne, murdered his wife and stepson.

Murder v. Suicide & the Expert Testimony

Both the State and Defense called two expert witnesses who at trial expressed conflicting opinions. The State called Tom Bevel whose oral testimony regarding his expertise and his written vitae were before the jury as evidence (RR. VII. 61, State's Exhibit (hereinafter SX) 103) and a forensic firearms expert recommended by Bevel,

Richard Earnest, whose oral testimony regarding his expertise and written vitae are before the jury also as evidence (RR. VII. 149-157, SX 111). They were commissioned to do a crime scene reconstruction. Deputy Noel Martin, Smith County Sheriff's Department, who was originally engaged by Lt. Tucker to do a crime scene reconstruction, but whose suicide opinion was questioned by Wood County authorities testified for the defense. His oral testimony regarding his expertise is before the jury. (RR. IX. 38-39). Petitioner's second expert witness was Ed Hueske whose oral testimony regarding his expertise is also before the jury. (RR. IX. 136-137). After hearing the conflicting evidence the jury resolved the murder/suicide issue in favor of the State and against the defense. That issue should not be disturbed by this court sitting as a thirteenth juror.

Tom Bevel

Tom Bevel was furnished the following information to complete his crime scene reconstruction, to wit: a recording of the 911 call, transcript and video recording of Jason Payne's interview, crime scene images recorded by Deputy W. Burge, a hand-drawn sketch of the first floor, autopsy reports of Nicole Payne and Austin Wages, a four page evidence list, a four page supplemental report by Deputy Burge, a two (2) page offense report by Lt. Miles Tucker, five (5) one page supplemental reports by Tucker, totaling of 93 pages of written material. He was later furnished the rifle in question, autopsy photographs, and both Martin's and Hueska's reports. These documents were sufficient to perform a crime scene reconstruction. (RR. VII. 68-69).[14] Martin concluded that Austin was seated on the bed with the gun resting on the floor at

[14] Both Martin and Hueska received similar documentation to complete their respective evaluations. (RR. IX. 48, IX. 138).

a forty-five degree angle when the gun discharged. Austin was holding the gun with his right hand near the muzzle at a muzzle to target distance of four (4) to eight (8) inches plus or minus two (2) inches either way. Hueska's reconstruction mainly concentrated on the stippling and soot issues and given Austin's arm lengths his ability to fire the weapon. He accepted Martins conclusions regarding blood spatter, the luminol testing, and Austin's right hand position, starting with Austin's right hand being positioned near the muzzle. (RR IX. 153-154). As previously noted, Bevel's methodology in an event analysis was to first formulate viable hypotheses as to how the event occurred and then attempt to falsify each hypotheses. His three hypotheses were (1) that Austin shot Nicole and then committed suicide by resting the rifle on the floor, positioning the rifle barrel with his right hand, and pulling the trigger with his left hand or toe as Deputy Noel Martin concluded, (2) Austin committed suicide and a third party shot Nicole, and (3) Petitioner shot and killed both Austin and Nicole. (RR VII. 70, 91, 92). Bevel started his reconstruction with Austin's body in its final resting position on the bed as noted in SX 51.[15] Through reverse engineering based on blood spatter he rotated the body to the upright sitting position with his feet on the floor, much as Martin theorized. (RR VII. 72-74). Bevel noted that the lack of blood on the right forefinger is not consistent with holding the rifle with the right hand near the muzzle as Martin concluded. (RR VII. 75-79; SX's 51-54, 108-109). Further, considering the amount of blood coverage on the rifle there should have been excess blood in the surrounding area, i.e. on the lower pants and carpet, but there is none. (RR VII. 79-80). According to Bevel the described lack of blood falsifies the hypothesis that the right hand was holding the rifle at the time of discharge. (RR VII. 80). Further, there is no visible evidence of backspatter, i.e

[15] Bevel believed Austin was shot at the location where he was found. (RR VII. 112).

blood and /or biological material traveling the opposite direction of the bullet. The blood on the hand is from blood loss, not spatter consistent with back spatter and there is no evidence of back spatter on the floor beneath the entry wound. Bevel also noted no visible forward spatter which he would expect to be present. (RR VII. 80-81). The position of the rifle is also inconsistent with Martin's hypothesis. Given the rifle resting at a 45* angle on a cement floor covered by a thin carpet and considering the substantial recoil of a .30-.30, Bevel opined that he would expect the rifle to be resting on the floor, not resting on top of the left hand as shown in the photographs. (RR SX 51 & 52). He further questioned the position of the rifle resting on top of the left hand. Considering all the pieces of the puzzle, i.e. recoil, lack of blood on the right forefinger, lack of blood in the carpet and lower extremities, he would not expect it to be in that location. (RR VII. VII. 82-83, 89, SX 51, 52). When questioned on direct as to why the rifle didn't ended up on the floor, Martin did not address the recoil issue.[16] According to Bevel's testing, the muzzle to target distance was established at 8 to 10 inches; however, he did not have the medical examiner's 90* close up of Austin's face for density testing. He requested an independent firearms examiner and after his testing sent the rifle to Richard Ernest for further testing. He testified he would defer to that report. (RR VII. 83-84). Austin's right arm from the right armpit to the tip of the right thumb measured 23 ½ inches and 26 inches from the right armpit to the tip of the right middle finger. Corresponding left arm measurements were 23 1/4 inches and 25 3/4

