Direct Appeal

States Response - Appellant's Response

No. 72,795

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

DARLIE LYNN ROUTIER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

APPELLANT'S BRIEF

On Appeal from the

Criminal District Court No. 3 of

Dallas County, Texas

Trial Court No. F96-39973-J

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW DARLIE LYNN ROUTIER, Appellant in the above styled and numbered cause and files this her Appellant's Brief in support of her prayer that the judgment of conviction be reversed and the cause remanded for a new trial and, as appropriate, the Court order further hearings in the trial court as requested herein.

STATEMENT OF THE CASE

Appellant was indicted for the capital murder of a child under the age of six. TEX.PENAL CODE ANN. §19.03(a)(8). A jury found Appellant guilty as charged, CR.1A: 150, and by operation of the jury's answers to the two special issues, CR.1A: 220-1, punishment was assessed at death, CR.1A: 220.

POINTS OF ERROR

POINT OF ERROR NUMBER ONE

APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BECAUSE HER LEAD COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST AND THE TRIAL COURT DID NOT CONDUCT A HEARING ON THE STATE'S MOTION TO DETERMINE WHETHER HE SHOULD BE DISQUALIFIED.

POINT OF ERROR NUMBER TWO

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED THROUGH NO FAULT OF HER OWN.

POINT OF ERROR NUMBER THREE

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APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE REPORTER'S RECORD DOES NOT CONFORM TO THE REQUIREMENTS OF TEX.R.APP.P. 34.6(A)(1) AND THE DEFECT CANNOT BE CORRECTED.

POINT OF ERROR NUMBER FOUR

APPELLANT IS ENTITLED TO A HEARING WHICH COMPORTS WITH DUE PROCESS ON HER OBJECTIONS TO THE COMPLETENESS AND ACCURACY OF THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

POINT OF ERROR FIVE

APPELLANT IS ENTITLED TO A RULE 34.6(E)(2) HEARING TO SETTLE THE DISPUTES ABOUT THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

POINT OF ERROR NUMBER SIX

THE COURT VIOLATED FORMER TEX.R.CRIM.EVID. 613 WHEN IT REFUSED TO ALLOW APPELLANT'S PRIVATE INVESTIGATOR TO TESTIFY ABOUT A PRIOR INCONSISTENT STATEMENT OF THE STATE'S BLOOD SPATTER EXPERT.

POINT OF ERROR NUMBER SEVEN

THE COURT DENIED APPELLANT DUE PROCESS WHEN IT REFUSED TO ALLOW HER PRIVATE INVESTIGATOR TO TESTIFY ABOUT A PRIOR INCONSISTENT STATEMENT OF THE STATE'S BLOOD SPATTER EXPERT.

POINT OF ERROR NUMBER EIGHT

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO COUNSEL BY USING AN UNRECORDED EX PARTE COMMUNICATION FROM AN UNNAMED PERSON THAT OCCURRED WHEN HER LAWYER WAS NOT THERE AS THE ONLY BASIS FOR DISCHARGING A SWORN JUROR.

POINT OF ERROR NUMBER NINE

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO BE PRESENT DURING AN UNRECORDED EX PARTE COMMUNICATION WITH AN UNNAMED PERSON THAT PROVIDED THE ONLY BASIS FOR THE TRIAL COURT'S FINDING THAT A SWORN JUROR WAS DISABLED.

POINT OF ERROR NUMBER TEN

THE TRIAL COURT ABUSED ITS DISCRETION UNDER TEX.CODE CRIM.PROC.ANN.ART. 36.29 BY REPLACING A SWORN JUROR WHEN THERE WAS NO EVIDENCE IN THE RECORD TO SHOW THAT SHE WAS DISABLED.

POINT OF ERROR NUMBER ELEVEN

THE TRIAL COURT VIOLATED TEX.CODE CRIM.PROC. ANN.ART. 36.27, BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF DARIN ROUTIER'S TESTIMONY WHEN APPELLANT WAS NOT PRESENT.

POINT OF ERROR NUMBER TWELVE

THE TRIAL COURT VIOLATED TEX.CODE CRIM.PROC. ANN.ART. 33.03, BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF DARIN ROUTIER'S TESTIMONY WHEN APPELLANT WAS NOT PRESENT.

POINT OF ERROR NUMBER THIRTEEN

THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF HER TRIAL BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF HER HUSBAND'S TESTIMONY WHEN SHE WAS NOT PRESENT.

POINT OF ERROR NUMBER FOURTEEN

THE TRIAL COURT ERRED IN REFUSING TO RULE ON APPELLANT'S FORMAL BILL OF EXCEPTION.

STATEMENT OF FACTS

Darlie Lynn Routier was charged with stabbing her five-year-old son to death in the early morning hours of June 6, 1996, in the downstairs "Roman" room of her own home. She was further accused of stabbing to death her six-year-old son Devon in the same transaction while her husband Darin and infant son Drake were asleep upstairs. RR.29: 31. Appellant's motive for these acts as alleged by the State was that she was "angry" over her family's purported economic difficulties and the negative effect this had on her "lifestyle." RR.29: 34.

Appellant's written and oral statements explained that she and her two older boys went to sleep in front of the big screen TV that summer's evening. Appellant had frequently slept downstairs recently because the baby's movement in the crib in her bedroom often woke up this young mother. RR.29: 36; Defendant's Exhibit No. 76A; RR.53: 6143.

Appellant said she was awakened during the night from the feeling of pressure on her shoulder and the sound of Damon saying "Mommy." Defendant's Exhibit No. 76A; RR.53: 6143. She then saw a male intruder walking away from her and then go through the kitchen, through the utility room, and out to the attached garage. Appellant followed this person initially, then turned on a light, and she saw a big knife on the floor which she picked up and placed on the kitchen counter. She ultimately noticed blood all over the Roman room, saw her children injured, and noticed she too was bleeding. Appellant screamed for her husband who soon came downstairs and she called 911. Defendant's Exhibit No. 76A; RR.53: 6143

The police investigation of the scene discovered in the garage an open window with a screen which had been cut; a variety of blood "trails" in the house; and microscopic fiber on the household's bread knife that was similar to the material from which the cut screen was made; and four spots of blood on Appellant's night-shirt which each had combinations of Appellant's blood and of one or the other dead boys. RR.28: 41-2.

The police also found a sock down an alley some 75 yards from Appellant's house which contained the blood of both Devon and Damon, but not Appellant's. RR.28: 46.

The police focused their investigation on Appellant virtually from their arrival and weeks prior to any confirmed analysis of the blood evidence and in doing so all but ignored the reports from neighbors of a suspicious black car which had been seen in the area recently, including the night of the offense. RR.28: 47-8.

The State's theory was that Appellant's wounds were "superficial," although this was a medical term simply meaning not "deep." Actually, Appellant's slashed throat was but 2 millimeters away from causing her death in 2-3 minutes time. RR.30: 795-6. It is strongly urged that this Court review the photographs of Appellant's injuries. Such will reveal the same to be anything but "superficial" in non-medical language. Defendant's Exhibit Nos. 1, 2, 3, 4, 5, 91, 92; RR.53: 6067, 6068, 6069, 6070, 6071, 6160, 6161. State's Exhibit Nos. 52A, 52B, 52C; RR.51: 5914, 5915, 5916.

Further specific evidence and testimony will be cited in support of the relevant points of error herein.

SUMMARY OF THE ARGUMENTS

The record fails to reflect Appellant waived her constitutional right to conflict-free counsel after the State filed a motion alleging her lead counsel might have a conflict from his previous representation of Appellant's husband.

A significant portion of the reporter's record was lost or destroyed thus requiring a reversal of the conviction. Additionally, Appellant is entitled to a new trial because the reporter's record fails to conform with the law and cannot be corrected, or, alternatively, Appellant is entitled to a hearing on her challenges to the record.

The trial court's refusal, because of a violation of "the Rule," to permit Appellant's investigator to testify as to what the State's bloodstain expert told the investigator and defense attorneys violated the applicable rule and due process.

The trial court excused a sworn juror in violation of the rules and constitution.

The trial court also violated the rules and constitutions in addressing and answering a jury question during deliberations outside Appellant's presence.

Lastly, the trial court erred in refusing to act on a formal bill of exception filed by Appellant.

POINT OF ERROR NUMBER ONE

(Restated)

APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BECAUSE HER LEAD COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST AND THE TRIAL COURT DID NOT CONDUCT A HEARING ON THE STATE'S MOTION TO DETERMINE WHETHER HE SHOULD BE DISQUALIFIED.

STATEMENT OF FACTS

Appellant's Lead Counsel Represented Her Husband At A Hearing That Was Substantially Related To The Facts Of Her Case When Her Husband Was A Prosecution Witness And A Suspect

Appellant was initially represented by court appointed counsel because she could

not afford to retain a lawyer. On September 19, 1996, the State filed a motion to discharge her court appointed attorneys because she was no longer indigent. The State's motion alleged that Douglas Mulder, "one of the most . . . successful attorneys in the State of Texas," had informed the trial court on September 12, 1996, that he was retained to represent Appellant. CR.1B: 474-75.[1] [1]

Appellant's court appointed lawyers appeared as her counsel of record and Mulder was present in the courtroom on September 20, 1996, when the trial court conducted a show cause hearing to determine whether her husband, Darin Routier, and her mother, Darlie Kee, should be held in contempt for violating a gag order. RR.8: 6-7;[2] [2] CR.1A: 11-16. At the beginning of the hearing, Mulder announced, "I am retained by Ms. Kee to represent her and she has asked me to represent Darin as well, I didn't know that until this morning." RR.8: 8. Mulder informed the trial court that he asked one of Appellant's attorneys to represent Darin, but the attorney told him that he could not do so. RR.8: 8.

Darin Routier was accused of violating a gag order which prohibited any witness or prospective witness from furnishing "any statement or information which could reasonably be expected to be disseminated by means of public communication" about the following subjects: 1) the expected testimony of the defendant or any witness; 2) the character, reputation or credibility of a witness; 3) the contents of any statement given by the defendant and 4) the nature of the evidence which may be presented. CR.1A: 12-14. Darin Routier was a witness and a prospective witness because he had testified about the facts of the case at a bond hearing and received a subpoena to testify for the State at the trial. RR.8: 8.

The show cause order alleged that Darin Routier provided unspecified "statements and information" about Appellant's case "to the KRLD radio talk show hosted by Rick Roberts which was aired on July 26, 1996" after he received his subpoena. CR.1B: 309. On the day after the talk show was broadcast, a Dallas newspaper published a story which stated, "prosecutors and police reacted angrily yesterday after the mother and husband of Darlie Routier appeared on a radio talk show to contend that Routier is innocent of charges that she fatally stabbed her two children. Assistant District Attorney Greg Davis filed a notice that Darlie Kee and Darin Routier had violated a court gag order and asked District Judge Mark Tolle to schedule a hearing to consider sanctions against them." Defendant's Ex. 70, p. 6; S.Ex.[3] [3] The article also stated that Rowlett Police Chief Randall Posey was "outraged that the Routiers would so directly violate Judge Tolle's court order." Defendant's Exhibit. 70, p. 7; S.Ex.1.

When the State introduced a tape recording of the Rick Roberts talk show at the hearing, Mulder assured the trial court that he had already reviewed it. RR.8: 9-10; State's Exhibit ZZZ. Mulder did not introduce any evidence or call Darin as a witness. RR.8: 12. Without placing him under oath, the trial court asked Darin whether he knew that the gag order pertained to him but it did not question him about what he said to the media. Darin acknowledged that he received a subpoena to testify for the prosecution, but he claimed that he was not aware that the gag order applied to him. RR.8: 12-13.

Mulder argued that Darin Routier did not violate the gag order by appearing on the talk show because "as I understand it, he did not discuss the evidence or really

anything that pertained to the case." RR.8: 12. The trial court reluctantly agreed with Mulder: "Well, I have heard what Mr. Routier stated on the show. I listened to those tapes several times. You did not go into any of the facts of the case. You were under the gag order, but since you did not go into any of the facts in the case, the Court, at this time, is unable to hold you in contempt." RR.8: 12-13.

Lead Counsel's Third Party Fee Arrangement

When the show cause hearing was completed, the trial court asked Darin Routier whether he had retained Mulder to represent Appellant at her trial. RR.8: 16. Darin denied this. RR.8: 16-17. The trial court then asked Darin whether Appellant had arranged to have Mulder represent her at her trial. RR.8: 16. Darin responded that he did not know of such an arrangement, but he added, "I don't understand exactly what--he has met with her." RR.8: 17. The trial court repeated the question and Darin unequivocally denied that Appellant had made any arrangements to have Mulder represent her. RR.8: 17.

Mulder attempted to clarify his role in the case by informing the trial court that Kee retained him as a "consultant" to assist Appellant's court appointed lawyers. RR.8: 17. The trial court ruled that Mulder could act as a consultant to her appointed counsel and remain in the courtroom during the trial, but he could not file motions or directly participate in the litigation of the case. RR.8: 18. The trial court advised Mulder that he had to file a formal motion to substitute himself as counsel of record before he could take control of the defense. RR.8: 19.

The Uncertified Record Of The Hearing On The

Motion To Substitute Counsel

Mulder filed a written motion to substitute himself and his associates as Appellant's counsel of record on October 21, 1996, which was the first day of jury selection. CR.1A: 52. The trial court's entry on docket sheet for that date stated, "hearing on atty Douglas Mulder's motion to substitute counsel. Testimony & evidence rec'd. Motion granted. Douglas Mulder & associates substituted as def's attorneys in this case." CR.1A: 6.

There is no certified reporter's record of the proceedings on the morning of October 21, 1996. The proceedings were stenographically transcribed by the court reporter who filed the original record in this case, Sandra Halsey, but the trial court found that Halsey's entire record had to be replaced with a new record because it did not conform to what happened at the trial. SCR.1: 128-9.

The court reporter who prepared the new record, Susan Simmons, included a 54 page uncertified English translation of Halsey's paper stenographic notes of the proceedings on the morning of October 21, 1996, in Volume 10 of the new record. RR.10: 1-54. Simmons signed a certificate in that volume, but it expressly states that Simmons did not certify that those pages were a true and correct transcription of what happened in court.[4] [4]

Mulder's prior representation of Darin Routier at the show cause hearing was not

mentioned in the uncertified English translation of Halsey's stenographic record of the proceedings on the morning of October 21, 1996. The uncertified pages did contain a brief discussion of a separate conflict of interest arising from Mulder's representation of Appellant's mother, Darlie Kee. RR.10: 9-10.

According to Halsey's uncertified stenographic notes, when Mulder presented his motion to substitute himself as Appellant's attorney of record, the trial court asked Mulder whether his "arrangement as a consultant" with Kee was terminated. RR.10: 9-10. Mulder responded that it was "expanded" to include representation of Appellant during the trial. RR.10: 10.

The trial court asked Appellant whether she wanted Mulder to represent her. Appellant stated that she did. RR:10: 10. The trial court then asked Appellant:

> [THE COURT:] ... If there is any potential conflict with Mr. Mulder representing you and being a consultant to Ms. Kee, do you waive any potential conflict that might exist.
>
> THE DEFENDANT: I'm not sure if I understand.
>
> MR. DOUGLAS MULDER: He wants to know if you give up any claim to a conflict in so far as I represent your mother as a consultant.
>
> THE DEFENDANT: No, there is no conflict.
>
> THE COURT: So you waive any conflict that might exist, is that correct?
>
> THE DEFENDANT: Yes, sir.

RR.10: 10-11. (Emphasis added.)

The trial court granted Mulder's motion to substitute himself and his associates as Appellant's counsel of record and discharged her court appointed attorneys after that colloquy was completed. RR.10: 11.

The State's Motion To Determine Whether

Appellant's Lead Counsel Had A Conflict Of Interest

On November 12, 1996, the State filed a motion that was styled NOTICE OF POSSIBLE CONFLICT OF INTEREST. CR.1A: 55. The State's motion asked the trial court to determine whether Mulder had an actual conflict of interest because of his prior representation of Darin Routier at the show cause hearing and, if so, whether Appellant and Darin Routier would waive it. CR.1A: 55-56. The State's motion alleged that Mulder knew when he represented Darin Routier:

> ... that the State disbelieved and intended to disprove the defendant's claim that these murders were committed by an unknown intruder. Mr. Mulder knew that the only other adult person in the residence during and immediately after these murders was his other client, Darin Routier. Mr. Mulder knew that the State's investigation was ongoing with regards to the analysis of physical evidence. Recent analysis of physical evidence suggests that Darin Routier may have participated with the defendant in the crime or cover-up of the crime.

CR.1A: 56.

The State disclosed two new pieces of circumstantial evidence that connected Darin to the murder of his sons and linked him to the stabbing of Appellant. A white tube sock that was found in the alley behind the Routier house had the blood of both children, a faint trace of Appellant's DNA, and fibers from Darin's sneakers on it. RR.38: 3127-8, 3144-5; CR.1A: 58. There was also a head hair on the knife that inflicted the children's wounds and Appellant's wounds which matched a known sample of Darin's head hair. CR.1A: 58-59.