[16] Martin responded, "Not really. It just ends up where it ends up. I've seen them in many, many different positions. It's not uncommon to see them that way. It's not uncommon seeing them laying on the floor. It's not uncommon to see them pointed away from the victim. It's not uncommon to see them just about any position that you really -- you know, when gunshots happen, people don't die instantly. There's involuntary muscle movements. There's all kinds of factors here. The gun is simply where it is."

inches. (RR VI. 132). Using an actor with similar measurements and the 8" to 10" muzzle to target distance, Bevel opined that it would be very difficult for Austin to maintain the trajectory reflected in the autopsy report at 8" inches and at 10" inches he would be unable to do so. (RR VII. 84-86). Using Richard Ernest's test results of 10 inches +/- 2 inches with a 10" dowel rod extending from the muzzle to insure that the proper distance is maintained, Bevel concluded it was impossible to maintain the proper trajectory at 10 inches. (RR VII. 86). Bevel considered the possibility that the foot was used to discharge the rifle; however, in those cases where it was determined that the toe was actually used, an indentation in the sock indicating it had been inserted into the trigger guard to discharge the weapon was found. No such evidence existed in the instance case. When ask how the same trajectory could be maintained if the shooter was standing in front of Austin, Bevel explained that rotating the head in line with the long axis of the firearm would maintain the same trajectory and demonstrated. (RR VII. 87-88). By falsifying the suicide hypothesis Bevel also partially falsified the second hypothesis that Austin committed suicide and a third party killed Nicole. There was no physical evidence of a third party being present. There is no evidence of forced entry or a struggle. (RR VII. 91) There is no evidence to support the conclusion that Nicole's death was the result of an outside third party's action and the defense did not raise the issue, thus hypothetical number two is falsified leaving number three as the logical producing event. (RR VII. 89). Bevel also drew on his experience. Bevel strongly disagreed with the statement that non-contact wounds are common in suicides. Out of the approximately one thousand suicides he had worked, excluding inner oral and underneath the chin, he could remember only two non-contact frontal face wounds and

very few of the wounds were inflicted from close range. (RR VII. 62, 86-87, 89). There were other factors and circumstances at the scene emanating from the investigator's reports that Bevel considered, some subjective as opposed to objective, but consistent with his other findings, observations, and data. When ask about the presence of GSR on Austin's hands, Bevel replied that it really doesn't mean much as he was obliviously in the presence of a firearm that was discharged. (RR VII. 88). Regarding the disparities in the body temperatures, Bevel noted that they are not absolutes, but are consistent with his other findings, data, and observations. (RR VII. 91-92). There was no physical evidence of a forced entry or struggle, and nothing to indicate that any one other than family was present at the scene. Although distinguishing factors were present, there was a strong odor of gunpowder in Nicole's bedroom as opposed to no odor in Austin's bedroom. (RR VI. 91-92). Last but not least was the lack of Nicole's blood on Austin's clothing. Austin's socks, T-shirt, jeans, boxers, and jacket/hoodie were tested producing a DNA profile belonging only to Austin Taylor Wages. As Nicole's wound was a close contact wound it was necessary for the shooter to be within the rifle's length when the gun was discharged.[17] As such the blowback generated by the contact wound was of sufficient strength to cause blowback blood to reach the shooter's clothing. In addition to the other factors the lack of blowback blood is inconsistent with Austin being Nicole's shooter. (RR VII. 132-135). It is Bevel's expert opinion based on all of the available data including his findings, observations, and data emanating therefrom, that the physical evidence is inconsistent with Austin's death

[17] The rifle measured 28" from the end of the barrel to the rear end of the lever action. (RR. VII. 193). Additionally, blowback blood is visible on the bed sheet at Nicole's rear and toward the shooter. (RR SX 109).

being caused by suicide, rather his death was caused by the firing of a third person. (RR VII. 89). He further opined in greater detail on cross examination that he believed that the better explanation was that Austin was shot before the Petitioner left for school and then he killed Nicole on his return. (RR VII. 122-124).[18] According to Payne's recorded interview he arrived home at 8:15 and the 911 call came at 9:08 leaving Payne some 53 minutes to murder his wife, stage Austin's murder scene, and to change and wash his bloody clothes. (RR V. 129-134).

Richard Ernest

Richard Ernest's testimony dealt primarily with muzzle to target distance determination and Austin's ability to discharge the rifle at the determined muzzle to target distance. However, some important firearm data was learned from the test firings, to wit: first, the bullet found in Austin's bedroom was the same caliber as the rifle, i.e. a 30-.30 caliber, and secondly, the casing found on the floor of the bedroom and in the rifle's chamber were fired from SX 64.[19] (RR VI. 106, VII. 165-66, 170-71).

Ernest explained his methodology for muzzle to target distance determination in the instant case to the jury in the following manner. The same firearm and ammunition or a like firearm and ammunition plus a means to measure the residue deposits, i.e. gunpowder stippling or tattooing around the gunshot hole, are required. (RR VII. 157).

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[18] Austin's body condition lends further support to this Bevel's hypothesis. On his initial walk through shortly before 9:30 A.M. Lt. Tucker described Austin's body as cold to the touch and his arm was stiff on movement. (RR V. 111). Rigor mortis was later developed to be the stiffing of the body occurring first in the extremities to the arms, legs, and toes beginning three (3) to four (4) hours after death and reversing itself in like manner in 72 hours.

[19] One casing was found on the floor in the garage and the other was still in the rifle. (RR VI. 236-237). As each victim was shot only one time, the State suggests that a reasonable explanation for that scenario was the casing found on the garage floor held the bullet that killed Nicole and was ejected to chamber the round that killed Austin with that casing remaining in the rifle until discovered by the investigating officers. (RR V. 67-68).

Here a to-scale photograph from the medical examiner showing a frontal view of Austin's face and the stippling and tattooing surrounding the entry wound was used to create, by increasing or decreasing the original, a 1:1 color copy to match the actual size of the subjects face. (RR. VII. 158-161, SX 112, 120). Using the ammunition from the scene the rifle (SX 64) was then test fired into five (5) mill plastic sheeting from known muzzle to target distances of 6" to 18" in two inch increments. (RR VII. 173-74, 176-189, SX 113-119). The indentations on the target caused by the burned and unburned gunpowder particles and particle fragments from each of the known distance test firings are then actually counted using a magnifying glass to determine their density and then compared with the density of the powder strikes in the 1:1 reproduction from SX 112. (RR VII. 175, 179-80, 196-197, SX 113-120). From his test firings and density comparisons Ernest determined the rifle was fired at a muzzle to target distance of 12 inches from Austin's face with a +/- 2 inch margin of error . (RR VII. 187, 193). Applying the muzzle to target distance to Austin's ability to fire the rifle, Ernest concluded that it was highly unlikely and virtually impossible for Austin to have fired the weapon. He reached this opinion based on the rifle's measurements, i.e. a 20" barrel length, 24" from the end of the barrel to the trigger, and 28" from the end of the barrel to the rear of the lever action. Add the muzzle to target distance of 12" and it would be at least 36 from the entry wound to the trigger and 39" to 40" to the rear of the lever action. (RR VII. 193-194). Ernest was aware of Austin's' arm measurements as he had a copy of the autopsy report. (RR VII. 200, 205). Ernest further concluded that the young man here "would have had to hold on to the barrel and then work the mechanism basically with both of his feet. He had to close the lever and hold it tight somehow and then also

work the trigger[20] or he had to have some other longer device, which was never found, to extend his reach." He further concluded that for him to operate that gun, it would have taken both his feet, his hands, and hold it a distance nearly a foot from his face. Based on his thirty (30) years of experience such was not impossible, but "it's highly unlikely, almost

virtually impossible for that to happen". (RR VII. 193-95).

As expected the State's experts and defense experts disagreed. Martin speculated that it could have been either a purposeful of accidental suicide. Hueska merely stated that "he shot himself, no one else, while seated on the bed, feet on the floor, a muzzle-to-target distance between four and 10 inches. (RR VII. 89, 193-195; IX. 59, 141). Both State's experts rule out suicide based on the totality of the objective and subjective evidence. The jury heard the evidence and by its guilty verdict resolved the murder/suicide issue in favor of the State and against the Defense. The jury is the trier of fact whose duty it is to weight the evidence, to fairly resolve conflicts in the testimony, and to draw reasonable inferences from basic facts to ultimate facts. Blackman v. State 350 S.W.3d 588, 595 (Tex. Crim. App., 2011); Hooper, supra at 13. This court should not reevaluate the weight and credibility of the evidence as a thirteenth juror and substitute its judgment for that of the jury in the event that it disagrees with the verdict. Rather it should defer to the collective judgment of the twelve jurors and view the murder/suicide issue in the light most favorable to the jury's verdict. Blackman, supra at 596; Isassi, supra at 638; Dewberry State 4 S.W.3d 735, 740 (Tex. Crim. App., 1999).

[20] Three and one-half (3½) pounds of force was required to operate the trigger mechanism. (RR VII. 167).

Circumstantial Evidence

Although the State agrees with the result reached by the Court of Appeals, i.e. that the evidence is legally sufficient, it disagrees with its analysis of the evidence. The standard of review in reviewing legal sufficiency is for the evidence to be viewed in the light most favorable to the verdict. Hooper, supra. Additionally, events occurring before, during, and after the event should be considered in reviewing sufficiency. Guevera, supra at 51. In its analysis the court upfront opined "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." Payne v. State, 2011 WL 1662856, at 1, (Tex. App., Tyler, 2011, not designated for publication). For example, in reviewing the circumstantial evidence, instead of accepting the witnesses' description of the blood on the washcloth as being bright red and his conclusion that it was fresh blood, the court noted that SX 60 did not show a bright red coloration thereby discrediting the witness's description instead of viewing it in the light most favorable to the verdict. Payne, supra at 3. When properly viewed in the light most favorable to the verdict, the combined direct and circumstantial evidence are clearly sufficient to convince a reasonable jury of Petitioner's guilt beyond a reasonable doubt.

Life Insurance as Motive. Petitioner received his share of the personal injury settlement on April 24, 2007, in the amount of $331,195.19. (RR SX 67). Petitioner and Nicole both applied for a 30 year term life insurance policy in the amount of $250,000.00 on June 26, 2007. The policies were issued on July 24, 2007; however, Petitioner's policy came back rated due to tobacco use and was declined due to the

increased premium, i.e. from the quoted annual premium of $455.00 to $1,622.50. Nicole's policy was accepted in the amount of $100,000 with a $10,000.00 rider on each of their four (4) children. The policy was in effect at the time of her murder and Petitioner was the beneficiary. Payne attempted to collect on the policy, but was denied when he refused to give a recorded statement regarding the event and the proceeds have been paid into the registry of the court pending determination of ownership. (RR VI. 165-69, 170-75; SX 71). Although their bank balance as of July 5, 2007 was still $18,519.57, it had decreased to ($271.45) on December 6, 2007, five (5) days prior to the murders.[21] (RR SX 68 – statements dated July 5 and December 6, 2007). The existence of life insurance is admissible to show motive and the time of purchase goes to the weight , not admissibility of the evidence. Jones v. State 243 S.W.2d 848, 851 (Tex. Crim. App., 1951); Reese v. State 151 S.W. 828, 835 (Tex. Crim. App., 1941). Further, motive is a significant circumstance indicating guilt. Guevara, supra at 50. In the instant matter the existence of life insurance at the time of death should be controlling as Petitioner was unemployed, except helping with Nicole's bird business, and his financial condition had significantly deteriorated to an overdrawn bank balance of minus $271.45.[22]