The Evidence Of Darin Routier's Guilt

That The Trial Court Was Aware Of

The trial court was aware of the significance of the new evidence that connected Darin Routier to the murder weapon and sock because the State presented a preview of its case at a bond hearing.[5] [5] The record of that hearing and the trial contains a substantial amount of other circumstantial evidence which also tended to incriminate Darin Routier.

Darin Routier had a powerful pecuniary motive to kill Appellant. Darin's business was failing and he was deeply in debt. RR.1: 10-38. Appellant's life was insured for

$250,000. RR.5: 315; HR.6: 491; Defendant's Exhibit No. 6, p. 3.[6] [6]

Appellant suffered multiple knife wounds during the offense, HR.6: 475-7; State's Exhibit Nos. 17-19, and Darin was totally unharmed, HR.6: 490; Defendant's Exhibit No. 5, p. 3. Dr. Vincent DiMaio testified that Appellant could not have inflicted her own wounds and she had to stab herself with both hands to do so. RR.43: 4524; 4548-50.

A significant part of Darin's description of what happened on the night of the murder was implausible and inconsistent with Appellant's version. Darin was in the bedroom on the second floor and Appellant was on the first floor with their sons, Damon and Devin, when the children and Appellant were stabbed. Darin testified at a pre-trial hearing that he was awakened by the sound of glass breaking and Appellant screaming. RR.4: 123. Darin and Appellant agreed in their written statements that Darin ran down the stairs and went straight to the room where the boys were attacked. HR.6: 478; State's Exhibit No. 20, p. 7; HR.6: 488; Defendant's Exhibit No. 3, p. 2. Appellant told the police that Darin yelled, "What is it? What is it?" and she responded, "he cut them, he tried to kill me, my neck." HR.6: 478; State's Exhibit No. 20. At the bond hearing, Darin acknowledged that he saw Appellant standing at the foot of the stairs when he came out of the bedroom. RR.4: 127. Appellant's throat was cut and her white night shirt was drenched in blood, but Darin claimed in his written statement that he ran past Appellant to the room where the boys were killed without noticing that she was injured. HR.6: 488; Defendant's Exhibit No. 3, p. 5.

Darin Routier made suspiciously inconsistent statements about his blue jeans. At the hospital early after the attacks, the police noticed blood on his blue jeans and a tear just below the right knee. When asked about the tear, he said he got it while working on the back yard gate just the day before. According to the police report, he didn't explain how blood got on his jeans because he said he came down the stairs naked and got blood on his stomach and bare knees while trying to give CPR to Devon. HR.6: 488; Defendant's Exhibit No. 5, p. 3. In his written statement, Darin told the police that he went to sleep naked, rushed downstairs nude when he heard Appellant scream, and then went back upstairs to put his pants on after he gave first aid to the children. HR.6: 488; Defendant's Exhibit No. 3, p. 3. At the bond hearing, Darin claimed that he went to sleep nude and took the time to put his jeans on before he rushed downstairs to find out why Appellant was screaming. RR.4: 124.

Several eyewitnesses saw Darin Routier remain at the crime scene for an inordinate amount of time after Appellant was rushed to the hospital. Officer Matt Walling noticed that Darin was sitting on the curb near the house after the ambulance left. Walling asked Darin whether he had a way to get to the hospital and Darin told him that he did not. One of Darin's neighbors assured Walling that he would drive Darin to the hospital. Thirty minutes later Walling noticed that Darin was still at the crime scene. Walling told him that he had to go to the hospital and he finally left. S.Ex.1; Defendant's Exhibit No. 70.

A neighbor, Nelda Watts, saw Darin lingering at the crime scene when his wounded wife and dead children were at the hospital. Watts thought that it was "strange" that Darin did not leave. She told the police that she believed that Darin and Appellant were both involved in the capital murder. S.Ex.1; Defendant's Exhibit No. 70.

Another neighbor, Bill Gorsuch, also saw Darin lingering at the crime scene. Gorsuch thought that it was very strange that Darin did not appear to be upset. S.Ex.1;

Defendant's Exhibit No. 70.

When the surgeons were operating on Appellant at the hospital, Detective Patterson noticed that Darin "acted as if nothing serious had happened." HR.6: 490; Defendant's Exhibit No. 5, p. 3. Darin "smiled and laughed" and boasted to the detective about the size of Appellant's breasts. HR.6: 490; Defendant's Exhibit No. 5, p. 2.

Appellant's statements to the police did not conclusively exonerate her husband. Appellant stated that she only had a brief glimpse of her assailant in the dim light that emanated from a large screen television a moment after she regained consciousness. Appellant was initially uncertain about the intruder's race and she did not see his face. Her description of a white male with long hair in blue jeans fit Darin as far as it went: Darin wore blue jeans that night and he had his hair in a pony tail at the hospital. RR.4: 54, 111-2; HR.6: 489; Defendant's Exhibit No. 4, p. 3; S.Ex.1; Defendant's Exhibit No. 70, Supplemental Report of Officer Walling at p.2; Statement of E. Zimmerman at p.3.

The Trial Court's Unfulfilled Promises To Conduct

A Hearing To Determine Whether Appellant's Lead

Counsel Had A Conflict Of Interest

On November 12, 1996, the same day that the State's NOTICE OF POSSIBLE CONFLICT OF INTEREST motion was filed, the trial court conducted the following colloquy with Appellant and two of the prosecutors:

> THE COURT: All right. Let's put on the record. I have in my possession notice of motion, notice of possible conflict of interest, by Gregory Davis, an Assistant District Attorney from Dallas asking me to ascertain whether or not Mr. Mulder has any conflict of interest in this case. And I believe that the record will reflect that I have already asked these same questions of Mr. Mulder when we first started and that Mrs. Routier previously waived any conflict of interest. Is that not so, Miss Routier?
>
> THE DEFENDANT: Yes, yes sir.
>
> THE COURT: And I believe that your husband Darin Routier also knowingly and intentionally waived any conflict of interest.
>
> THE DEFENDANT: Yes, he did.

THE COURT: I think that was all in the record. Was it not?

THE DEFENDANT: It was asked to us at the beginning when we changed.

THE COURT: That is my recollection of things.

THE DEFENDANT: Yes, sir.

THE COURT: We did that the first day here, didn't we?

MR. TOBY L. SHOOK: I think so.

THE DEFENDANT: We did it that day, but you had asked me when I was changing attorneys.

THE COURT: Yes, ma'am. But I mean in Kerrville. We did it right then and there.

THE DEFENDANT: Yes.

THE COURT: As I recall it, it was the first day before the jury, change of venue and all that, before we got into the jury selection.

MS. SHERRI WALLACE: Judge, I think this is new evidence and Greg just wanted to make real sure. There is some new evidence.

THE COURT: Well, I will tell you what will do. We will have the hearing when this jury's picked. We will have a hearing all over and I will ask Miss Routier again and I will ask Mr.

Routier again. I'm sure we will see what the questions are.

THE DEFENDANT: I know you have to go through that procedure but the questions will be--.

THE COURT: Well, I feel I will not be surprised at the same answers. Thank you. But we will do it after we get this jury picked.

THE DEFENDANT: Yes, sir.

THE COURT: All right.

RR.22: 2668-70. (Emphasis added.)

On November, 18, 1996, the trial court briefly addressed the State's motion to determine whether Mulder had a conflict of interest because of his representation of Darin Routier again without ruling on it:

THE COURT: ... Now, I have several motions. I have a motion filed last week considering any conflict of interest that Mr. Mulder might have. The Routiers, I think, we have already waived that. We have got him on the record when they came down here the first day. Was it not, Mrs. Halsey?

THE COURT REPORTER: Yes, sir.

THE COURT: On the 21st, as I recall, I put Ms. Kee under oath, Mr. Routier under oath, Ms. Darlie Routier, the defendant, under oath for this purpose only. And they both waived any conflicts that may exist. Has anything new happened since then?

MR. RICHARD MOSTY: Our response, that Darlie Routier signed last week further reconfirms that.

> THE COURT: That's right. She reconfirmed it last week. Now, we can have a brief hearing when we start this on the 6th if everybody wants to, but I'm quite sure the answers will be the same.

RR.26: 3322-23.

The signed "response" that defense counsel Mosty referred to is not in the record. Despite this second promise to conduct a hearing on the State's conflict motion, such is never mentioned again in the appellate record of the trial.

ARGUMENT AND AUTHORITIES

Appellant's Sixth Amendment right to effective assistance of counsel was violated because the trial court did not conduct a hearing on the State's motion to determine whether her lead attorney, Doug Mulder, had a conflict of interest. There is no reason to remand the case for such a hearing now because the record clearly shows that Mulder had an actual conflict of interest and prejudice must be presumed.

The Trial Court Violated Its Constitutional Duty

To Conduct A Hearing On The State's Motion To

Determine Whether Appellant's Lead Counsel

Had A Conflict Of Interest

The Sixth Amendment guarantee of effective assistance of counsel cannot be satisfied "when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). An actual conflict of interest existed if counsel's duties of loyalty or confidentiality to the defendant and another client were inherently opposed to each other. Perillo v. Johnson, 205 F.3d 775, 797 (5th Cir. 2000); Ramirez v. State, 13 S.W.3d 482, 486 (Tex.App. - Corpus Christi 2000, pet.dism'd, improvidently granted, 2001 WL 599698 Tex.Crim.App., May 30, 2001).

A trial "court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant" a substitution of counsel. Wheat v. United States, 486 U.S. 153,160 (1988); accord Lerma v. State, 679 S.W.2d 488, 497 (Tex.Crim.App. 1984). There are three circumstances in which the trial court must conduct a hearing to determine whether counsel should be disqualified:

1. the attorney or the defendant made a timely objection to a potential conflict of interest, Holloway v. Arkansas, 435 U.S. at 488;

2. the prosecutor raised the issue and the "facts demonstrate convincingly the duty of the court to recognize the possibility of a disqualifying conflict of interest," Wood v. Georgia, 450 U.S. 261, 272-73 (1981); or

3. the trial court "knows or reasonably should know that a particular conflict exists" in spite of the fact that neither party raised the issue. Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980).

The State's motion to determine whether Mulder had a conflict of interest because of his representation of Darin Routier was certainly sufficient to trigger a constitutionally mandatory hearing. Wheat v. United States, 486 U.S. at 160; Wood v. Georgia, 450 U.S. at 273. The potential for a conflict existed for three reasons. First, Darin Routier was suspected of participating in the crime that Appellant was accused of. Maya v. State, 932 S.W.2d 633 (Tex.App. Houston [14th Dist.] 1996, no pet.). Second, Darin was an important prosecution witness.[7] [7] United States v. Martinez, 630 F.2d 361 (5th Cir. 1980). Third, there was substantial relationship between Mulder's representation of Darin and Appellant. Webb v. State, 433 So.2d 496 (Fla. 1983) (hearing was required to determine whether counsel had a conflict because he represented defendant's wife at proceeding to hold her in contempt for not complying with prosecution's subpoena to testify at his capital murder trial). The need for a hearing was so obvious that the trial court "reminded the defense that [it] had inquired into a possible conflict several weeks" before the State raised the issue. Lerma v. State, 679 S.W.2d at 496.

The trial court did not perform its constitutional duty to conduct a hearing about the conflict that arose from Mulder's representation of Appellant's husband regardless of whether the uncertified English translation of Halsey's stenographic notes of the proceedings on the morning of October 21, 1996, can be considered as part of the record. The uncertified record of those proceedings shows that the trial court only conducted a hearing about the potential conflict that existed because of Mulder's representation of Appellant's mother, Darlie Kee. The separate conflict that existed because of Mulder's representation of Darin Routier was not mentioned in the uncertified part of the record and the trial court did not keep its promise to conduct a hearing about that conflict after the State raised the issue.

Appellant's Conviction Must Be Reversed Because

The Trial Court Should Have Known That Her

Lead Counsel Had An Actual Conflict Of Interest

When It Failed To Conduct A Constitutionally

Mandatory Hearing On The Matter

When the trial court violated its constitutional duty to inquire about counsel's conflict of interest, the defendant is entitled to relief regardless of whether the conflict adversely affected her attorney's performance. Ciak v. United States, 59 F.3d 296 (2d Cir. 1995). If, as occurred here, a trial court should have known that counsel had an actual conflict of interest and failed to conduct a hearing when the State raised the issue, the defendant's conviction must be reversed automatically. Wood v. Georgia, 450 U.S. at 273; United States v. Levy, 25 F.3d 146, 154 (2d Cir. 1994); United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994); State v. Watson, 620 N.W.2d 233, 238 (Iowa 2000); State v. Bowen, 999 P.2d 286, 292 (Kan. App. 2000); State v. Gillard, 595 N.E.2d 878, 881 (Ohio 1992); People v. Bonin, 765 P.2d 460, 475-76 (Cal. 1989); In re Richardson, 675 P.2d 209 (Wash. 1983).

A post-conviction hearing on the State's motion to determine whether counsel had a conflict of interest is only permissible if the trial court violated its duty to inquire and the appellate record does not show whether counsel had a potential conflict or an actual conflict. Wood v. Georgia, 450 U.S. at 273.[8] [8] If a post-conviction hearing shows that counsel had an actual conflict in such a case, the defendant's conviction must still be reversed regardless of whether the conflict adversely affected counsel's performance. id.[9] [9]

A remand for a post-conviction hearing is not necessary here because the record already shows that Mulder had an actual conflict of interest. Wood v. Georgia, 450 U.S. at 273. The test for an actual conflict is whether Mulder owed a duty of loyalty or confidentiality to Darin that was inherently opposed to his duty of loyalty to Appellant. Perillo v. Johnson, 205 F.2d at 797-801; Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir. 1998); United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985). Mulder had an actual conflict because there was a plausible alternative defensive strategy that he could not have pursued in Appellant's case without violating his duty of loyalty and confidentiality to her husband who was a suspect, a prosecution witness, and a former client in a substantially related case. Perillo v. Johnson, 205 F.2d at 801. That conflict existed regardless of whether Mulder actually failed to pursue the alternative strategy because he owed a duty to Darin, Perillo v. Johnson, 205 F.3d at 807; United States v. Malpiedi, 62 F.3d 465, 470 (2d Cir. 1995), or whether his performance was adversely affected by his failure to use that strategy. Perillo v. Johnson, 205 F.3d at 806; see also Berger v. Kemp, 483 U.S. 776, 785 (1987) (existence of actual conflict and adverse effect are separate issues); cf. James v. State, 763 S.W.2d 776 (Tex.Crim.App. 1989) (possible existence of alternative defensive strategy was not sufficient to establish an actual and significant conflict of interest of the degree requiring reversal when no one raised the issue at trial).[10] [10]

A defense that shifted all of the blame for the murder of both children and the cover-up to Darin Routier was a very plausible alternative to the unknown intruder defense that Mulder used. There was substantial circumstantial evidence in the record to support that alternative defense and no credible evidence which disproved it beyond a reasonable doubt. Darin had a stronger motive than Appellant, he had the means, and he had the opportunity to commit the crime. The fact that Darin was not harmed and Appellant had nearly fatal knife wounds that could not have been self-inflicted in the opinion of a renowned forensic pathologist strongly incriminated Darin.[11] [11] Darin could

have carried the sock with the blood of both boys on it to the alley without shedding any blood because he was not wounded. Darin could have cut the window screen in the garage with the knife from the wooden block on the kitchen counter.

Darin's demeanor after the crime was much more incriminating than the disputed evidence of Appellant's failure to express sufficient grief about the murder of their children at the hospital. Darin's claim that he slept through the murder by stabbing of his two children and was awakened by the sound of a wine glass breaking was at least as problematic as Appellant's claim of traumatic amnesia. Appellant's failure to recognize that her husband was the faceless intruder who attacked her in a dark room when she was asleep might have presented an obstacle to a defense that shifted all of the blame to Darin, but it was not insurmountable and she does not have to "show that the defense necessarily would have been successful if it had been used." O'Brien v. United States, 695 F.2d 10, 15 (1st Cir. 1982).[12] [12]

A defense which shifted part of the blame to Darin Routier was also a plausible alternative to blaming the unknown intruder because there would have been no evidence of the roles that Appellant and Darin played in the crime. The State had to prove that Appellant actually caused Damon's death because she was not tried for the murder of Devon and the jury was not instructed to apply the law of parties. Goff v. State, 931 S.W.2d 537, 544 (Tex.Crim.App. 1996). Appellant's presence at the scene of the crime with someone who had the means and the opportunity to murder both children and even any involvement in the cover-up would not have been sufficient to convict her of murdering Damon as a party. See Moffett v. State, 207 S.W.2d 384 (Tex.Crim.App. 1948) (fact that mother of three year old child stood idly by while another person beat girl to death and mother's failure to report the crime to police was insufficient to convict her of murder as party); Isham v. Collins, 905 F.2d 67 (5th Cir. 1990) (defendant's presence at scene of murder with killer and his concealment of murder weapon insufficient to prove that he was a party to the murder).[13] [13]

Mulder could not have used a defense that accused Darin of participating in the murder of his children, allowing his wife to take all of the blame, and committing perjury without violating his duty of loyalty to him. "An attorney who cross examines a former client inherently encounters divided loyalties.'" Perillo v. Johnson, 205 F.3d at 801 (citation omitted). The fact that counsel's former client was an important prosecution witness is alone sufficient to create an actual conflict, even if there was no relationship between his former client's case and the defendant's case. See, e,g., Castillo v. Estelle, 504 F.2d 1243, 1244 (5th Cir. 1974) (counsel represented prosecution witness in unrelated civil litigation); United States ex rel Miller v. Myers, 253 F.Supp. 55 (E.D. Pa. 1966) (same); State v. Needham, 298 N.J. 100 (N.J. Supr. Ct. Law. Div. 1996) (unrelated criminal case); State v. James, 111 N.C.App. 785 (1993) (counsel had conflict because he could have obtained confidential information about former client in unrelated case that could have been used to impeach his credibility when he testified for prosecution in defendant's case). Mulder's conflict was especially severe because Darin Routier was a suspect as well as an important prosecution witness, and Mulder represented him in a case that was substantially related to Appellant's. Perillo v. Johnson, 205 F.3d at 802.

The consistencies between Darin Routier's trial testimony and the defense that Mulder used did not remove the inherent conflict between Mulder's duties of loyalty to Darin and Appellant. Cowell v. Duckworth, 512 F.Supp. 171 (N.D. Ind. 1981) (counsel

who represented defendant's wife in related civil case had conflict because she was an accomplice after the fact, even though wife's testimony for prosecution was consistent with insanity defense). Appellant was entitled to counsel who could decide whether to accuse Darin or embrace his story without considering Darin's interests. Mulder's selection of a defense that was consistent with Darin's testimony was tainted by his conflict even if Mulder reasonably believed that he made the best choice for Appellant. Perillo v. Johnson, 205 F.3d at 806.[14] [14] A post-conviction hearing could not remove the taint because "after the fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful." United States v. Malpiedi, 62 F.3d at 470; accord Perillo v. Johnson, 205 F.3d at 807.

Mulder's duty of confidentiality to Darin was also inherently in conflict with his duty to defend Appellant. It must be presumed that Mulder acquired some confidential information from Darin about her case because he needed that information to properly defend Darin against the charge of violating the gag order. Perillo v. Johnson, 205 F.3d at 801; cf., Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994), citing Strickland v. Washington, 466 U.S. 668, 689 (1984)(there is a strong presumption that counsel rendered effective assistance of counsel). Darin Routier had extensive personal knowledge of Appellant's case and the gag order prohibited him from discussing any aspect of it with the news media.

Darin could have divulged confidential information about Appellant's case to Mulder in spite of the fact that Darin did not discuss the facts of the case on the tape recording of the talk show. Darin could have been held in contempt for making a statement about the case that was not broadcast because the gag order was not limited to statements that were actually disseminated by the news media. The prosecutor and the police apparently had a good reason to believe that Darin made a statement about the facts of the case to the talk show host that was not on the tape because they angrily complained to a newspaper that he directly violated the gag order. Mulder could not have known whether there was a basis for that accusation without asking Darin whether he made a statement about the facts of the case that was not recorded on the tape.

Mulder also needed to question Darin about his knowledge of Appellant's case to advise him about whether to testify at the show cause hearing. Perillo v. Johnson, 205 F.3d at 803. Mulder could not have known whether Darin would incriminate himself or destroy his credibility as a witness at Appellant's trial by testifying at the hearing without asking him what he knew about her case. Darin may also have volunteered confidential information about Appellant's case to Mulder because he was concerned that he would incriminate himself or hurt her defense if he was questioned about it at the show cause hearing.

The brevity of Mulder's representation of Darin Routier did not substantially reduce the likelihood that he obtained confidential information from Darin about Appellant's case. Perillo v. Johnson, 205 F.3d at 800-01, 805-06 (counsel's informal second chair representation of another client for a few hours in a related case created conflict). Mulder had a very strong incentive to carefully question Darin about his knowledge of Appellant's case in the short time that they had to discuss the matter before the show cause hearing because Darin's testimony at the hearing could have had profound consequences for him and Appellant. It would not have taken Darin five minutes to disclose facts to Mulder that could have freed Appellant and put him in the dock. Mulder had a continuing duty to maintain the confidentiality of any privileged statement that Darin made to him after their brief attorney-client relationship ended. Perillo v. Johnson, 205 F.3d at 797, 801. The fact that Mulder was assisted by other

attorneys who did not have a conflict did not make his actual conflict of interest harmless. Stoia v. United States, 22 F.3d 766 (7th Cir. 1994); United States v. Fulton, 5 F.3d 605 (2d Cir. 1993); United States v. Tatum, 943 F.2d 370 (4th Cir. 1991). Mulder had to decide whether to use a defense that accused Darin because he was Appellant's lead counsel. None of her other lawyers necessarily knew whether Mulder obtained confidential information from Darin that would have helped her and incriminated him.

Appellant Did Not Waive Her Right

to Conflict Free Representation

Appellant did not waive her right to conflict free representation. The right to conflict free counsel may be waived, but in order to be effective the record must show the waiver was done voluntarily and intelligently. Ex parte Prejean, 625 S.W.2d 731 (Tex.Crim.App. 1981); Ramirez v. State, 13 S.W.3d at 487. The test for a waiver of conflict free counsel is as strict as the test for a complete waiver of counsel. Maya v. State, 932 S.W.2d at 637. The State has the burden of proving a waiver with clear and convincing evidence and the defendant is entitled to the benefit of every reasonable presumption against a waiver. Johnson v. Zerbst, 304 U.S. 458 (1938). For the waiver of a conflict to be effective under that high standard, the record must show the defendant was aware of counsel's conflict, understood the consequences of continuing with such counsel, and knew that she had the right to obtain other counsel. Gonzales v. State, 605 S.W.2d 278 (Tex.Crim.App. 1980); Maya v. State, 932 S.W.2d at 637; United States v. Garcia, 517 F.2d 272 (5th Cir. 1972).

The record in this case does not establish any of the elements of a valid waiver regardless of whether the uncertified English translation of Halsey's stenographic notes of the proceedings on the morning of October 21, 1996, can be considered as part of it. The uncertified part of the record only shows that Appellant was willing to waive the potential conflict which existed because of Mulder's representation of her mother, Darlie Kee. She did not waive or even discuss her right to object to the separate and far more serious actual conflict which existed because of Mulder's representation of her husband on that date. United States v. Abner, 825 F.2d 835, 843 (5th Cir. 1987) (when counsel has more than one conflict, each one must be separately waived).

The references to a prior waiver of the conflict that arose from Mulder's representation of Darin Routier which were made by Appellant and her attorneys on November 12 and 18, 1996, after the State raised the issue, did not show that there was a valid prospective waiver of any objection to that conflict on October 21, 1996. Lisney v. State, 574 S.W.2d 144, 145 (Tex.Crim.App. 1978); Petis v. State, 693 S.W.2d 669 (Tex.App. - Amarillo 1985, no pet.). There is "nothing in the record which reflects that this [prior waiver] did in fact occur" and such "would not alone constitute an affirmative waiver" in any event. Jordan v. State, 571 S.W.2d 883, 885 (Tex.Crim.App. 1978). Appellant and her attorneys stated on November 12 and 18 that they believed that she waived the conflict on October 21, 1996, but their statements do "not give a full enough picture of the proceedings [on October 21] to allow us to determine whether the waiver was knowingly and intelligently made" on that date. Moran v. Estelle, 607 F.2d 1140, 1144 (5th Cir. 1979).

Furthermore, a knowing and intelligent waiver of the conflict on October 21 would not have waived Appellant's right to object to it on November 12, when the State disclosed new circumstantial evidence of Darin's involvement in the capital murder, unless she prospectively waived her right to raise the issue again if new evidence emerged. United States v. Swartz, 975 F.2d 1042, 1049 (4th Cir. 1992) (waiver of

conflict at arraignment not valid because defendant did not know of serious conflict that developed at sentencing). "Thus even if the trial court extensively questioned [Appellant] about the possible conflict of interest present in the case [on October 21] and even if [Appellant] indicated that no such conflict existed at that time, [the] view of the case would not change." Lerma v. State, 679 S.W.2d at 493 n.2 (trial court should have conducted a second hearing about conflict even if there was a hearing about it at an earlier proceeding that was not transcribed).

There is absolutely nothing in the record to indicate that Appellant was aware of the consequences of Mulder's conflict when she expressed a willingness to waive her objection to it on November 12 and 18, 1996. United States v. Martin, 965 F.2d 839, 843 (10th Cir. 1992) (cursory judicial warning about consequences of conflict insufficient to establish a knowing waiver even though defendant said it was "no problem"). This Court cannot presume that Mulder privately advised Appellant about the consequences of his continuing duties of loyalty and confidentiality to her husband. United States v. White, 706 F.2d 506 (5th Cir. 1983) (court had duty to admonish defendant about consequences of conflict even though counsel claimed that he did so).

It is very unlikely that Appellant knew without being told that she was entitled to different and even court-appointed counsel because Mulder had an actual conflict of interest. United States v.White, 706 F.2d at 510. It would have been reasonable for Appellant to assume that she waived her right to court-appointed counsel when she discharged them and retained Mulder. Cf. Cuyler v. Sullivan, 446 U.S. at 343-44 (court must disqualify retained counsel if he has a conflict). Appellant had no money of her own to hire a different lawyer if Mulder was discharged because of his conflict. RR.1: 10-38. There was no evidence that her family could afford to retain another attorney to represent her at a capital trial that was likely to last six to eight weeks after they paid for the services of "one of the most ... successful lawyers in the State of Texas." Appellant also did not know whether the trial court would give another lawyer any time to prepare her defense if her family was able to retain one for her.

In short, Appellant's conviction must be reversed and a new trial must be ordered because her lead counsel had an actual conflict of interest and the trial court did not conduct a hearing to determine whether she was aware of the conflict, whether she understood all of its consequences, and whether she wanted a different attorney to represent her.

POINT OF ERROR NUMBER TWO

(Restated)

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED THROUGH NO FAULT OF HER OWN.

The reporter's record of the proceedings conducted on the morning of October 21, 1996, was lost or destroyed because the trial court found that the original stenographic record was inaccurate and a corrected record cannot be certified. The missing part of the record is significant and necessary to the appeal of Appellant's claims regarding conflict

of interest and the court's preliminary instructions to the venire.

STATEMENT OF FACTS

The original reporter's record in this case was prepared, certified and filed by the official reporter who attended the trial, Sandra Halsey. Halsey testified that she was present at all of the pretrial hearings in this case. SRR.5: 9. Judge Robert Francis made a finding of fact that Halsey's entire record had to be replaced with a new record because it did not conform to what happened at the trial that the former Judge Mark Tolle presided over. SCR.1: 128.

Another court reporter, Susan Simmons, was appointed to prepare, certify, and file a new reporter's record. SRR.5: 16; SCR.1: 21.[15] [15] Simmons created her record by systematically comparing the hard copy of the Halsey record with the unauthenticated audiotapes.[16] [16] When Simmons found an error in the hard copy (as compared against what she heard on the audiotape), she made a correction. SRR.13: 23. Simmons acknowledged this process as being an "audio edit" of the Halsey record. SRR.13: 28. Simmons had the paper stenographic notes that Halsey turned over to the court, but Simmons only used the notes to assist her in identifying voices on the tapes or at portions of the tape she was "unsure of," SRR.13: 24, 36, because she could not certify that they were a true and correct transcription of what happened at the trial, SRR.26: 13. Halsey's certificates were not included in the new record that Simmons filed.

Simmons did not produce a certified reporter's record of the proceedings on the morning of October 21, 1996. Simmons found discrepancies between the paper stenographic notes of the proceedings that Halsey surrendered and the official hard copy of that part of Halsey's record. SRR.26: 10-13. In Simmons' opinion, Halsey must have used an audiotape to edit her stenographic notes of the proceedings and filed a hard copy of the edited record. SRR.26: 19. However, Halsey's attorney informed the trial court that no audiotape for this portion of the proceedings had been located. SRR.27: 3. Simmons said there "did not appear to be" any gaps in the stenographic notes of the proceedings on the morning of October 21, 1996. SRR.26: 12. However, she would not certify that Halsey's notes were a true and correct transcription of what happened in court without being able to listen to an audiotape. SRR.26: 13. Halsey had never authenticated any of the stenographer's notes used by Simmons and there is no evidence in this record that the notes Simmons used to prepare the uncertified morning session of October 21, 1996, are the same notes (if any) that Halsey typed contemporaneously therewith.

Simmons included a 54 page uncertified English translation of Halsey's stenographic notes of the proceedings on the morning of October 21, 1996 in Volume 10 of the new record that she prepared. RR.10: 1-54. Simmons expressly stated in her certificate for Volume 10 that it did not apply to the first 54 pages therein. RR.10: (last page).

The uncertified pages in Volume 10 of the new record contain a hearing on a motion to substitute counsel and the court's preliminary instructions to the venire, RR.10: 8-11, RR.10: 20-54. The docket sheet for October 21, 1996, confirmed that those events occurred on that date. CR.1A: 6.

Appellant filed written objections to the inclusion of the 54 page uncertified record

of the proceedings on the morning of October 21, 1996, in Volume 10 of the new record, SCR.2: 500, and requested a hearing on the matter, SCR.2: 484. Appellant alleged that this part of the reporter's record was lost or destroyed because it could not be certified. She maintained that the missing part of the record was necessary to appeal her attorney conflict of interest claim and any error in the preliminary instructions to the venire. She also objected that the uncertified part of the record was inaccurate because it did not contain a hearing to determine whether lead counsel Doug Mulder had a conflict of interest as a result of his representation of Darin Routier.

Judge Francis adopted Simmons' testimony that the English translation of Halsey's stenographic notes of the proceedings on the morning of October 21, 1996, could not be certified, but he refused to order Simmons to remove the 54 uncertified pages from the new record or conduct a hearing to determine whether that part of the record was lost, destroyed or inaccurate. SCR.1: 368.[17] [17]

ARGUMENT AND AUTHORITIES

TEX.R.APP.P. 34.6(f)

TEX.R.APP.P. 34.6(f) provides that an Appellant is entitled to a new trial when a significant part of the reporter's record necessary to the appeal was lost or destroyed through no fault of her own. The Appellant has the burden of proving that: 1) there was a court proceeding in her case that does not appear in the reporter's record; 2) a stenographic record of the proceeding was made by the official reporter; 3) that part of the record was lost or destroyed; and 4) the Appellant was not responsible for it. Dunn v. State, 733 S.W.2d 212, 215-16 (Tex.Crim.App. 1987).

If a significant part of the reporter's record necessary to decide the appeal was lost or destroyed through no fault of the Appellant, no further showing of harm is required for her to obtain a new trial. Isaac v. State, 989 S.W.2d 754 (Tex.Crim.App. 1999).

The loss or destruction of the record of a pretrial hearing which was significant and necessary to the appeal cannot be remedied by ordering a nunc pro tunc hearing. Payne v. State, 802 S.W.2d 686 (Tex.Crim.App. 1990).

The Record Of A Court Proceeding Was Lost Or Destroyed

Appellant proved that there was a stenographic record of a court proceeding on the morning of October 21, 1996, because the official court reporter, Sandra Halsey, testified that she was present at all of the pretrial hearings[18] [18] and purportedly all the steno notes had been turned over, including the notes that she allegedly took on that date.

The reporter's record of the proceedings on the morning of October 21, 1996, is lost as a matter of law, even if all of Halsey's paper stenographic notes of the proceedings were preserved, because that part of the record is not and cannot be certified. The official court reporter who filed a stenographic record must certify in writing that it is a true and correct transcription of the proceedings in the courtroom. See TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN

CRIMINAL CASES S (b)(1)(q)(effective through April 30, 1999) and Uniform Format Manual for Texas Court Reporter's (effective on and after May 1, 1999). An uncertified reporter's record cannot be used to decide an appeal. Ex parte Smith, 561 S.W.2d 842 (Tex.Crim.App. 1978) (uncertified reporter's record cannot be used to decide appeal); Johnson v. State, 924 S.W.2d 750, 751 (Tex.App. - Houston [1st Dist.] 1996) (same). If part of the reporter's record is not certified, that part of the record cannot be considered. Landrum v. State, 356 S.W.2d 673, 674 (Tex.Crim.App. 1962).

Simmons did not certify a reporter's record of the proceedings on the morning of October 21, 1996, and she will not do so because Halsey's stenographic notes are not trustworthy and the audiotape of the proceedings was lost or destroyed. See Martin v. State, 744 S.W.2d 658 (Tex. App. - Beaumont 1988, no pet.) (incomplete audiotapes could not be used as substitute for stenographic record); In re G.M.S., 991 S.W.2d 923 (Tex.App. - Ft. Worth 1999, writ denied)(new trial ordered because part of certified electronic record was lost or destroyed).

Halsey's original certified record of the proceedings on the morning of October 21, 1996, cannot be used to decide the appeal because Judge Francis found that Halsey's record did not conform to what happened at the trial. SCR.1: 127. Halsey's certificate created a presumption that her record was a true and correct transcript of the proceedings, but the presumption of regularity was overcome with evidence. Melendez v. State, 936 S.W.2d 287, 290 (Tex.Crim.App. 1996); McGee v. State, 774 S.W.2d 229, 247 (Tex.Crim.App. 1989); Smith v. Morris, 123 Tex. 360, 70 S.W.2d 994, 995 (1934); Spencer v. State, 34 Tex.Crim. 238, 30 S.W. 46 (1895).