The Marital Relationship. Approximately two and a half months prior to Nicole's murder she called her ex-boyfriend and had a two (2) hour telephone conversation during which she stated that she was "as unhappy as she ever had been in her life" and she was "getting divorced". (RR VIII. 182-83). When her father, Richard Hawthorne, was ask if he noted tension between Petitioner and Nicole, he responded that it seems

[21] See Note 10 for a detailed listing of purchases since receiving the settlement.
[22] See Note 8 regarding the bird business.

like he was getting more controlling and that he (Payne) did not want us (sic her parents) having contact with our daughter, not even by telephone. (RR VIII. 73, 81-82). Prior to August 25th Nicole called to arrange a meeting with her sister-in-law, Sara Hawthorne, and stated during the call that she wanted a divorce. Hawthorne who described Nicole as her best friend, testified that she last saw Nicole on August 25th at a Posadas' restaurant meeting in Tyler and that Nicole said that she wanted a divorce. She also said that Petitioner had threatened to kill her. In that same meeting she also told her sister-in-law that he threatened to burn her alive in the house. The meeting ended with Nicole begging Sara to avenge her death if something happened to her. She remembered the date because Nicole was scared. From the time of the August meeting Hawthorne and Nicole talked at least weekly with Nicole sometimes calling from a closet and at least once she called from the creek in the rear of their property. Nicole characterized her marriage relationship with Petitioner in those conversations with Hawthorne in a negative light. (RR VIII. 100, 103 –04, 107-10). Petitioner argues that the death threats and avenging request are inadmissible hearsay. Notwithstanding, when conducting a legal sufficiency review, an appellate court considers all of the record evidence whether it is admissible or inadmissible. Russeau v. State 171 S.W.3d 871, 879 (Tex. Crim. App., 2005); Dewberry v. State 4 S.W.3d 735, 740 (Tex. Crim. App., 1999).

Lies to Investigators. Lies to police to conceal incriminating evidence are probative of wrongful conduct and circumstances of guilt. Guevara, supra at 50. Petitioner lied to police regarding the state of his marital relationship with Nicole and their financial condition. During his interview with Lt. Tucker and Ranger Kemp, Lt.

Tucker ask if Petitioner and Nicole normally stay (meaning slept in its context) together when she wasn't sick and Petitioner responded "Oh, yeah". He was then ask if he had any problems with her and he responded "No, no". (SX 74 at p. 25). When ask by Tucker if they fought Payne responded "No" and responded to the same question about arguing stating "normal, small things' and characterized their occurrence as seldom. (SX 74 at 29-30). Later Ranger Kemp ask, 'You and your wife real close?" and Payne responded, "Yeah, we were pretty close". Kemp then ask, "Would you consider you – her best friend" and Payne responded, "Yeah". We had fallouts, yeah?" Payne then told the Ranger the last fall out was "Yesterday, the day before" and characterized it as little stuff, nothing, nothing. (SX 74 at 44-45). This characterization of the marital relation is in direct contrast to Nicole's statement to her exboyfriend and to her sister-in-law.

He also lied about their financial condition. When ask by Lt. Tucker if they had any financial problems Payne responded "No, no...We owned everything...no payments going out...no problems making ends meet... didn't have any bills". (SX 74, at 29). This statement was made by an unemployed individual with a bank balance of minus $271.45. (RR SX 74 at p.5). During the last couple of months of Nicole's life when she was receiving $600/$700 a month child support from Austin's biological father, Brent Todd Wages, she wrote post cards to him saying they needed money. (RR VIII. 202-03). Other evidence of financial stress was Petitioner's rush to sell a boat. Subsequent to receipt of the settlement Petitioner purchased a 20 ft. 2001 single consol Ranger boat and trailer with a 200 hp Yamaha motor. On October 31, 2007, approximately six (6) months after the settlement, Petitioner representing himself as a fishing guide contacted

a boat and barge broker near Quitman, TX around 8:30 A.M. saying he needed to sell his boat and trailer. The conversation ended with the broker saying he would get back with him the following Monday. About 10:30 A.M. Payne called back saying he needed the money today as he was buying a boat in Texarkana. They dickered briefly, settled on $13,000, met at the bank, and completed the sale in cash as demanded by Petitioner. At the time the loan value of the boat was $18,000. (RR VIII. 73, 124-29). Petitioner's 10/4/07 bank statement reflects a balance of $27.70. (RR SX 68). Additionally, in July or August 2007, Petitioner and Nicole approached Preston Bridges about purchasing a 14 acre tract that adjoined Payne's property. At first Bridges told them he was not interested as it had been in his family since the early 1900's. Later that same day when they again approached Bridges, he told them that he might interested, but would have to know their financial ability as they wanted him to carry the note. Further discussion revealed that the Payne's could not make any payment for over a year and the negotiations ceased. (RR VIII. 187-189).

In March '07 Nicole saw Aaron Polk M.D. for depression due to extreme financial hardship caused by her husband being out of work due to a vehicle accident four years ago. She owed her attorney 13% interest on monies advanced on the settlement. Cymbalta 30 mg, an antidepressant, was prescribed. At the time she was already taking Zoloft and had Tramadol in her system. The autopsy showed that at the time of death she had Tramadol and citalopram, both antidepressants and relaxants, diphenhydramine (Benedryl), and norepinephrine, a pain medication, in her system.. (RR VI. 136; VII. 10-16; SX 98). A jury could reasonably conclude that she was still

suffereding from depression and other ailments brought on by the state of her marriage and probable financial stress.

Staged Scene. The lead investigator, Lt. Tucker, felt that Austin's scene had been staged, i.e. made to look like a suicide. (RR. VI. 105). In part this was because he had never seen a suicide that was caused by a non contact wound. There is support for Tucker's intuition in both Bevel's and Ranger Kemp's reservations about the scene. Bevel questioned the lack of both back and forward spatter, the left hand's position, and the rifle's position. *Infra at 22-23.* Ranger Kemp also questioned the lack of back and forward spatter, the position of the left hand, and the rifle's position. (RR VIII. 37-43). These issues lend credibility to Tucker's perception that the body had been positioned to look like a suicide and the jury could reasonably have viewed the testimony in that light.

The Rifle. Petitioner told Lt. Tucker and Ranger Kemp that he had fired the rifle the day before and had been deer hunting the evening before the offense. (RR SX 74 at 32-33). Examination by a DPS firearms examiner produced no prints, smudges, or any other indication that the rifle had been handled by an individual to the surprise of the examiner. He would have expected there would be some indication of it being handled. When ask if that was consistent with being wiped down he responded "Well, it could happen because of packaging when submitted to us. Yes, if it had been wiped down or something to that nature, that would preclude to anything being on there". (RR VI. 153-157). We know that if Austin had committed suicide he would have been the last person to handle the rifle. We know he did not wear gloves and could not have wiped down the rifle after firing the fatal shot. As it was unusual for there not to be

some indication of handling the finger points to the Petitioner for any alteration of the condition of the rifle.

The Bloody Rag. A white wash cloth with Nicole's fresh, bright red blood on it was found in Petitioner's truck while processing the scene. (RR V.52-55,68-69; VII. 45-47; SX 60). Sgt. Burge also observed what he believed to be a smear of blood on the door post of Payne's extended cab pickup. (RR V. 55-56).

Opportunity. According to Payne's recorded interview he arrived home at 8:15 and the 911 call came at 9:09 leaving Payne some 54 minutes to murder his wife and stage Austin's murder scene. (RR V. 29, 130; SX 74 at 19).

Petitioner's Quizzical Conduct. Petitioner told Lt. Tucker and Ranger Kemp in the interview that he took his son General Jackson Payne to school arriving on time at 8:00 A.M., and returning home at 8:15.[23] He explained that after he left the school he had two short detours: first, he decided they needed pigeon food, but abandoned that believing he needed to explain to Nicole what they (his daughter Remington was with him) would be doing; and, secondly, that Remington then wanted to go to the park so he started in that direction, but again abandoned that in favor of explaining to Nicole what they would be doing. During this indecision about explaining to Nicole, he admitted he had a cell phone, but did not call because he believed that Nicole probably would not have answered the phone. However, on home arrival instead of entering the house and explaining to Nicole as was his stated intention, Petitioner stated that he and Remington first went to the creek to throw acorns and then up the hill to where the birds

[23] According to Tucker it is about a 5 minute drive from the school to the house. (RR V. 131-132).

were housed.[24] When the officers arrived Petitioner's conduct in accounting for Austin's location and his disregard for Lt. Tucker's instruction to remain where he was added more to his quizzical conduct. (RR V. 87-110, 129-134; SX 74 at pp. 17-22). His explanation of his actions after arriving home were inconsistent with his stated reason for aborting the earlier detours on the way home, i.e. instead of informing Nicole of what he and Remington would be doing, he and Remington went to the creek and threw acorns then up the hill to where the birds were housed. (RR V. 131-134). Although not conclusive, Petritioner's quizzical conduct at the scene, i.e. disregarding Tucker's instruction to stay away from the house (RR V. 87-94) and in failing to report Austin as a victim are cause for concern. Were the lapses in reporting Austin's location the result of a confused mind resulting from his own odious acts or were they the result of a state of shock brought on by events beyond his control? (RR VI. 109-113).

The Graves. Just prior to Thanksgiving, 2007, Kyle Bridges, Preston Bridges's nephew discovered two holes near the edge of the property adjoining the Payne property. Kyle described larger of the two as 10' X 4' X 7' and the smaller 5' x 2' x 2 ½' seven (7) feet deep. He had been on the property two (2) months prior and the holes were not there. According to Preston Bridges who had helped his father dig graves the holes were not made by animals of natural forces because "The size of them and way the walls were, as deep as they were". They were mechanically or physically dug. (RR VIII. 186, 190, 193: SX 76-83).

Summary

[24] Nicole had a business furnishing doves for weddings and funeral. At a time in the ceremony the doves would be released. After being released they would return to where they were housed. She was paid $150.00 per event. (RR VI. 205, 208).