Halsey cannot certify a corrected stenographic record of the proceedings on the morning of October 21, 1996, because she lost her court reporter's license and Judge Francis would not trust her to perform any official duty if her license was restored.

There is ample precedent for holding that the reporter's record was lost as a matter of law in similar cases where the stenographic notes of an official court reporter who died or was disabled were available, but another court reporter was unable to use her notes to transcribe a complete and accurate record. See, e.g., Hartgraves v. State, 374 S.W.2d 888 (Tex.Crim.App. 1964); Seliger v. State, 139 Tex.Crim. 26, 138 S.W.2d 817 (1940); McNabb v. State, 137 Tex.Crim. 463, 132 S.W.2d 273 (1939); Brannan v. State, 137 Tex.Crim. 611, 132 S.W.2d 594 (1939); Little v. State, 131 Tex.Crim. 164, 97 S.W.2d 479 (1936); Gillen v. Williams Brothers, 933 S.W.2d 162 (Tex.App. - Houston [14th Dist.] 1996, no pet.); Hernandez v. J.L.G. Industries, 905 S.W.2d 778 (Tex.App. - San Antonio 1995, no writ).

Furthermore, the uncontradicted statements of Halsey, the trial judge, two prosecutors, a defense attorney and Appellant on November 12 and November 18, 1996, proved that Halsey must have made a stenographic record of the hearing about the conflict which resulted from Mulder's representation of Darin Routier on the morning of October 21, 1996, which does not appear in the stenographic notes of the proceedings that Simmons translated. The undisputed unsworn statement of a single defense attorney, one prosecutor, the trial judge or Halsey would have been sufficient to establish that there was such a hearing even if it did not appear in a certified record. See Moody v. State, 827 S.W.2d 875, 879 (Tex.Crim.App. 1993) (accepting undisputed recollections of trial judge and deputy clerk that a juror was excused at proceeding that did not appear in reporter's record); Rey v. State, 897 S.W.2d 333, 336 (Tex.Crim.App. 1995) (accepting defense counsel's undisputed statement that court made adverse ruling on motion that did not appear in reporter's record); Quevedo v. State, 661 S.W.2d 321 (Tex.App. - Corpus Christi 1983, pet. ref.d)(accepting prosecutor's undisputed statement that defense counsel requested instruction about lesser included offense at in chambers charge conference that did not appear in reporter's record); Hicks v. State, 525 S.W.2d

177, 178 (Tex.Crim.App. 1975) (accepting defense attorney's undisputed statement that prosecutor pointed at defendant during his summation). The undisputed recollections of the court and all of its officers are more trustworthy than the uncertified English translation of Halsey's stenographic notes and it is inconceivable that they were all mistaken.

The prosecutor who cautiously filed a written motion for a second hearing about the conflict arising from Mulder's representation of Darin Routier on November 12, 1996, to avoid the risk of a reversible error certainly did not create such an error by neglecting to follow through on his motion. It is much more likely that the prosecutor decided that it was not necessary to have another hearing after he requested it because he concluded that Appellant made a valid prospective waiver of any conflict arising from Mulder's representation of her husband at the first hearing on October 21, 1996.

Simmons' failure to notice a gap in Halsey's unauthenticated paper stenographic notes of the proceedings on the morning of October 21, 1996, does not prove that Halsey did not make a stenographic record of a hearing on that date about the conflict that resulted from Mulder's representation of Darin Routier. The missing part of Halsey's stenographic record could be a couple of lines long if it was similar to the very brief discussion of Mulder's representation of Darlie Kee. Halsey could have typed that small part of the record on a separate strip of paper that was lost or destroyed. The missing conflict hearing could have been artfully removed from the beginning or end of the paper strip that Simmons translated. Halsey's stenographic machine could have malfunctioned for a few moments when she typed that part of the record.

The trial court's entry on the docket sheet for October 21, 1996, is evidence that Halsey's paper stenographic notes did not reflect all of the proceedings that were conducted that morning. Facts set forth in a docket entry (or the absence of such an entry) are routinely accepted as evidence of the occurrence (or absence) of an event, unless some statutory mandate provides to the contrary. Cartwright v. State, 605 S.W.2d 287 (Tex.Crim.App. 1980)(even in absence of statement of facts, docket entry failing to reflect evidence at punishment phase of bench trial required abatement for hearing on restitution ordered.); Schaeffer v. State, 583 S.W.2d 627 (Tex.Crim.App. 1979)(lack of docket entry was one fact used to demonstrate record failed to reflect court made a competency determination after defendant's return from state hospital); Williams v. State, 767 S.W.2d 868 (Tex.App. - Dallas 1989, pet. ref'd)(filing date of information established by docket entry); Jenkins v. State, 734 S.W.2d 197 (Tex.App. - Houston [1st Dist.] 1987, no pet.)(no docket entry regarding appeal of foreign state conviction is evidence conviction was final for enhancement purposes); Sharp v. State, 707 S.W.2d 611, 616 (Tex.Crim.App. 1986) (docket sheet showed that indictment was read to jury even though it did not appear in reporter's record); Robbins v. State, 705 S.W.2d 398 (Tex.App. - Fort Worth 1986, pet. ref'd)(absence of docket entry of State's ready announcement considered evidence of the failure to so announce); H.G.V. v. State, 646 S.W.2d 623 (Tex.App. - San Antonio 1983, no pet.)(docket entry showing examining trial was proof of same); Samora v. State, 642 S.W.2d 817 (Tex.App. - Tyler 1982, no pet.)(docket sheet entry of State's announcement of ready was evidence this occurred); Escobar v. Escobar, 711 S.W.2d 230, 232 (Tex. 1986) (docket entry is "some evidence" of a rendered judgment and its contents); but where a statute requires a specific written document, mere docket entry is insufficient, McClain v. State, 730 S.W.2d 739 (Tex.Crim.App. 1987)(defendant's written agreement to stipulate evidence); Faulkner v. Culver, 851 S.W.2d 187, 188 (Tex.1993) (docket entry of ruling on motion for new trial insufficient - written order required). The docket sheet states that testimony and evidence was introduced at the hearing on Mulder's motion to substitute himself as lead counsel, but the English translation of Halsey's stenographic notes only shows that there was an unsworn colloquy about that motion.

In accordance with the above authorities, no conclusion can be drawn from the fact that the docket sheet did not mention a hearing about a conflict of interest on October 21, 1996, because there is evidence to the contrary. Halsey's uncertified stenographic notes show that there was a hearing about the conflict arising from Mulder's representation of Darlie Kee on the morning of October 21, 1996, that was not mentioned on the docket sheet. This is because it is wholly different to assert that a docket entry is evidence something did occur compared to a claim that the absence of a docket entry reflects an event did not occur where the "record" reflects otherwise. It is quite possible that the trial court did not mention that conflict or the conflict arising from Mulder's representation of Darin Routier on the docket sheet because the trial court considered the discussion of both conflicts to be part of the hearing on Mulder's motion to substitute himself as Appellant's counsel of record. Or the court simply could have failed to make an entry due to oversight. There is, after all, no legal requirement that such a docket entry be made.

Extrinsic evidence cannot be used to reconstruct the reporter's record of the proceedings on the morning of October 21, 1996, that was lost or destroyed, even if the trial court found that the reconstructed record conformed to what happened at the trial. Dunn v. State, 733 S.W.2d at 215-16. It would also be impossible to use that procedure here because the judge who presided over the trial is retired.

The Missing Part Of The Reporter's Record

Is Significant And Necessary To The Appeal

A.

The Attorney Conflict of Interest Claim

A reporter's record of the proceedings on the morning of October 21, 1996, is essential to determine whether Appellant is entitled to relief on the attorney conflict of interest claim that she raised in Point of Error Number One, if the incomplete record does not show that this point of error must be sustained. There are two questions that the Court must answer to decide that claim: 1) did the trial court fail to conduct an adequate hearing about Mulder's conflict, United States v. Garcia, 517 F.2d 272 (5th Cir. 1972); and 2) did Mulder have an actual conflict or a potential conflict. Wood v. Georgia, 450 U.S. 261, 273 (1981). A record of the proceedings on the morning of October 21st could contain the answers to both of those questions.

There was no hearing about the conflict that existed because of Mulder's representation of Darin Routier if the hearing did not occur on the morning of October 21, 1996, because it does not appear in any other part of the record. If a hearing about that conflict was conducted on the morning of October 21st, the record of it is necessary to decide whether Appellant made a valid prospective knowing and intelligent waiver of her right to raise the issue again if new evidence of the conflict emerged. See United States v. Swartz, 975 F.2d 1042, 1049 (4th Cir. 1992) (defendant's waiver of conflict was invalid because new evidence of conflict emerged after it was made).

A record of a conflict hearing on the morning of October 21, 1996, could have shown that Mulder had an actual conflict instead of a potential conflict because Mulder's representation of Darin Routier was more closely related to Appellant's case than the incomplete record presently suggests. See, e.g., United States v. Boling, 869 F.2d 965 (6th Cir. 1989) (counsel initially claimed that he had no conflict because he only represented prosecution witness in unrelated child support case, but existence of conflict

became apparent during trial when he disclosed that he also represented the witness in a civil case that was related to defendant's criminal case).

A record of the conflict hearing on the morning of October 21, 1996, may also have revealed that Mulder was retained by Darlie Kee to act as a legal advisor to the entire family because she was concerned that Appellant's court-appointed lawyers were planning a defense that pitted her daughter and son-in-law against each other. That third-party fee arrangement would have made it impossible for Mulder to give Appellant conflict-free advice about whether to adopt a defense that accused Darin, even if his representation of Darin at the show cause hearing only created a potential conflict.

Any hypotheses about what happened at the conflict hearing would necessarily be speculative, but it is not possible to conclude that there was no reversible error without a record of that proceeding.

B.

The Preliminary Instructions

A certified reporter's record of the proceedings on the morning of October 21, 1996, is also significant and necessary to the appeal because the prospective jurors received preliminary instructions in that part of the record which may have been erroneous. See Jones v. State, 923 S.W.2d 158 (Tex.App. - Beaumont 1996) (defendant entitled to new trial under former TEX.R.APP.P. 50(e), because reporter's record of preliminary instructions was lost), rev'd, 942 S.W.2d 1 (Tex.Crim.App. 1997) (reporter never made a record of preliminary charge).

TEX.CODE CRIM.PROC.ANN. art. 35.17(2), provides that in a capital felony case the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence and opinion. A reversible error may occur if the trial court failed to explain an applicable principle of law or misstated it. Blue v. State, 41 S.W.3d 129 (Tex.Crim.App. 2000) (trial judge's preliminary comment to venire was fundamental error because it undermined presumption of innocence); Harris v. State, 790 S.W.2d 568, 582 (Tex.Crim.App. 1989) (failure to give any preliminary instructions about applicable principles of law was error). It is not possible for Appellant to show that there was such an error without a certified verbatim transcript of the preliminary instructions. Landrum v. State, 356 S.W.2d 673, 674 (Tex.Crim.App. 1962) (court reporter's paraphrase of jury instruction not acceptable as a substitute for certified verbatim record of instruction).

Appellant's conviction must be reversed and a new trial must be ordered because that significant part of the record and the hearing about Mulder's conflict was lost or destroyed through no fault of her own.

POINT OF ERROR NUMBER THREE

(Restated)

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE REPORTER'S RECORD DOES NOT CONFORM TO THE REQUIREMENTS OF TEX.R.APP.P. 34.6(A)(1) AND THE DEFECT CANNOT BE CORRECTED.

STATEMENT OF FACTS

Appellant is entitled to a new trial because the reporter's record does not and cannot be made to conform to the requirements of TEX.R.APP.P. 34.6(a)(1). Rule 34.6(a)(1) provides that the reporter's record must be a certified verbatim transcription of the stenographic notes of the court reporter who attended the trial. The reporter's record in this case is a transcription of unauthenticated, uncertified audiotape recordings prepared by a court reporter who had no personal knowledge of the trial or the integrity of the tapes. The stenographic notes of the court reporter who attended the trial cannot be accurately transcribed and certified by any reporter because the trial court found that the notes did not conform to what happened in the courtroom. It would be impossible to correct the original stenographic record by settling the disputes about it with extrinsic evidence because it may be judicially noticed that the judge who presided over the trial is retired and the court reporter who typed the stenographic record is no longer a certified reporter.[19] [19] Further, Appellant is entitled to a verbatim transcription "unblemished by human interpretation." Fisher v. First Security Bank of Cranfills Gap, Texas, 576 S.W.2d 886, 887 (Tex.App. - Waco 1979, no writ).

Appellant's Initial Objection To The

Accuracy Of The Original Reporter's Record

The original reporter's record in this case was prepared, certified and filed by the official court reporter, Sandra Halsey, in April, 1998, only after this Court held her in contempt for disobeying several filing deadlines. SCR.1: 72.

The first dispute about the accuracy of Halsey's record was raised in APPELLANT'S MOTION TO CORRECT/CLARIFY REPORTER'S RECORD dated October 11, 1998. SCR.1: 39. Appellant alleged that there were substantive discrepancies between the reporter's record of part of Darin Routier's testimony and a transcript of the same part of his testimony in the clerk's record that was read back to the jurors during their deliberations. SCR.1: 45-51; CR.1A: 155-57; HR.42: 4376-79.[20] [20] Appellant asked this Court to remand the case pursuant to TEX.R.APP.P. 34.6(e)(2)(3), for the trial court to determine whether the record of that part of Darin Routier's testimony was inaccurate. SCR.1: 42.

On October 14, 1998, this Court issued an order which stated, "the dispute is submitted to the trial court for resolution. The trial court must ensure that the reporter's record is made to conform to what happened at trial." SCR.1: 52.

The Review Of The Entire Reporter's Record

That The Trial Court Ordered

On October 30, 1998, the trial court decided after a hearing that the accuracy of the entire reporter's record of the trial had to be reviewed to comply with this Court's order. SRR.1: 14-15. Halsey had testified that her stenographic notes of Appellant's trial were simultaneously typed on paper strips and computer edit disks that automatically translated the stenographic symbols into English. SRR.1: 12. Halsey testified that she also made audiotape recordings, but "the only tapes that [she] had where the tape recorder was actually working were the ones from the jury voir dire." SRR.1: 10. Halsey explained that the microphone on her tape recorder did not work during the remainder of the proceedings because it needed a battery. She claimed that she did not discover the problem until "after the trial was over." SRR.1: 10.

The trial court ordered Halsey to review her entire record to determine whether it was accurate and correct any mistakes that she found. SRR.1: 15-17. The trial court also announced that it was going to appoint independent expert court reporters to compare the stenographic notes on Halsey's computer edit disks to the hard copy of her record "so that if necessary independent testimony or evidence can be given as to the ability to certify as to the Reporter's Record." SRR.1: 14-15.

On November 4, 1998, the trial court appointed three expert court reporters (Tommy Mullins, Judy Miller and Jerry Calloway) to review Halsey's record of both phases of the trial on the merits. SRR.2: 3, 13; SCR.1: 29.

The Stipulations About The

Unauthenticated Audiotape Recordings

Halsey met with Miller, Calloway and Mullins and told each of them that she had no audiotapes of the trial on the merits. SRR.3: 12, 19, 25. However, on November 13, 1998, the parties stipulated that Halsey told prosecutor Lindsay Roberts that "there were audiotapes reflecting the occurrences of the guilt/innocence and punishment phases." SRR.3: 37-38. According to the stipulation, Roberts accompanied Halsey to a storage facility in Plano where he retrieved a box of audiotapes that were represented to him "as the audiotapes for the Routier trial." SRR.3: 38.

Halsey's daughter, Susan Crowley, was one of two "scopists" who helped Halsey edit her original stenographic record before she filed a hard copy of it. Crowley testified that Halsey gave her audiotapes of the guilt and penalty phases of the trial and the original stenographic record of those proceedings that Halsey typed on computer edit disks. Crowley used the audiotapes to make permanent changes in the English translation of the original stenographic record on the computer disks. SRR.3: 40-42, 46-49. Crowley never received any audiotapes of the voir dire or pretrial hearings because she did not participate in the preparation of the record of that part of the trial. SRR.3: 52.

Crowley looked at "some" of the audiotapes that Halsey turned over to Roberts and testified that they were "similar" to the tapes that she used to change the computer disks. SRR.3: 43. Crowley did not say whether Halsey gave Roberts all of the audiotapes of the guilt and penalty phases of the trial nor did she specifically identify the tapes displayed to her as being all the tapes she reviewed. SRR.3: 42-3.

When the State introduced the audiotapes that Roberts received from Halsey and

the stipulation, counsel objected that Appellant did not agree that "these are in fact the tapes, and that they're authentic." SRR.3: 39. The prosecutor confirmed that he was not making any representation to the court about the authenticity of the audiotapes. SRR.3: 39. The tapes were admitted into evidence with the understanding that the question of their authenticity would be "subject to further review." SRR.3: 39. The trial court never ruled on that question.