Although not impossible, both of the State's experts concluded that it was highly unlikely that Austin committed suicide and the State's crime scene reconstruction expert further concluded that based on all of the evidence it was his expert opinion that Petitioner killed his wife, Nicole, and his stepson, Austin. Supporting the direct evidence are numerous circumstances which are individually insufficient, but collectively and cumulatively are sufficiently incriminating when combined with the direct evidence to establish Petitioner's guilt beyond a reasonable doubt. Twelve jurors heard the evidence, gave it the weight to which it was entitled, resolved conflicts in testimony, and drew reasonable inferences from basic facts to ultimate facts. By so doing they expressed their individual and collective judgments that Jason Thad Payne murdered his wife and stepson. This court must give deference to the jury's resolution of the conflicts in the testimony, to the weight given evidence by the jury, and to the reasonable inferences drawn by the jury from basic facts to ultimate facts. The jury has spoken and this court should not sit as a thirteenth juror thereby substituting its judgment for the jury's verdict regardless of whether or not it agrees with that verdict. Blackman v. State 350 S.W.3d at 595-596; Isassi v. State 330 S.W.3d at 638; Dewberry v. State 4 S.W.3d at 740.

COUNTERPOINT NO. 2, RESTATED
(In Response to Appellant's Point of Error No. 2)

THE COURT OF APPEALS PROPERLY RULED THAT THE INADMISSIBLE HEARSAY STATEMENTS OF SARAH HAWTHORNE DID NOT HAVE A SUBSTANTIAL AND INJURIOUS AFFECT OR INFLUENCE ON THE JURY'S VERDICT AND WERE, THEREFORE, HARMLESS ERROR.

Standard of Review

The Texarkana court summarized the applicable standard of review in Rogers v. State, i.e.,

> We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. Green v. State 934 S.W.3d 92, 101-02 (Tex.Crim.App. 1996). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles. Montgomery v. State, 810 S.W.2d 372, 391 (Tex.Crim.App.1991) (op. on reh'g). The mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not demonstrate such an abuse. We will not reverse a trial court's ruling on the admission of evidence as long as the ruling is within the zone of reasonable disagreement.

183 S.W.3d 853, 857 (Tex. App., Tyler, 2005). The Court of Appeals properly held that the testimony of Richard Hawthorne concerning Nicole's state of mind statement that Petitioner did not want her having contact with her parents and Sarah Hawthorne's testimony of Nicole's state of mind statements that she wanted a divorce were properly admitted under the state of mind exception to the hearsay prohibition. Accordingly, the State will address the testimony of Sarah Hawthorne that was held inadmissible, but harmless by the court. In doing so because of the Court of Appeals curt dismissal of the State's argument that the error is not preserved (Payne, supra at 4, n.4) and its failure to address its second argument that the admission of the testimony was not an abuse of discretion, the State urges this court to review those areas in connection with its harm analysis.

Procedural

The following conversation occurred by telephone between Sarah and Nicole the night before Nicole's death.

> Q. (BY MR. WHEELER) What did you discuss with her in regard to her relationship with Jason Tad Payne?

A. That she wanted a divorce and that **he had threatened to kill her.**

(RR VIII. 103). Appellant had urged a "hearsay" objection during the testimony of Richard Hawthorne, the previous witness, and reurged that prior objection (hearsay) to this testimony. (RR VIII. 81, 103). The State had countered the original hearsay objection with a proffer under 803(3), state of mind. (RR VII. 81). The question is a proper question under Tex. Code Crim. Proc., art. 38.36 as it seeks relevant facts and circumstances surrounding the previous relationship between the accused and the deceased, i.e. whether the accused and the victim were friends, co-workers, married, estranged, separated, or divorced. Tex. R. Evid., rule 803(3) permits hearsay testimony reflecting 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). Assuming the portion, "he had threatened to kill her" was improper, the State suggests that the question was proper under art. 38.36 and the answer was either non-responsive or objectionable as a statement of memory or belief. Petitioner failed to urge a non-responsive objection. When a response, a portion of which is responsive and another portion is non-responsive, the defendant is required to specify which portion is inadmissible in order to preserve error. Heidelberg v. State 36 S.W.3d 668 (Tex. App. Hou [14 Dist] 2001); Jackson v. State 889 S.W.2d 615, 617 (Tex. App., Hou [14 Dist] 1994, pet. ref'd). Accordingly, nothing is presented for appellate review. Further, as the record stood at that time, Petitioner's only objection was "hearsay" which is nothing more than a nonspecific general objection to the non responsive part, "and he has threatened to kill her". As certain enumerated exceptions under 803(3) are admissible hearsay, Petitioner failed to advise the court by specific objection in response to the

State's state of mind proffer that he felt this statement violated the probation against statements of memory or belief as he now claims on appeal. As such Petitioner had failed to preserve the alleged error and nothing is presented for appellate review. See e.g., Moore v. State 109 S.W.3d 537, 542 (Tex. App., Tyler, 2001); Teixerira v. State 89 S.W.3d 190, 192 (Tex. App., Texarkana, 2002); Gregory v. State 56 S.W.3d 164, 182 (Tex. App., Houston [14th Dist], 2001); Hernandez v. State, 53 S.W.3d 742, 745 (Tex. App., Houston [1st Dist.] 2001); Scherl v. State 7 S.W.3d 650, 652 (Tex. App., Texarkana, 1999,); Chisum v. State 988 S.W.2d 244 (Tex. App., Texarkana, 1998); Hernandez v. State 2002 WL 1763988 (Tex. App., El Paso. 2002, not designated for publication). In addition, his trial objection (hearsay) does not comport with his complaint on appeal (statement of memory of belief). Accordingly, nothing is presented for appellate review. Allridge v. State 762 S.W.2d 146, 157 (Tex. Crim. App., 1988); Little v. State 758 S.W.2d 551, 564 (Tex. Crim. App., 1988); Pyles v. State 755 S.W.2d 98, 116 (Tex. Crim. App., 1988); Ranson v. State 707 S.W.2d 96, 99 (Tex. Crim. App.,1986). When testimony contains both admissible and inadmissible evidence, the objection must specifically refer to the material that is objectionable. Having failed to do so, Petitioner's complaint is not preserved for appellate review. Rogers v. State 183 S.W.3d 853, 866 (Tex. App., Tyler, 2005, no pet.). Prior to the testimony that relating the events of the August 25th meeting at Posado's restaurant in Tyler the court granted a running objection "to any testimony regarding what she was told by Nichole or any person". (RR VIII. 104-105). Two conversations occurring at Posado's were ruled inadmissible by the court of Appeals. The first,

Q. And what did she tell you about her marriage at Posadas?

A. That she was wanting a divorce and **he had threatened her to burn her alive in the house.**

(RR VIII. 108-109). In the interest of brevity the State's response to the question and answer regarding divorce and a threat to kill addressed above will not be repeated verbatim, but the same arguments and authorities are incorporated by reference and reurged as if set forth in their entirety to the instant testimony. Lastly, Petitioner complains of the following testimony, also occurring at the August 25th meeting.

Q. How did that meeting end?
A. She begged me in the parking lot to avenge her if something happened to her.

(RR VIII. 109). Addressing the "She begged me in the parking lot to avenge her if something happened to her" statement, this Court in dealing with similar testimony, i.e.

> Graves' testimony that Veronica told her three weeks before the offense that she (Veronica) was afraid of a man named Virgil, and if anyone saw him, to call the sheriff's department.

opined the following,

> There are two aspects of Graves' testimony: (1) Veronica's statement that she was afraid of appellant, and (2) Veronica's plea to Graves to call the sheriff if anyone saw appellant. Veronica's statement that she was afraid of appellant was a statement of the declarant's then existing state of mind, and therefore fell within the Rule 803(3) hearsay exception. Her request to call the sheriff's office, even if it may be characterized as a "verbal expression" under Rule 801(a), was not hearsay. The request was not admitted to show that the sheriff's office was called, but was admitted to show Veronica's fear of appellant.

Martinez v. State 17 S.W.3d 677, 688 (Tex. Crim. App., 2000). Who else was Nicole afraid of, who did she want to divorce, why did Sarah beg her to cancel her life insurance policy, change her will, and to get out of the house. According to the evidence, no one! But she was afraid Petitioner was going to kill her, was miserable in her marriage, and wanted a divorce. (RR VIII. 104, 109, 182-183). As in Martinez the

request was not admitted to show that her death was avenged, rather it was admitted to show the Deceased's fear of the Petitioner.

Abuse of Discretion

The test for determining whether an abuse of discretion has occurred is not whether the facts present an appropriate case for the trial court's action; rather, the test is whether the trial court acted without reference to any guiding rules and principles, or in other words, acted in an arbitrary and unreasonable manner. Roise v. State 7 S.W.3rd 225 (Tex. App., Austin, 1999) citing Downer v. Aquamarine Operators, Inc. 701 S.W.2d 238, 241-42 (Tex. 1985); see also Molina v. State 998 S.W.2d 302 (Tex. App., El Paso, 1999). Unless the Petitioner can show that the trial court acted arbitrarily or unreasonably, a reviewing court should uphold the trial court's ruling. Stated differently, in applying the abuse of discretion standard of review, an appellate court should uphold the trial court's ruling on appeal as long as the trial court's ruling is within the zone of reasonable disagreement, i.e. reasonable men may disagree whether in common experience a particular inference from the testimony is justifiable. Only when the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that the court's ruling was arbitrary or unreasonable under the facts presented can it be said that the trial court abused its discretion. Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App., 1990).

The testimony at issue is Sarah Hawthorne's testimony regarding Nicole's hearsay statements that Petitioner threatened to kill her and to burn her alive. Also at issue is her request that her death be avenged. The Court of Appeals Rogers v. State 183 S.W.3d 853, 861 (Tex. App., Tyler, 2005, no pet.) set out similar statements with

apparent approval, i.e. "Therefore, we will review the other evidence properly admitted by the trial court regarding these facts",[25]

> Gotcher testified that Appellant had threatened to kill the victim and had hit her, causing bruises on numerous occasions. Id. At 861.
>
> **********
>
> On or about December 2, 1992, Respondent threatened to kill Applicant [Victim] with a knife. Respondent threatened to go buy a Smith & Wesson and kill everyone at Applicant's place of employment located at 2610 Stonewall Street, Greenville, Hunt County, Texas. Respondent grabbed Applicant by the hair of Applicant's head and pushed Applicant down onto the floor and attempted to strangle Applicant. Respondent knocked several holes in the wall of Respondent and Applicant's house. Further, Respondent has previously threatened to kill Applicant on numerous occasions. Id. at 861
>
> **********
>
> On Sunday, November 4, 1998 at approximately 12:30 a.m., Floyd Edward Rogers, Jr. physically threw me into the floor pried my legs apart and sexually forced himself upon me. This event left bruises on my legs, arms and chest area. Id. at 862.
>
> Further, on Sunday, November 4, 1998, Floyd Edward Rogers, Jr. choked me with his bare hands. Id. at 862
>
> Additionally, he has threatened to kill our entire family before he would allow us to be separated. Id. at 862.
>
> **********
>
> If I can't have you, no one can. Id. at 863.