On December 9, 1998, Halsey's lawyer produced 12 additional audiotape recordings to comply with a subpoena for all of her audiotapes of the trial. SRR.7: 3-9, 19-20. No sworn testimony about the identity or history of the tapes was ever introduced and they were never authenticated.

Halsey's Invocation Of Her Right

Against Self Incrimination

The trial court relieved Halsey of her duties as the official court reporter in this case with the consent of both sides after she turned over the unauthenticated audiotape recordings. SRR.3: 57-59. Counsel subsequently tried to question Halsey as a fact witness, but she invoked her right against self-incrimination after she testified that she was present at all of the proceedings in Appellant's case including the pretrial hearings. SRR.5: 8-11.

The Findings And Recommendations Of

The Trial Court's Experts

On November 13, 1998, Miller, Calloway and Mullins testified that they each reviewed Halsey's record of the part of Darin Routier's testimony that was read back to the jury and other selected parts of her record of the trial on the merits. Each expert compared the hard copy of those parts of the Halsey record to the stenographic symbols on Halsey's computer edit disks. SRR.3: 8. Each expert testified that there were significant discrepancies between the hard copy of the record and the stenographic symbols on the disks. SRR.3: 14, 20, 35. In the opinion of each expert, Halsey must have used audiotape recordings to make changes in the English translation of the stenographic record that she typed on the disks, printed a hard copy of the altered record and filed it. SRR.3: 12, 20, 26.

Each expert court reporter recommended that the entire Halsey record should be reviewed by another reporter. SRR.3: 14, 16, 22. Mullins specifically recommended that Halsey's stenographic notes and the unauthenticated audiotapes should both be compared to the hard copy of Halsey's record. SRR.3: 14-15.

The Trial Court's Order For A New Court Reporter

To Review Halsey's Record Of The

Guilt And Punishment Phases Of The Trial

The trial court accepted the recommendations of its experts to appoint a new court reporter to review Halsey's record. SRR.3: 59, 61. The parties agreed that Susan Simmons should do the job. SRR.4: 8-9.

The trial court initially ordered Simmons orally and in writing to compare the hard copy of the Halsey record of the guilt and punishment phases of the trial with Halsey's paper stenographer's notes, her computer edit disks and the tape recordings "in compliance with standard industry practice," make all corrections which she deemed necessary, produce a record "of everything she has reviewed" and certify to the accuracy of a new record if possible. SRR.4: 16; SCR.1: 21.

When the trial court orally announced that order, counsel objected that it was not legally permissible for Simmons to certify a new record. SRR.4: 18. The trial court responded, "I imagine that will be an issue taken up with a different court than this one." SRR.4: 18.

On November 18, 1998, Appellant filed in this Court a motion to abate this appeal. This motion recited the developments in this case which had so far occurred pursuant to the proceedings conducted under the authority of this Court's order of October 14, 1998. However, it was then apparent that the errors in the Halsey record went far beyond those cited in Appellant's earlier motion to correct/clarify and that Sandra Halsey was refusing to participate in any correction of the record. In turn, the relief needed by Appellant to ensure an accurate appellate record went beyond that which this Court granted in its October order. Appellant requested an abatement to give the trial court jurisdiction to take such steps as necessary to ensure an accurate reporter's record.

This motion was denied, although this Court did extend the original 30 day deadline for compliance with the October order.

The Hearing To Determine Whether Simmons

Could Certify A New Record Of The Guilt

And Punishment Phases Of The Trial

On April 1, 1999, the trial court conducted a hearing which the trial court described as "a continuation of hearings which began after October the 14th of 1998, pursuant to an Order issued to this Court by the Court of Criminal Appeals on that date." SRR.13: 3.

The trial court called Simmons and Tommy Mullins to testify as the court's witnesses. The attorneys were only allowed to propose questions for them in writing. SRR.13: 3-4. Appellant had filed a written objection that this procedure violated her constitutional rights to due process, effective assistance of counsel, and confrontation. SRR.13: 4; SCR.1: 133. The trial court overruled these objections and explained that Appellant would not be permitted to directly question the witnesses "because this is a fact finding hearing and I'm doing this at the direction of the Court of Criminal Appeals...." SRR.13: 4-5. It is unclear whether the court was referring to this Court's direction to conduct this hearing or to the decision not to allow Appellant to question the witnesses. While conducting one or more hearings seems a logical extension of this Court's order of October 14, 1998, Appellant is unaware of any order of this Court not to

permit counsel to question witnesses at any such hearing(s).

Simmons testified that she created her own new record of the guilt and punishment phases of the trial as well as a red-lined copy of the Halsey record that reflected all of the changes that she made. SRR.13: 24-29; Court's Exhibit AA; Court's Exhibit BB.[21] [21] Simmons had Halsey's original stenographic notes on paper strips, but she did not produce an English translation of them. SRR.13: 20, 50, 52-53. She did not know whether Halsey changed the original English translation of her stenographic notes on her computer disks before she surrendered the disks. SRR.13: 51-52.

The procedure that Simmons used to create her new record was different than the procedure that a court reporter ordinarily uses to create a hard copy of the record from the original stenographic notes that were simultaneously typed during the trial on paper strips and the computer disks where the reporter's symbols are automatically translated into English on a split screen. SRR.13: 15-23. Simmons testified that the first step of the standard procedure is to load the original stenographic record that the reporter typed on the computer edit disks to a split computer screen that displays the stenographic symbols and an English translation of them side by side. SRR.13: 12-15. The reporter listens to an audiotape as she reads the English translation on the computer screen and makes any necessary changes in the English translation. SRR.13: 16. The edited English translation on the screen is next downloaded onto new computer disks, proof-read, and saved again on the new disk. A hard copy of the proof-read English translation on the new disks is printed out and filed with the court. SRR.13: 15-17.

Instead of this normal procedure, Simmons started by systematically comparing the hard copy of the Halsey record with the unauthenticated audiotapes instead of comparing the tapes to the English translation of the stenographic record on Halsey's computer disks which Halsey could have changed. SRR.13: 23, 51-52. When Simmons found a mistake in the hard copy of the Halsey record, she made a hand-written change on it in red ink. SRR.13: 23. She described this process as an audio edit of the Halsey record. SRR.13: 28.[22] [22]

Simmons had Halsey's original paper stenographic notes beside her when she used the unauthenticated audiotapes to change the hard copy of the Halsey record, SRR.13: 23, but she did not systematically compare the notes to those materials. Simmons testified that she would only flip to the paper stenographic notes that Halsey typed if she came to a part of the hard copy of the Halsey record that she was unsure of when she compared it to the audiotape. SRR.13: 24. Simmons explained that she also consulted the paper notes when she had a question about the identity of a speaker. SRR.13: 36. She never indicated that she referred to the paper notes for any other purpose.[23] [23]

Tommy Mullins testified that it was common practice for a court reporter to use audiotapes for "editing" purposes to create a record that is different in some respects from the original stenographic notes. SRR.13: 48. Neither Mullins nor Simmons nor any other witness indicated what the usual level of discrepancy was or whether Halsey's record exceeded it. Both Mullins and Simmons agreed in response to the trial court's leading questions that it is normal for a new record and the original stenographic record

not to match exactly. SRR.13: 48, 52-54.

Simmons testified that the unauthenticated audiotapes of the guilt and punishment phases of the trial were complete, audible, and had no discernable gaps when she listened to them, but she did not offer an expert opinion about whether any of the tapes were edited or erased before she received them. She acknowledged that her new record could be tainted if there was a defect in the tapes that she could not detect by playing them. SRR.13: 36. She claimed that she could certify that her record was a true and correct transcription of what happened at the guilt and penalty phases of the trial even though she had no personal knowledge of the proceedings, the identity of the audiotapes, or their integrity. SRR.13: 37, 51.

Appellant filed and presented a written motion to make a bill of exception about some of the questions that she was not allowed to ask Simmons. SRR.13: 4; SCR.1: 133.[24] [24] Appellant's bill stated that she would have asked Simmons whether she compared each line of the Halsey record to Halsey's original stenographic notes and if not, why. SCR.1: 134-5. Her bill stated that she also would have asked Simmons to describe exactly how she used Halsey's original stenographic notes to prepare her record. SCR.1: 134. The trial court did not ask Simmons those specific questions.

Appellant's Request For An Opportunity

To Call Witnesses To Testify About

The New Record After She Reviewed It

Appellant's attorneys did not receive a copy of Simmons' new 28 volume record of the guilt and punishment phases until after Simmons finished her testimony. SRR.13: 58. Counsel informed the trial court that he might want to call witnesses to testify about the new record after he reviewed it. The trial court responded, "we'll cross that bridge when we get to it." SRR.13: 58.

Appellant's Objection To Filing The New

Reporter's Record Before She Had An

Opportunity To Review That Record And

Compare It To Halsey's Original Stenographic Notes

Appellant filed written OBJECTIONS TO FILING A NEW OR CORRECTED COPY OF THE REPORTER'S RECORD and presented them to the trial court for a ruling at the beginning of the April 1, 1999, hearing. SRR.13: 4; SCR.1: 139. Appellant asserted in this pleading that she was unwilling to agree to the filing of the Simmons record without reading it because Simmons used the uncertified, unauthenticated audiotapes to create a new record instead of transcribing Halsey's stenographic notes. SCR.1: 142. Appellant further stated that she was unable to prove that there were specific discrepancies between the Simmons record and Halsey's steno notes because the trial court did not give her attorneys an opportunity to compare those materials. SCR.1: 147-8. Appellant

also asked the trial court to order Simmons to systematically compare Halsey's stenographic notes to her record, the Halsey record, and the audiotapes or give her attorneys a reasonable opportunity to do so before a new record of the guilt and penalty phases was filed with this Court. SCR.1: 144-5. The trial court promised to address those issues with a written order. SRR.13: 57

The Trial Court's Order To Replace The Original

Reporter's Record Of The Guilt And Penalty

Phases Of The Trial And Give Appellant An

Opportunity To Object To The

New Record After She Reviewed It

On April 14, 1999, the trial court signed an order which stated that the Halsey record of the guilt and punishment phases of the trial should be replaced by the Simmons record because Halsey's record of those proceedings did not conform to what happened at the trial. SCR.1: 127. The trial court believed Simmons' testimony that her record of the proceedings was true and correct and arranged for her new record to be filed with this Court before Appellant had an opportunity to review it. SCR.1: 128-9. The trial court did not independently review the new record before it made that finding. SRR.20: 9.

The trial court's April 14, 1999, order gave Appellant 120 days to read the 28 new volumes that she received that day and file any objections to the new record or motions for further relief because the interests of justice required it. SCR.1: 128.

The Hearing To Determine Whether Simmons Could Certify A New Record Of The Voir Dire And Other Pretrial Proceedings

On April 26, 1999, this Court granted Appellant's motion to order the trial court to review Halsey's record of the voir dire and pretrial hearings to determine whether it conformed to what happened at the trial.

On October 14, 1999, the trial court called Simmons as its witness and questioned her about her record of those proceedings again without allowing the attorneys to do so. Appellant renewed her objections to that procedure and they were overruled. SRR.23: 29-30. Simmons testified that she used the same materials and procedures to produce a new certified record of the voir dire and pretrial hearings that she used to prepare a new record of the guilt and penalty phases of the trial. SRR.23: 5-17.

The Trial Court's Order To Replace The Original Reporter's Record Of The Voir Dire And Other Pretrial Proceedings And Give Appellant An Opportunity To Object To The New Record After She Reviewed It

On November 5, 1999, the trial court issued an order which stated that Halsey's record of the voir dire and pretrial hearings should be replaced by the Simmons record of those proceedings because the Halsey record did not conform to what happened at the trial. SCR.1: 103. The trial court believed Simmons' testimony that her record of those proceedings was true and correct, but it gave Appellant an additional 120 days to file any objections that she had to the Simmons record or motions for further relief. The trial court instructed Appellant to file a separate motion to request a hearing on her objections to the Simmons record that set forth in detail why a hearing is necessary. SCR.1: 105.

The Uncertified Part Of The New Reporter's Record

On December 13, 1999, another hearing was conducted regarding the discovery that Simmons did not prepare a new record of the pretrial proceedings that were reported in Volumes 10 and 11 of Halsey's record. Simmons was instructed to review both volumes and certify a new record of those proceedings if she could. SRR.25: 3-7.

On January 28, 2000, Simmons testified about her review of Volumes 10 and 11. Simmons prepared a new certified record of the proceedings reported in Volume 11 and the proceeding on the afternoon of October 21, 1996, that was reported in Volume 10 by using the same procedures that she used to create the other parts of her new record. SRR.26: 5-9. Simmons would not certify a new record of the proceeding from the

morning of October 21, 1996, that was reported in Volume 10 of the Halsey record. SRR.26: 9-13.

Simmons testified that she did not receive an audiotape of the proceeding that was conducted on the morning of October 21, 1996, and this was the reason she refused to certify this portion:

> Based on the 10,000 pages that I've done previous to this, and seeing Miss Halsey's record compared to her notes and the audiotape, I don't feel comfortable certifying to the first 53 pages without an audiotape to listen to.

SRR.26: 13.

In Simmons' opinion, Halsey must have used an audiotape to edit that part of her record because the hard copy was different than her paper stenographic notes. SRR.26: 19. Simmons physically included an English translation of Halsey's paper stenographic notes of the proceeding on the morning of October 21, 1996, in Volume 10 in her own record, but her certificate in that volume specifically excludes those 54 pages.[25] [25] RR.10: 1-54.

On February 4, 2000, Halsey's attorney informed the trial court that she did not have an audiotape of the proceedings for the morning of October 21, 1996. Halsey's lawyer did not indicate whether she made a tape and lost or destroyed it. SRR.27: 3-4.

On February 9, 2000, the trial court issued an order that adopted Simmons' testimony about the pages in her record that she did not certify. SCR.2: 566. The trial court did not decide whether the uncertified 54 page transcript of Halsey's stenographic notes of those proceedings in Volume 10 of the Simmons record conformed to what happened at the trial or whether there ever existed an audiotape for these 54 pages. SCR.2: 568. Again, however, the only testimony in this record on this subject is that of Simmons who stated that, in her opinion, there had been an audiotape used in the preparation of this part of the proceedings. SRR.26: 19.

Appellant's Objections To The New

Reporter's Record And Request For A Hearing

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[25] [25] Appellant objected that Halsey's certificates on the original record could not be used to certify any part of the new one because she testified at her license revocation hearing that she knew that her record was inaccurate when she signed them. SCR.2: 501-3. The trial court did not rule on that objection, but Halsey's certificates were not included in any of the volumes of the new record.

In its order dated February 9, 2000, the trial court extended the deadline until March 6, 2000, for Appellant to file objections to the Simmons record and request a hearing on them. SCR.2: 569.

On March 2, 2000, Appellant filed written objections to the Simmons record, SCR.2: 490, and a separate motion for a hearing, SCR.2: 480. Both pleadings also were submitted to this Court by a letter to the clerk dated March 8, 2000.

Appellant's motion for an evidentiary hearing identified twenty-seven specific disputed factual questions about the new record. SCR.2: 480.

Appellant's nine objections to the new record were presented in a detailed twenty-eight page pleading. There was a point heading, statement of facts, and arguments and authorities for each objection. Her objections challenged virtually all of the substantive changes that Simmons made in the record; the loss or destruction of specific parts of the record; the procedures that Simmons used to create her record; and the use of Halsey's certificates on the old record to certify any part of the new record that Simmons would not certify. SCR.2: 490.

She promised to introduce an English translation of Halsey's original stenographic notes to prove her objection that Simmons used the unauthenticated audiotapes to make thousands of inaccurate substantive changes in the record. SCR.2: 508, n.7.

Numerous exhibits were attached to Appellant's objections to the new reporter's record to substantiate her allegations about facts that were not in the record of the previous proceedings that the trial court conducted. Appellant's exhibits included statements that Halsey made at a hearing to revoke her license and to the press after she invoked her Fifth Amendment right not to testify in this case. These included Halsey's concession that there could be something wrong with her own audiotapes and she would not depend on them. SCR.2: 558. Halsey warned that her audiotapes should not be used to create a record because they could be blipped. SCR.2: 558. Halsey confessed that she knew that her record was inaccurate when it was filed. SCR.2: 524. Halsey admitted that she lied to the trial court to try to conceal defects in her record because she did not want Appellant to get a new trial. SCR.2: 528. Among other things, she blamed this Court's "threatening me with jail" as why she filed her record knowing it was inaccurate. SCR.2: 525.

The trial court had previously stated it was "quite troubled" by the fact that a witness might "invoke her Fifth Amendment right not to testify here in court [and then] give their opinions to the press, attempting to influence public opinion ... because this is not a game... There are definitely two children who are dead and a woman who's been sentenced to death...." SRR.27: 4.

Attached to these written objections were 42 pages of exhibits supporting the pleading. SCR.2: 490. In its order of September 7, 2000, the trial court found that Appellant's "objections are clear, concise, and sufficiently apprise this court and will apprise the Court of Criminal Appeals as to [Appellant's] objections." The trial court further found Appellant "adequately preserved her objections for review."[26] [26] SCR.2: 368.