How can a trial court act without reference to any guiding rules and principles, or in other words, act in an arbitrary and unreasonable manner when it relies on a published opinion by the appellate court for its district upholding far more graphic statements than

[25] The quoted statement by the court refers to same or similar evidence admitted and relied upon by the court in holdings that the challenged evidence, State's Exhibits 1A and 1B, written affidavits prepared for divorce proceedings, was harmless error. See Rogers, supra at 861.

the instant challenged testimony? Additionally, the Rogers' court determined that the more detailed and graphic evidence contained in State's exhibits 1A and 1B did not influence the jury or had but a slight effect and was, therefore, harmless. Considering the court's opinion in Rogers and the gray area in distinguishing between state of mind and statements of memory or belief, in the worst case scenario the instant testimony falls with in the zone of reasonable disagreement and no abuse of discretion is shown.

Harmless Error

Again, the testimony at issue is the avenging request and threats to kill/burn her Nicole alive. The Tyler court has summarized the standard of review for determining whether the improper admission of evidence requires reversal in Young v. State,[26]

> As such, we must determine if the improper admission of this evidence was harmful to Appellant. The erroneous admission of evidence is nonconstitutional error under Texas Rule of Appellate Procedure 44.2(b). *See* TEX.R.APP. P. 44.2(b); *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998); *King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997). Any nonconstitutional error that does not affect substantial rights must be disregarded. TEX.R.APP. P. 44.2(b); *Johnson v. State,* 43 S.W.3d 1, 4 (Tex.Crim.App.2001). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King,* 953 S.W.2d at 271 (citing *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). In making this determination, we review the record as a whole. *See Johnson v. State,* 967 S.W.2d at 417. The presence of overwhelming evidence of guilt, though only one factor in the analysis, plays a determinative role in resolving the issue. *Motilla v. State,* 78 S.W.3d 352, 356–57 (Tex.Crim.App.2002). Other factors relevant to the harm analysis are the character of the alleged error and how it might be considered in connection with other evidence in the case and whether the State emphasized the error. *Id.* at 355–56. We may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, and even voir dire, if applicable. *Id.*

Overwhelming Evidence of Guilt. The evidence is detailed in the Statement of Facts and in the arguments and will not be repeated. Summarizing, the evidence

[26] 242 S.W.3d 192, 202 (Tex. App., Tyler, 2007).

establishes that Petitioner was present and had the opportunity to commit the offense; he had a motive, i.e. insurance proceeds to remedy his dire financial condition; crime scene disparities, i.e. no evidence of forced entry or struggle, no evidence of third party intervention, disparities in body temperatures, odor of gun powder, position of the rifle, lack of blowback and forward splatter, position of Austin's right hand, the difficulty of maintaining the proper trajectory from the 8 to 10 inch muzzle to target distance; rarity of non-contact suicide wounds; presence of a rag containing Nicole's bright red/fresh blood in Petitioner's pickup; fresh blood on the door post of Appellant's pickup; a bad marriage relationship with divorce imposing potential unacceptable conditions i.e. loss of child custody, child support, loss of home, etc; dire financial condition; lies to investigators regarding marriage relationship and financial condition to divert attention from himself; acts inconsistent, after arriving home, with reasons stated for aborting earlier detours; Petitioner's quizzical conduct at the scene; recently dug holes resembling grave sites; death threats; Petitioner's refusal to give statement to insurance company; no evidence of Petitioner's handling murder weapon the day before; Lt. Tucker's opinion that scene was staged; and expert testimony excluding suicide based on arm measurements, muzzle to target distance, blood spatter analysis, crime scene disparities, and on viewing the evidence as a whole

Character of the Alleged Error. The evidence of a bad marriage fear, avenging, and death threats was prejudicial as was most of the State's evidence; however, it was not misleading or confusing. It was merely cumulative other evidence properly before the jury that went directly to the existing relationship between the deceased and the Petitioner, i.e. bad marriage, dire financial condition, and Nicole's fear of Petitioner.

Character of the error in light of the entire record. The testimony at issue was brief in light of the entire record and had little emotional impact when viewed in the light of the overwhelming evidence. It occupied only six (6) lines on three (3) pages out of 825 pages of the State's testimony.

Emphasis by State. The State briefly alluded to the complained of testimony one time in its opening argument. (RR X. 10). There was no reference to the testimony in the State's closing argument.

The admission of the testimony regarding the avenging request and threats to kill/burn the deceased alive when viewed in the context of the entire case against Petitioner did not have a substantial or injurious effect on the jury's verdict and did not affect Petitioner's substantial rights. Rogers, supra at 861-63. The Court of Appeals correctly concluded,

> In this case, the only plausible conclusion about the evidence is that the jury concluded that Austin could not have shot himself based on the physical evidence. In that context, the verdict rests on very substantial grounds and the admission of Nichole's hearsay statements had little or no effect on the verdict.

Payne, supra at 8.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, there being legal and competent evidence to justify the verdict and no error appearing in the record of the trial of the case, the State moves the Court to affirm the judgment of the trial court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief has been served on Douglas H. Parks, Attorney for Appellant, 321 Calm Water Lane, Holly Lake Ranch, TX 75765 by depositing same in the United States Mail, Postage Prepaid, on this 23 day of January, 2012.

HENRY WHITLEY