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[26] [26] Since the issue of "preservation" of an objection is an appellate court determination, perhaps the most that can be said about these findings is that the objections were

Of course, what Appellant was seeking went beyond a mere understanding of her objections: Appellant was seeking a ruling on these objections in a proceeding which comports with due process by permitting testimony, evidence, and argument.

In Exhibit E of the written objections there are listings of multiple substantive changes Simmons made in Halsey's reporting of non-verbal responses, among other things.[27] [27] For instance, during voir dire a juror, per Halsey, responded to a question by answering "Um-hum." HR.12: 367. However, Simmons revised this to "Uh-huh," which of course is inconsequential, but then Simmons added the parenthetical "(Witness nodding head affirmative)." RR.12: 367. Appellant will assume that Simmons could not hear on the audiotape the juror nodding his head. And since Simmons has testified it was not part of her job to deal with Halsey's parentheticals, SCR.2:

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specific enough to leave no doubt that the trial court understood them.

[27] [27] This exhibit has a few erroneous citings to the record and it did not encompass the guilt and punishment phases. Appellant had a corrected and expanded version of this exhibit for introduction and use at the scheduled hearing of September 8, 2000.

556, just where did this new parenthetical come from? This same scenario is presented in comparing HR.12: 255 with RR.12: 254 as well as HR.13: 627 with RR.13: 668, to point out but a few. Simmons also changed responses of a juror, apparently based on whether she could hear it on the audiotape. See HR.13: 467 and RR.13: 467. Now Appellant understands as well as anybody Simmons' refusal to vouch for Halsey's steno notes or reporter's record without audiotape corroboration, but that only amplifies the problems presented by this record reconstruction effort to begin with, plus it places the parenthetical issue at the fore. The principle of presumed regularity cannot be applied to Halsey's parentheticals given her history of lying and knowingly submitting an inaccurate record. But coupling this with Simmons' stated refusal to put anything in her record which she could not corroborate, leaves all the parentheticals in this case subject to challenge.

The Cancellation Of The Hearing On

Appellant's Objections To The New Reporter's Record

The trial court set Appellant's case on the calendar for September 8, 2000, to conduct a hearing on her objections to the new reporter's record. SCR.2: 391, 465. Appellant served subpoenas for Halsey, Simmons, and nine other witnesses to testify at the hearing. SCR.2: 560-1, 370, 372, 374, 381, 383, 385, 387, 389. The trial court also signed Appellant's subpoena for an out of state witness who was to be flown from Virginia to Dallas. SCR.2: 464-67. Appellant filed a motion to suppress the unauthenticated audiotapes. The State acknowledged in its response to the motion that it expected the trial court to conduct the hearing and allow the parties to question Simmons about the new record. SCR.2: 391. The trial court cancelled the hearing on the day before it was scheduled to take place with the issuance of its September 7, 2000, order. SCR.2: 368.[28] [28]

The Trial Court's Response To Appellant's Objections

To The New Reporter's Record And Request For A Hearing

On September 7, 2000, at 3:15 p.m., the trial court issued a one and a half page order which made the following findings:

> 1. The trial court found that it complied with all of the orders that the Court of Criminal Appeals issued before Appellant filed her objections to the new reporter's record;

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[28] [28] The docket sheet does not show that a hearing was scheduled on September 8, 2000, but Appellant filed a formal bill of exception to make a record of that fact. SCR.2: 282, 286. The trial court subsequently ruled that it did not have jurisdiction to approve her formal bill. SCR.2: 281. The State will not dispute that a hearing was set as alleged.

2. All of the prior findings and orders previously issued by the trial court before Appellant filed her objections to the new record were incorporated without making any findings of fact or conclusions of law about those objections;

3. Appellant's written objections to the new reporter's record and motion for a hearing adequately preserved all of her claims because any tribunal would be able to discern the basis for them;

4. An additional evidentiary hearing is not necessary to comply with the orders of the Court of Criminal Appeals that were issued before Appellant filed her objections to the new record; and

5. No additional evidentiary hearings shall be conducted by the trial court unless the Court of Criminal Appeals instructs other-wise.

SCR.2: 368. (Emphasis added.)

The Trial Court's Refusal To Act On Appellant's

Formal Bill Of Exception Or To Allow Appellant To

Make An Offer Of Proof About The Evidence That

She Would Have Introduced At The Hearing On Her

Objections To The New Reporter's Record

On September 25, 2000, Appellant filed her Defendant's Formal Bill of Exception No. 1 together with a proposed order. SCR.2: 282, 285. Contemporaneously with this pleading, Appellant filed a Motion For A Hearing To Make an Offer Of Proof Of The Evidence That She would Have Introduced At The Hearing On Her Objections To The "Simmons Record." SCR.2: 286.

The trial court responded to these pleadings with an order on October 3, 2000, finding that "it lacks jurisdiction to consider any additional filings in this case unless the case is again remanded to this court by the Court of Criminal Appeals." SCR.2: 281.

ARGUMENT AND AUTHORITIES

The Reporter's Record Does Not Conform

To The Requirements Of TEX.R.APP.P. 34.6(a)(1)

There are two possible methods for creating the reporter's record of a criminal trial in Texas. "If the proceedings were stenographically recorded, the reporter's record consists of the court's reporter's transcription of so much of the proceedings and any of the exhibits that the parties to the appeal designate." See TEX.R.APP.P. 34.6(a)(1). "If the proceedings were electronically recorded, the reporter's record consists of certified copies of all tapes and other audio storage devices that the parties to the appeal designate and certified copies of the logs prepared by the court reporter under Rule 13.2." See TEX.R.APP.P. 34.6(a)(2).

The official reporter's record in this case must be a transcript of the stenographic notes that Sandra Halsey typed. An electronic reporter's record can only be used in certain counties that were designated by an order of the Texas Supreme Court. Valenzuela v. State, 940 S.W.2d 664, 666 (Tex.App. - El Paso 1996, no pet.). Most of the proceedings in this case occurred in Kerr County and Kerr County is not one of the counties designated to use electronic records.

The record that Susan Simmons certified was certainly not a "verbatim transcription" of "all the notes taken by the court reporter during the proceedings." Dunn v. State, 733 S.W.2d 212, 213-214 (Tex.Crim.App. 1987). Simmons used uncertified, unauthenticated audiotapes to make tens of thousands of substantive changes in the transcript of the stenographic record that Halsey filed.

The record that Simmons created is not a corrected version of Halsey's stenographic record. The official stenographic record can only be corrected after it was filed if a party alleged that a specific part of it was inaccurate and the trial court conducted a hearing to resolve the dispute. See Rule 34.6(e)(2). The trial court never conducted a hearing to settle the specific disputes about the accuracy of Halsey's record that Appellant raised. The violations of the Texas Rules of Appellate Procedure in Halsey's original record were so flagrant that it had to be replaced with a new record. See Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(2).

Simmons certainly could not lawfully use the uncertified audiotapes to correct Halsey's stenographic record. Valenzuela v. State, 940 S.W.2d at 666; Ex parte Occhipenti, 796 S.W.2d at 807. While it is a common practice for court reporters to use uncertified audiotape recordings to edit a stenographic record before it is filed, Simmons used uncertified audiotapes to make tens of thousands of substantive changes in the transcript of the original stenographic record after it was filed without reading the stenographic notes of the official reporter. The important distinction between a stenographic record and an electronic record would be meaningless if that procedure could be used to correct a stenographic record. Valenzuela v. State, 940 S.W.2d at 666; Ex parte Occhipenti, 796 S.W.2d at 806-07; Bond v. State, 694 S.W.2d 622, 623 (Tex.App. - Beaumont 1985, pet. ref'd); compare State Farm Fire and Casualty Ins. Co. v. Vandiver, 941 S.W.2d 343 (Tex.App. - Waco 1997, no pet.) where the court reporter failed to take short hand notes of the portions of certain depositions which were read into the record. The court of appeals held that the reporter's audiotapes could be referred to to establish the pages and lines of the depositions read and then the record supplemented with those portions of the depositions. However, contrary to the case at bar, this procedure was dependent upon there being "a proper written transcription of the testimony [having been] made at the time the deposition was given." 941 S.W.2d at 343. In Appellant's case, Simmons conclusively excluded the possibility that Halsey made a "proper written transcription" of the testimony in this case.

If a court reporter can use audiotapes to make such extensive substantive changes in the official stenographic record without a Rule 34.6(e)(2) hearing, she should at least be required to follow the rules that protect the integrity of an electronic record. All of the rules for creating and maintaining an electronic record were flagrantly violated in this case. When an electronic record is made, the official reporter must make a certified log of the audiotapes, not allow anyone else to handle the tapes without a written order from the court before the record is filed, and certify from her personal knowledge that the tapes were not modified or altered. See TEX.R.APP.P. 13.2(e); In re L.B., 936 S.W.2d 335 (Tex.App. - El Paso 1996, no writ). None of the audiotapes that Halsey and her lawyers turned over were certified. Simmons did not know whether the tapes were modified or altered and she did not have the expertise to make that determination by listening to them. It is not possible to determine with any degree of certainty whether Halsey made a tape of the missing hearing about counsel's conflict of interest on the morning of October 21, 1996, because there is no log of her tapes. It would not be surprising if that tape was lost or destroyed because Halsey allowed the prosecutors, her attorney and her daughter to handle the tapes. See In re G.M.S., 991 S.W.2d 923 (Tex.App. - Ft. Worth 1999, writ denied) (new trial ordered because part of electronic record was lost or destroyed).

In Soto v. State, 671 S.W.2d 43 (Tex.Crim.App. 1984), the Court held that a record created from audiotapes under less disturbing circumstances was unacceptable. Soto's trial was audiotape recorded by deputy clerks with the prior knowledge and approval of the trial judge. The tapes were kept in a safe until one of the clerks typed a transcript of them. Parts of the tapes were unintelligible, but the trial court corrected all of the defects that Soto objected to. The State contended that the record was an acceptable alternative to a transcript of an official reporter's stenographic notes. In an opinion for a unanimous court, former Presiding Judge Mike McCormick held, "We decline to sanction the granting of alternatives such as the one in the instant case. We shudder to think of the condition of appellate records should such alternatives be allowed." Soto v. State, 671 S.W.2d at 44 (Emphasis added).

This case is the bottom of the slippery slope that Presiding Judge McCormick was afraid of when he wrote those prophetic words. The tapes that Simmons used to create her record were not made with the knowledge and approval of Judge Tolle for that purpose. Sandra Halsey did not believe that the tapes would be used as the official record and she would not have used them for that purpose because they could be altered. Halsey lied to conceal the existence of the tapes, there is no chain of custody evidence, and one of the most important tapes disappeared. There are about 30,000 discrepancies between the hard copies of the Simmons and Halsey records. No one knows how much their records differ from Halsey's original paper stenographic notes because her notes were never accurately transcribed by anyone.

The reasoning of Soto v. State is perfectly sound today even though the record in that case was prepared pursuant to the former version of TEX.CODE CRIM.PROC.ANN. art. 40.09(4). The statute provided that,

> At the request of either party the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, objections to the court's charge, and final arguments. He is not entitled to any fee in addition to his salary for taking these notes. A transcription of the reporter's notes when certified to by him and included in the record shall establish the occurrence and existence of all testimony, argument, motions, pleas, objections, exceptions, court actions, refusals of the court to act and other events thereby shown and no further proof of the occurrence or existence of same shall be necessary on appeal; provided, however, that the court shall have power, after hearing, to enter and make part of the record any finding or adjudication which the court may deem essential to make any such transcription speak the truth in any particular in which the court finds it does not speak the truth and any such finding or adjudication having support in the evidence shall be final.

Every requirement of Art. 40.09(4) was codified in the Texas Rules of Appellate Procedure. The official court reporter is still required to create a stenographic record and certify that "a true and correct transcription of all portions of evidence and other proceedings." See Rule 34.6(a)(1); Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q), and the Uniform Format Manual for Texas Court Reporters. And the trial judge still has the authority to make the record conform to what happened at the trial after a hearing to settle any dispute about its accuracy. See Rule 34.6(e)(2).

It Is Impossible To Make The Reporter's Record Conform

To The Requirements Of Rule 34.6(a)(1)

It is not possible to produce a stenographic reporter's record that conforms to the requirements of Rule 34.6(a)(1), by transcribing Halsey's original paper stenographic notes because no court reporter would be willing or able to certify that her notes are a complete and accurate record of what happened at the trial.

Nor would it be feasible to try to correct Halsey's stenographic record by ordering Judge Francis to settle all of the disputes about its accuracy at a Rule 34.6(e)(2) hearing. In Little v. State, 97 S.W.2d 479 (Tex.Crim.App. 1936), the court reporter who typed a stenographic record died before he could transcribe his stenographic notes. The district attorney obtained the notes and had another licensed court reporter transcribe them. The defendant disputed the accuracy of the State's proposed record and submitted his own version. There were thousands of disagreements between the two versions of the record that the trial judge had to resolve before an official record could be certified and filed. The trial judge found that because "the court reporter who took shorthand notes of this testimony down at the time of the trial is dead, this court on such a vital question with the death penalty involved, could not in good conscience from recollection prepare a statement of facts" that fairly settled all of the disputes about the record. 97 S.W.2d at 480.

The difficulties of trying to create a record from Halsey's notes are greater because there are serious questions about the accuracy of her notes and the integrity of the audiotapes. Judge Francis could not settle the disputes from recollection because he did not preside over the trial. He would probably have to resolve thousands of swearing contests between witnesses who have some interest in the outcome of the case and fading memories of the trial which occurred over five years ago. It could take longer to settle the record in that manner than it did to conduct the entire trial.

The Violation Of Rule 34.6(a)(1) Was Not Harmless

The absence of a reporter's record which conforms to Rule 34.6(a)(1) cannot be deemed harmless in this case because the error affected Appellant's substantial right to meaningful appellate review of her death sentence and conviction for capital murder. See TEX.R.APP.P. 44.2(b). A complete and accurate record is an essential element of that right. Dobbs v. Zant, 506 U.S. 357 (1993); Dunn v. State, 733 S.W.2d 212, 214 n.5 (Tex.Crim.App. 1987). This Court cannot conclude with any degree of confidence that the transcript of an incomplete set of uncertified, unauthenticated audiotapes of very questionable integrity is a complete and accurate record of what happened at the trial. Judge Francis' findings of fact are entitled to deference, but Judge Francis relied on Simmons' opinion that the tapes were accurate without listening himself to any of them. Simmons' opinion about the accuracy of the tapes had no probative value because Simmons did not know whether the tapes conformed to what happened at the trial and she did not have the expertise to determine whether they were altered or modified by listening to them.

Appellant is not suggesting that the failure to provide a reporter's record which conforms to the requirements of Rule 34.6(a)(1) can never be harmless. Cf. Issac v. State, 989 S.W.2d 754 (Tex.Crim.App. 1999) (loss or destruction of significant part of reporter's record can be harmless in a particular case even if there is insufficient data to make that determination in most cases). The error in Soto v. State might have been harmless under Rule 44.2(b), because there did not appear to be any real question

about the accuracy of the record or the integrity of the tapes in that case. However, the absence of sufficient concrete data to determine the accuracy of the record and integrity of the tapes in this case shows that the error was not harmless because Appellant does not have the burden of proving that she was prejudiced. See Llamas v. State, 12 S.W.3d 469 (Tex.Crim.App. 2000).

In short, Appellant's conviction must be reversed and a new trial must be ordered because the reporter's record did not conform to the requirements of TEX.R.APP.P. 34.6(a)(1) and the error was not harmless.

POINT OF ERROR NUMBER FOUR

(Restated)

APPELLANT IS ENTITLED TO A HEARING WHICH COMPORTS WITH DUE PROCESS ON HER OBJECTIONS TO THE COMPLETENESS AND ACCURACY OF THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

POINT OF ERROR FIVE

(Restated)

APPELLANT IS ENTITLED TO A RULE 34.6(E)(2) HEARING TO SETTLE THE DISPUTES ABOUT THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

ARGUMENT AND AUTHORITIES

If Appellant has not established that it is impossible to produce a complete and accurate reporter's record for her appeal, this case must be remanded for a hearing on all of her objections to the new record that Simmons filed. The proceedings that the trial court conducted about those objections did not comply with any of the requirements of due process and TEX.R.APP.P. 34.6(e)(2).

The requirements of due process clearly apply to a hearing about the completeness and accuracy of the appellate record when the death penalty was imposed. Chessman v. Teets, 354 U.S. 156 (1957). The minimum requirements of due process include advance notice of issues to be resolved by the adversary process and an opportunity for the defendant to be heard, to examine the witnesses, to offer testimony, and to be represented by counsel. Lankford v. Idaho, 500 U.S. 110, 126 (1991) (and cases cited therein).

Those requirements of due process are codified in Rule 34.6(e)(2). The rule provides that the trial court must settle disputes about the accuracy of the reporter's

record after notice and hearing. When a hearing is required by the Texas Code of Criminal Procedure, the defendant must be allowed to present live testimony and cross-examine the State's witnesses, unless the code specifies that a paper hearing is permissible. Garcia v. State, 15 S.W.2d 533 (Tex.Crim.App. 2000). There is no reason and no precedent for interpreting the word "hearing" in Rule 34.6(e)(2) differently.

All of the requirements of due process and Rule 34.6(e)(2) would be violated in this case if the proceedings that the trial court conducted were deemed sufficient to settle the disputes about the accuracy and completeness of the new record. Appellant was not notified in advance that any of those proceedings were held to resolve the disputes about the new record. Simmons completed her testimony about the new record before Appellant read that record and filed her objections to it. Appellant was not allowed to question Simmons before or after she read the new record and filed her objections to it. Appellant was not permitted to introduce any evidence about the new record or make an offer of proof. It would be an understatement to say that she was denied an opportunity to be heard: the truth is that she was blinded, gagged, restrained, ejected from the courthouse, and then locked out and ordered not to return.

The time and money that the trial court invested to create the new record was not a substitute for a fair hearing on Appellant's objections to it. In Williams v. State, 427 S.W.2d 868 (Tex.Crim. App. 1967), the court reporter who attended the trial died before he transcribed some of his stenographic notes and certified the record. The deceased reporter's uncertified partial transcript of the trial, his stenographic notes and his uncertified backup audiotapes were given to a new reporter who produced and certified a new record. A hearing was conducted to resolve disputes about the new record. At the hearing, the new court reporter acknowledged that he did not compare the audiotapes to the stenographic notes. The new reporter was ordered to make that comparison before the hearing was completed and the record was settled. This Court held that the new record was acceptable because the defendant "certainly had his day in Court upon settlement of the record." Williams v. State, 427 S.W.2d at 872.

Appellant never had her day in court because Judge Francis refused to accurately transcribe Halsey's original paper stenographic notes, compare them to the audiotapes, and conduct a fair hearing to determine whether either version of the record entirely or partially conforms to what happened in the courtroom. This Court should hold her appeal in abeyance and remand the case with instructions to conduct such a hearing if the record does not already show that her conviction must be reversed for the reasons stated in her other points of error. Further, in the event of a hearing, it may be (actually, it is probable) that there will be additional facts which will be established which support Appellant's points of error pertaining to the record.

POINT OF ERROR NUMBER SIX
(Restated)

THE COURT VIOLATED FORMER TEX.R.CRIM.EVID. 613 WHEN IT REFUSED TO ALLOW APPELLANT'S PRIVATE INVESTIGATOR TO TESTIFY ABOUT A PRIOR INCONSISTENT STATEMENT OF THE STATE'S BLOOD SPATTER EXPERT.

POINT OF ERROR NUMBER SEVEN
(Restated)

THE COURT DENIED APPELLANT DUE PROCESS WHEN IT REFUSED TO ALLOW HER PRIVATE INVESTIGATOR

TO TESTIFY ABOUT A PRIOR INCONSISTENT STATEMENT OF THE STATE'S BLOOD SPATTER EXPERT.

ARGUMENT AND AUTHORITIES

In the interest of brevity, Appellant will argue Points of Error Nos. Six and Seven together.

The trial court denied Appellant due process and violated TEX.R.CRIM.EVID. 613[29] [29] when it refused to allow her private investigator, Lloyd Harrell, to testify about the exculpatory opinion that the State's bloodstain pattern expert, Tom Bevel, related to him during a pretrial interview. Harrell was in the courtroom when Bevel testified, but it was an abuse of discretion to suppress Harrell's testimony on that ground because Appellant could not have anticipated that Bevel would contradict what he said to Harrell before the trial.

"'Few rights are more fundamental than that of an accused to present his witnesses in his own defense.'" Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (citation omitted). TEX.R.CRIM.EVID. 613 provided that at the request of a party the court shall order witnesses excluded from the courtroom when they are not testifying, but a defense witness' mere presence in the courtroom during the trial does not make his testimony inadmissible. Webb v. State, 766 S.W.2d 236, 244 (Tex.Crim.App. 1989). The defendant's due process right to present his defense must be balanced against the State's interest in enforcing the rule. Holder v. United States, 150 U.S. 91, 92 (1893); Davis v. State, 872 S.W.2d 743 (Tex.Crim.App. 1994); Webb v. State, 766 S.W.2d at 244; Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972). When a defense witness was in the courtroom after the rule was invoked, the trial judge must consider alternatives to excluding the witness' testimony, such as a cautionary instruction that allows the jury to consider the witness' presence in the courtroom in assessing his credibility or a contempt proceeding against the person who was responsible for the violation of the rule. Webb v. State, 766 S.W.2d at 244.

This Court has adopted a two pronged test to determine whether a defense witness' testimony should be admitted in spite of his presence in the courtroom after the State invoked the rule. It is an abuse of discretion to exclude the testimony of the witness if: 1) the defendant and his counsel did not consent to, procure, connive or have knowledge of the presence of a subpoenaed or potential witness in the courtroom after the rule was invoked and 2) the testimony of the witness is crucial to the defense. Webb v. State, 766 S.W.2d at 244. If the defendant and counsel are blameless, the risk that the witness' testimony will be tainted by exposure to other testimony must be balanced against the relative strength of his testimony, the importance or crucial nature of the issue upon which it is offered and the extent to which it is cumulative of other evidence in the case. Webb v. State, 766 S.W.2d at 244.

Tom Bevel testified on direct examination that he talked to three of her lawyers and "an investigator, Lloyd Harrell" on December 30, 1996, in Oklahoma City for four hours. RR.39: 3371. Harrell was in the courtroom assisting Appellant's attorneys when Bevel was on the stand. RR.44: 4762.

Bevel told the jury that there were four minuscule cast off blood stains on the front of the t-shirt that Appellant was wearing when she and her children were stabbed. Bevel

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[29] [29] Rule 613 was recodified in Rule 614 of the current version of the Texas Rules of Evidence that took effect on March 1, 1998.

believed that the most likely explanation for the four stains was that the blood was cast off of the knife when Appellant was stabbing her sons. RR.39: 3349-52; 3601-2. Two of these blood stains were made with Appellant's blood and the blood of Damon. The other two stains were made with her blood and Devon's. RR.39: 3343-49, 3492-3.[30] [30]

Bevel acknowledged that Appellant had to be cut before she stabbed her sons if she cast her blood from the knife to her shirt when she was stabbing them. RR.39: 3548-9. However, Bevel claimed that Appellant could have stabbed both children before she cut herself and cast drops of her blood on top of drops of their blood. RR.39: 3490-1. Bevel conceded that one cast off stain near the left front shoulder of the shirt that he designated as LS1 was made with a single drop of Appellant's blood and Damon's blood mixed together, but he insisted that each of the other three stains could have been made by a tiny drop of Appellant's blood that landed on top of a tiny drop of a child's blood with such accuracy that he could not determine whether there were one or two stains in each place on the shirt. RR.39: 3343-6.

Counsel tried to impeach and rebut this part of Bevel's testimony by confronting him with a prior inconsistent statement that he made to Harrell and Appellant's lawyers in Oklahoma:

> Q. Now, were you also asked a hypothetical about the stabbing of Damon, in that same regard with respect to the blood, the mixed blood -- when we were in Oklahoma, did you tell us that was mixed blood?
>
> A. I told you there was some mixed blood. I don't know if we specifically addressed that stain. I don't recall.
>
> Q. Well, you told us that in your judgment that was mixed blood in one stain?
>
> A. I don't recall specifically stating that it was one stain. Now, which one are we referring to here?
>
> Q. I'm talking about these, I'm talking to all four of them on the front of the shirt, all four of them mixed?
>
> A. The only one that I can say is really consistent without hesitation, is the one that is up in this area here, which is going to be LS-1.
>
> Q. You are talking about the highest one on the left shoulder?
>
> A. That is correct.

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30 [30] Stain LS1 near the left shoulder contained Darlie's and Damon's blood. RR.39: 3345. Stain LS3 near the left shoulder contained Darlie's and Devon's blood. RR.39: 3345. Stain T9 near the right shoulder contained Darlie's and Damon's blood. RR.39: 3344. Stain T10 near the right shoulder contained Darlie's and Devon's blood. RR.39: 3344.

> Q. Okay. But you didn't tell us when we were up there that you thought all of those others were a stain that was mixed before it hit the shirt?
>
> A. I don't believe so.

RR.39: 3491-2.

Lead counsel Doug Mulder asked the court to allow Harrell to testify about the prior inconsistent statement that Bevel denied making in spite of the fact that Harrell was in the courtroom during Bevel's testimony because Bevel's memory of what he said to him and Harrell "was less than accurate." RR.44: 4755. The court refused to allow Harrell to take the stand in front of the jury and invited counsel to make a bill of exception. RR.44: 4758.

Co-counsel John Hagler reminded the court that Rule 613 is not a "per se exclusionary rule" and the court's discretion to suppress the testimony of an unsequestered witness depends on his testimony and whether the defendant was responsible for his presence in the courtroom. RR.44: 4756-7. Hagler asserted that the defense team "had no idea what Bevel was going to testify to." He argued that Harrell's testimony was crucial. He also cited Webb v. State to the court with the volume and page number of the case. RR.44: 4756-7.

> Co-counsel Preston Douglas argued, "you can't anticipate an expert, who is a police officer, is going to say something different from the interviews. The only way you can respond to it then is to have a witness come up and say directly contrary to what he told us in Oklahoma." RR.44: 4758. The court still refused to allow Harrell to testify in front of the jury. RR.44: 4758.

Harrell testified on a bill of exception that he was employed a special agent for the FBI from 1965 until 1989 and worked as a private investigator after he left the bureau. RR.44: 4760-61. Harrell interviewed Bevel in Oklahoma with three of Appellant's lawyers on December 30, 1996. RR.44: 4768-9. They questioned Bevel about blood stains on Appellant's t-shirt. RR.44: 4769. Harrell swore that Bevel's trial testimony about those blood stains was materially different from the opinion that he expressed in his interview. RR.44: 4769. Bevel told them that he selected the blood stains on Appellant's t-shirt that were to be DNA tested. RR.44: 4770. Bevel stated that the most important selection criteria was whether one axis of it was longer than the other one because that enabled him to determine the direction that the blood was traveling when it landed on the shirt. RR.44: 4770. Bevel made every effort to select stains that were made with a single drop of blood because overlapping multiple stains can cloud the issue of directionality. RR.44: 4770. When Appellant's attorneys and Harrell questioned Bevel about this particular issue, Bevel said that the cast off stains on the shirt contained mixtures of Darlie's blood and the blood of her children. RR.44: 4770. Harrell heard Bevel testify that the individual cast off stains that he sampled may not have been made by a mixture of Appellant's blood and a child's blood because each stain could be the result of "two separate occurrences causing that particular single stain." RR.44: 4771. When Harrell was asked whether there was a material discrepancy between that part of Bevel's testimony and the opinion that Bevel gave them in Oklahoma, Harrell responded,

> Absolutely, for this reason. In Oklahoma City he was asked at least twice does this mean that each of those stains, the knife tip had to contain the blood of Darlie and the blood of one of her children? His response to that answer was yes.

RR.44: 4771.

Harrell concluded that Bevel contradicted that opinion on the witness stand. RR.44: 4772.

Counsel renewed their argument about the admissibility of Harrell's testimony after they made their bill. They informed the court that they had no knowledge before the trial that Harrell would be a witness. They explained that they did not know that Bevel was going to testify that any of the cast off stains were made with drops of Appellant's blood and a child's blood that hit the same spot on her shirt. They contended that Harrell's testimony was admissible under the federal constitution as well as Rule 613. RR.44: 4779-83. The court ruled again that Harrell could not testify. RR.44: 4781.

Appellant clearly satisfied the first prong of the Webb v. State test for an abuse of discretion and a violation of due process because she and her attorneys could not have anticipated that it would be necessary to have Harrell testify about Bevel's prior inconsistent statement. 766 S.W.2d at 246.[31] [31] A defendant and her lawyers cannot be faulted for not sequestering a witness who was called to contradict the testimony of a prosecution witness if they did not know when the rule was invoked what the prosecution witness was going to say on the stand. Clayton v. State, 78 Tex.Crim. 158, 180 S.W. 1089 (Tex.Crim. 1915).

This exception to the rule of sequestration frequently applies in cases like this one where a prosecution witness unexpectedly contradicted a statement that he made to a defense investigator during a pretrial interview. Tell v. State, 908 S.W.2d 535, 542 (Tex.App. - Fort Worth 1995, no pet,);[32] [32] Allen v. State, 641 S.W.2d 710, 713 (Ark. 1982). The primary purpose of conducting such an interview is to learn what the witness will say on the stand. There is always a possibility that the witness will recant or forget what he told the investigator, but it was reasonable for Appellant's counsel to believe that a very experienced expert witness like Bevel would not directly contradict an opinion about a crucial issue that he gave their investigator in a high profile capital murder case because he should have known that it could damage his credibility and reputation.

Appellant satisfied the second prong of the Webb v. State test for an abuse of discretion and a violation of due process because Harrell's testimony was strong, absolutely crucial to her defense and not cumulative. Webb v. State, 766 S.W.2d at 244. Harrell was a very credible witness because of his experience and training as an FBI agent. In cross-examination, the prosecutor established no basis to disbelieve Harrell. RR. 44: 4776-8. There was no realistic possibility that he was mistaken about Bevel's answer to a pointed question about a material issue because Bevel repeated it at least twice.

The opinion about the cast off blood stains on Appellant's shirt that Bevel gave to Harrell and Appellant's lawyers was the essential first link in a chain of circumstantial evidence that would have established that an intruder must have carried a sock that had the blood of both of her children on it out of the house and left it on the sidewalk. Bevel conceded that Appellant had to be cut before both of her children if two drops that contained a mixture of her blood and Damon's blood and two drops that contained a

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31 [31] The unsworn statements that Appellant's attorneys made about their failure to anticipate that they would need to have Harrell testify about Bevel's prior inconsistent statement must be accepted as true because the court and the prosecutor did not dispute them. Hicks v. State, 525 S.W.2d 177, 178 (Tex.Crim.App. 1975).

32 [32] In Tell v. State, the Court of Appeals held that the trial judge abused his discretion by excluding the testimony of a defense investigator about a prior inconsistent statement that a prosecution witness made to him because there was no evidence that the defendant's attorney anticipated using the investigator as a witness when the State invoked the rule. 908 S.W.2d at 541. Counsel knew that the investigator interviewed the witness about his failure to identify the defendant at a lineup, but there was nothing in the record to indicate that counsel anticipated that the witness would actually contradict his statement to the investigator.

mixture of her blood and Devon's blood were cast off the knife to her shirt when she was stabbing them. RR.39: 3548. Appellant would have left an obvious trail of blood in the garage and on the sidewalk if she cut herself first, then stabbed both children and finally carried the sock with their blood on it to the trash barrel in the alley because her wounds bled profusely wherever she went.

The police meticulously searched the entire route and they did not find a drop of blood there. RR.32: 1266-71. Bevel escaped from that trap by testifying that drops of Appellant's blood could have landed on top of cast off stains of her children's blood on her shirt. This meant that she could have stabbed the boys first, carried the sock with their blood on it to the alley and then cut herself without bleeding outside of the house.[33] [33]

The theory that an intruder must have carried the sock out of the house would have been very strong if the jury had believed that Appellant was stabbed before the children because there was no conceivable reason for Appellant to do it if she was guilty. Bevel conceded that Appellant would not have left the sock with a barely visible amount of blood on it a few houses away from the scene of the crime if she was smart enough to plant it as a false clue because the police might have overlooked it there. RR.39: 3459-60. The person who left the sock in plain view next to an open sewer duct and a trash barrel that would have made excellent hiding places for it was obviously not trying to conceal incriminating evidence from the police. State's Exhibit No. 20; RR.50: 5810. The State's theory that Appellant used the sock like a glove to keep her fingerprints off of the murder weapon when she stabbed the children and tried to hide it in the alley before she stabbed herself with her bare hands defies common sense because her prints would have gotten on the weapon when she inflicted her own wounds. RR.46: 5241.

Appellant also had no time to inflict her own injuries and take the sock out of the house after the children were stabbed. The State's pathologist testified that Damon could not have lived more than nine minutes after his last stab wound was inflicted. RR.28: 138.[34] [34] Appellant did not cut herself or carry the sock out of the house during her tape recorded five minute and 44 second telephone conversation with the 911 operator after Damon was stabbed. RR.30:

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[33] [33] The one cast off stain that was definitely made by a single mixed drop of Appellant's blood and Damon's blood did not even establish that she must have been cut before Damon because it could have been cast off the knife to her shirt when she cut herself with the knife that she used to cut him. That hypotheses could not be stretched to explain how she could have stabbed both children before she cut herself if the four cast off stains on her shirt were each made with a single drop of her blood and a child's blood. None of the stains would have been made with a single mixed drop of her blood and the blood of the first child who was stabbed because that child's blood would have been wiped off the knife or mixed with the blood of the second child when the blade was repeatedly inserted into him.

[34] [34] This nine minute survival period is almost unreasonably generous to the State. The medical examiner testified that it was "conceivably a little longer" than five minutes. When she was asked whether the boy could have survived for eight or nine minutes, she replied, "you can't tell." RR.28: 138.

677.[35] [35] She also did not cut herself and transport the sock to the alley in the minute and ten seconds that must have elapsed between arrival of Officer Walling at the end of that tape recording and the time that a paramedic saw Damon take his last breath because Officers Waddell and Walling and her husband were with her.[36] [36]

This would have left only two minutes and six seconds for her to leave the house with the sock wearing nothing but a night shirt; run on concrete in her bare feet to the back gate; kick the broken gate open with her bare foot; run the length of three houses; drop the sock next to the trash barrel; return to the back gate by the same route; close the back gate and enter the house; pick up the butcher knife in her right hand; cut her throat, shoulder and cheek without turning on a light; switch the knife to her left hand and cut her right forearm and fingers of her right hand; put the knife with her blood on it down on the carpet near the couch; move the knife to the kitchen counter; turn on the kitchen light switch with a bloody hand; rush to the utility room and touch the door to the garage with a bloody hand; break a wine glass so that pieces of it landed on top of her blood; grab the vacuum cleaner with a bloody hand; roll it through her blood in the kitchen, lift it off the floor and roll it through her blood again; knock the vacuum over on top of her blood and the broken glass; scream for Darin and wait for him to rush downstairs; pick up the telephone and dial 911. RR.28: 91-2; RR.29: 476-7, 483-4; RR.30: 725-28; RR.33: 1617-18, 1730; RR.34: 2170; RR.35: 2281-2; RR.38: 3300; RR.39: 3331-2, 3398-9, 3485; RR.40: 3661, 3681-2, 3749-54; RR.42: 4334; RR.43: 4548-50, 4571-3; State's Exhibit No. 43C, RR.51: 5886; State's Exhibit No. 111B, RR.52: 6033; State's Exhibit No. 122, RR.52: 6048; State's Exhibit No. 132; RR.52: 6053. It was not necessary for the jury to decide whether Appellant could have performed all of those feats in 126 seconds like a genius killer in a pulp murder mystery. Bevel closed that small window of opportunity completely by testifying that several minutes elapsed between the time that Appellant bled on the kitchen floor and rolled the vacuum through her own blood. RR.38: 3313.[37] [37]

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[35] [35] Darin was with Appellant during the entire conversation and Officer Waddell was there for a substantial part of it.

[36] [36] This figure is also generous to the State. The paramedics arrived with Walling, but he testified they had to wait outside for one or two minutes while he and Waddell searched every room of the two story house to make sure that the intruder was not hiding there. RR.29: 412, 427-31, 438; RR.30: 550, 560, 693-95; RR.32: 1427-8. At least 10 seconds must have elapsed between the time that Walling invited the paramedics to enter the house and Damon's death. RR.32: 1432-33.

[37] [37] Appellant's testimony and written statement were consistent with the time line. She only had to follow the intruder to the utility room, turn on the kitchen light, pick up the knife, put it on the counter, return to the family room where she saw the bodies, go the entrance hallway, scream for Darin, wait for him to come down the stairs and call 911 between after Damon was stabbed. There was a two minute and six second window of opportunity for her to do these things because a paramedic or police officer could have rolled the vacuum through her blood in the kitchen several minutes after she bled there.

The compelling evidence that Appellant did not deposit the sock in the alley did not make Harrell's testimony about Bevel's prior inconsistent statement cumulative or unimportant. "[S]imply because the excluded testimony is not the only evidence supporting a defensive theory does not mean that it is not crucial." Davis v. State, 872 S.W.2d 743, 746 (Tex.Crim.App. 1994). The jurors would have been more inclined to believe Appellant did not carry the sock down the alley if Harrell had testified because there was other evidence that strongly supported the hypotheses. id.

Bevel's prior inconsistent statement to Harrell cannot be dismissed as mere impeachment material. The prior inconsistent statement was not only admissible for the limited purpose of impeaching Bevel's credibility under the former TEX.R.CRIM.EVID. 612(a),[38] [38] but the expert opinion that Bevel gave to Harrell and Appellant's lawyers was also admissible as substantive evidence under the rule of optional completeness because the State opened the door to it. Miranda v. State, 813 S.W.2d 724, 738 (Tex.App. - San Antonio 1991, pet. ref'd); see also Garcia v. State, 887 S.W.2d 862 (Tex.Crim.App. 1994). The rule of optional completeness is codified in TEX.R.EVID. 107. Rule 107 provides that when part of a conversation is given in evidence by one party, the whole of the same subject may be inquired into by the opposing party to make it fully understood or explain its meaning. Evidence that is inadmissible under another rule can come in under Rule 107 because its purpose is to prevent the jury from being misled. Foster v. State, 779 S.W.2d 854, 855-56 (Tex.Crim.App. 1989).

The State did not have to introduce part of the contents of Bevel's conversation with counsel and Harrell to open the door to the substantive use of that evidence under Rule 107. Streff v. State, 890 S.W.2d 815, 819 (Tex.App. - Eastland 1994, no pet.). In Streff v. State, a defendant opened the door to an inadmissible videotaped statement that a witness made to a police officer by referring to the fact that the statement was made during his cross-examination of the officer and suggesting with a question that the officer was hiding evidence. 890 S.W.2d at 819. The defendant did not question the officer about the contents of the tape, but it was admissible under the rule of optional completeness because he suggested that it would help his case. id.

The same principle applies here. The jurors probably would have concluded that the four hour interrogation of Bevel by a tag team of three defense lawyers and their investigator did not yield a scintilla of evidence that was helpful to Appellant if her attorneys chose not to share any part of the conversation with them.[39] [39] In fact, the prosecutor

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[38] [38] Former Rule 612(a) is now codified in Rule 613(a) of the Texas Rules of Evidence.

[39] [39] In Grunsfield v. State, 813 S.W.2d 158 (Tex.App. - Dallas 1991), aff'd on other grounds, 843 S.W.2d 521 (Tex.Crim.App. 1992), the Court of Appeals held that the State did not open the door to the contents of a written statement that a witness made to a police officer by merely questioning the officer about the fact that the statement was made, but that case is distinguishable from this one. The only probative inference that the Grunsfield jury could have drawn was that the prosecutor chose not to ask the officer what the witness told him because it would not have helped his case. Counsel's failure to question the officer about the contents of the witness' statement would not have been prejudicial because the jury had no reason to believe that counsel knew what the witness said. Here, the shoe was on the other foot: counsel knew what Bevel

indirectly drove that point home to the jurors in his summation when he criticized counsel for not presenting the testimony of a defense blood spatter expert who had inspected Darlie's t-shirt to discredit Bevel's opinion: "It speaks volumes to you sometimes what you don't see and hear, and it speaks volumes in this case with regards to that t-shirt." RR.46: 5341. (Emphasis added.)

The exclusion of Harrell's testimony was not harmless. The error is subject to the test for harmless constitutional error because it was a violation of due process as well a violation of Rule 613. See Webb v. State, 766 S.W.2d at 244. TEX.R.APP.P. 44.2(a) provides that a constitutional error is reversible, unless the Court determines beyond a reasonable doubt that it did not contribute to the defendant's conviction. The Court must calculate the probable impact of the error in light of all of the evidence to determine whether it might have contributed to the verdict. Harris v. State, 790 S.W.2d 568, 586 (Tex.Crim.App. 1989). The evidence must be viewed in a neutral, impartial and even handed manner. Harris v. State, 790 S.W.2d at 586. The Court should consider the nature of the error, the source of the error, whether or to what extent the error was emphasized by the State, the probable collateral consequences of the error, and how much weight a juror would probably place on it. Harris v. State, 790 S.W.2d at 587. Whether "the evidence sufficiently or even overwhelmingly supports the verdict" is largely irrelevant. Atkinson v. State, 923 S.W.2d 21, 26 (Tex.Crim.App. 1996).

The suppression of Harrell's noncumulative testimony about a crucial issue must have contributed to the verdict. Webb v. State, 766 S.W.2d at 246. In fact, the error would be reversible under Rule 44.2(b), even if it was not of constitutional magnitude because it affected Appellant's substantial right to present her defense. See Higganbotham v. State, 807 S.W.2d 732, 734 (Tex.Crim.App. 1991) (error is more likely to cause harm when it "had the effect of disparaging a defense").

The State's evidence was not strong enough to make the erroneous exclusion of Bevel's prior inconsistent statement to Harrell harmless beyond a reasonable doubt. The State's theory was that an upper middle class mom who poetically expressed sincere love for all of her children in her private diary when she had no motive to lie woke up in the middle of the night, slaughtered two of them and nearly killed herself with a butcher knife that was bigger than the one that Norman Bates used to kill his mother in Psycho because she was depressed about a new baby whom she did not try to harm and then danced a barefoot tango in her own blood with a vacuum cleaner. She was supposed to be smart enough to stage a struggle by planting false clues, but dumb enough to tell the police an incredible tale about sleeping through her own stabbing that did not refer to any of those clues two days after she gave them a plausible statement about struggling with the intruder. RR.40: 3678-3690; RR.42: 4099-4101; Defendant's Exhibit No. 76A; RR. 53: 6143.

Charles Linch's opinion that rubber and fiber glass debris from the cut window screen was on the blade of a bread knife in the butcher block was the most incriminating evidence because it meant that someone in the house staged the break-in, but there were substantial reasons for the jury to doubt whether it was true. RR.37: 2909, 3016. Officer Charles Hamilton could have accidentally contaminated the bread knife with debris from the window screen by dusting the blade with the same fingerprint powder brush that he used to dust the frame of the screen and the window. Hamilton testified that he thoroughly dusted the area around the cut screen with his brush before he did anything else. RR.34: 1980-1, 1983-4.

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said to them and the jury had no reason to suspect that the prosecutor was aware of it.

A retired veteran homicide detective, James Cron, who knew how to preserve physical evidence at a crime scene, warned the Rowlett police not to dust things that might have trace evidence on them for fingerprints before Linch had a chance to collect it, but Hamilton did not follow his advice. RR.34: 1980-1, 1983-4, 2207. Linch claimed that the bread knife was never finger printed, but there was "grayish black material" - "carbon black" on the blade and handle of the knife in a photograph that the State introduced without explaining how or when it got there. RR.37: 2909, 2911; State's Exhibit No. 116; RR.52: 116. Hamilton could have applied that fingerprint powder at the crime scene with a brush that was contaminated with rubber and fiber glass after he dusted the area around the cut screen.[40] [40] In addition, Linch's credibility was tarnished because a DNA test revealed that he mistakenly matched a police officer's hair in the frame of the cut screen with a known sample of Appellant's hair. RR37: 2848-50, 2960-2.

The remainder of the State's highly circumstantial evidence only proved the possible or probable existence of equivocally incriminating facts. If Bevel's opinion about the blood stain from the murder weapon on the carpet was correct, the intruder could have put the bloody knife on the carpet when Appellant was unconscious because he had to wipe blood off of his face or pick up something that he dropped. RR.38: 3300; State's Exhibit No. 111B; RR.52: 6033. The intruder could have dropped the knife on a throw rug near the entrance to the utility room or a black cap near the washer and dryer without leaving a blood spatter on the linoleum floor. Both of those fabric items were stained with Appellant's blood. RR.44: 4869; State's Exhibit No. 36F; RR.50: 5858; CR.1A: 65. The evidence did not explain exactly how the wine glass fell off of the wine rack, how the vacuum cleaner ended up in the kitchen on top of Appellant's bloody footprints, or how difficult it would have been for an intruder to close the back gate, but these little mysteries were not proof that Appellant brutally murdered her own children. RR.33: 1730-1; RR.35: 2371-2, 2392-3, 2419; RR.42: 4272-3; RR.44: 4809. In fact, the officer who collected most of the evidence agreed that "someone has tampered with the crime scene." RR.33: 1834. There was also conflicting testimony about the bruises on Appellant's arms and the knife holes in her shirt that did not correspond to her wounds, but she was entitled to the benefit of the doubt about those issues. RR.30: 770-2; RR.31: 959-60, 1099-1102, 1162; RR.32: 1211-12; RR.37: 2869, 2888-90, 3045; RR:40: 3817-18, 3845-6; RR.41: 3967-8, 4001-3; RR.43: 4561-2.

One only needs to review Skelton v. State, 795 S.W.2d 162 (Tex.Crim.App. 1989) to appreciate the significance of un-scrutinized expert testimony. This Court reversed a death sentence and entered a judgment of acquittal after closely examining the testimony of an expert who the State argued had tied the accused to the offense. In Appellant's case, had Harrell been allowed to testify, the State's theory of the offense would have been devastated while the defense theory was simultaneously bolstered.

In sum, the "due administration of justice cannot be preserved and maintained by sustaining the trial court's ruling" to exclude the testimony of a crucial witness like Harrell just because he was not sequestered, especially "in view of the fact that the extreme penalty of death was assessed." Nixon v. State, 309 S.W.2d 454, 456 (Tex.Crim.App. 1958).

> [Ilt is not reasonable to take away from a prisoner on trial the benefit of testimony on which his life may depend, because of the misconduct of another person. The humanity of the law is

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[40] [40] Hamilton processed the kitchen counter where the knife rack was located for fingerprints, but he could not remember what specific items on the counter he dusted. RR.34: 2078.

> shocked at the punishment of the innocent. It provides with the greatest solicitude that persons accused of crimes shall have fair and impartial trials. The object is considered of sufficient importance to be guaranteed by the solemn and impressive declarations of our organic law. The scheme and theory of our legal system seek to provide that no man shall be adjudged guilty, unless the truth of the matter charged upon him has been established after a fair and full investigation. The ascertainment of the truth is the great end and object of all the proceedings in a judicial trial. Subject to well-known and distinctly marked exceptions, a person on trial has the right to prove the truth relating to the accusation against him by the evidence of all witnesses who have any knowledge of it. And they are compelled to attend and deliver their testimony in his behalf. Since such great care has been taken to secure the right of an accused person to prove the truth relating to the accusation against him, it would be very strange, if he should forfeit this most precious privilege by the misbehavior of a witness. If the evidence of such witness would show the innocence of a prisoner on trial for his life, then the discretion of the Judge to admit or reject the testimony amounts to a discretion to take the prisoner's life, or to spare it. The wise, just and merciful provisions of our criminal law do not place human life on such an uncertain tenure. A man's life and liberty are protected by fixed rules prescribed by the law of the land, and are not enjoyed at the discretionary forbearance of any tribunal. All suggestions of this kind are alien to the spirit and genius of our jurisprudence.

Parker v. State, 67 Md. 329, 331-32 (1887).

Appellant's conviction must therefore be reversed.

POINT OF ERROR NUMBER EIGHT
(Restated)

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO COUNSEL BY USING AN UNRECORDED EX PARTE COMMUNICATION FROM AN UNNAMED PERSON THAT OCCURRED WHEN HER LAWYER WAS NOT THERE AS THE ONLY BASIS FOR DISCHARGING A SWORN JUROR.

POINT OF ERROR NUMBER NINE
(Restated)

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO BE PRESENT DURING AN UNRECORDED EX PARTE COMMUNICATION WITH AN UNNAMED PERSON THAT PROVIDED THE ONLY BASIS FOR THE TRIAL COURT'S FINDING THAT A SWORN JUROR WAS DISABLED.

POINT OF ERROR NUMBER TEN
(Restated)

THE TRIAL COURT ABUSED ITS DISCRETION UNDER TEX.CODE CRIM.PROC.ANN.ART. 36.29 BY REPLACING A SWORN JUROR WHEN THERE WAS NO EVIDENCE IN THE RECORD TO SHOW THAT SHE WAS DISABLED.

ARGUMENT AND AUTHORITIES

In the interest of brevity, Appellant will argue Points of Error Nos. Eight, Nine, and Ten together.

The trial court committed three errors when it accepted an unsworn, unrecorded ex parte communication from an unnamed person about a juror's illness and replaced her without conducting any sort of a judicial inquiry into the matter. Appellant had a right to be present with her lawyer when the court received the evidence of the juror's disability. The court also had no discretion under TEX.CODE CRIM.PROC.ANN.art. 36.29, to find that the juror was disabled because there was no evidence of that fact in the record when she was discharged.

On January 16, 1997, at 9:00 a.m., when the prosecution was about to resume the presentation of its case-in-chief, the trial court announced, "All right. Juror number 12 is ill, and disabled and unable to continue fully to perform her function as a juror. So I am replacing her with alternate number 1." RR.35: 2228. Counsel acknowledged that the trial court has discretion under Art. 36.29 to replace a juror if she "in fact becomes disabled," but he objected that the case should be adjourned for 24 hours "for the Court to determine whether [this juror] is truly, and in fact, disabled as provided under the statute." RR.35: 2229. He pointed out that she attended all of the proceedings during the first week and a half of the trial. RR.35: 2229. The trial court responded, "[t]his juror had the flu yesterday, struggled to come down, continues to have it today and is bedridden. So, I am replacing her." RR.35: 2229.

The court violated Appellant's right to counsel by engaging in an unrecorded ex parte communication about the discharged juror's disability when her lawyer was not there. A trial judge can engage in a preliminary ex parte communication with a juror to determine whether a formal judicial inquiry into her ability to serve is required without violating the defendant's right to counsel, Santiago v. United States, 977 F.2d 517, 522 (10th Cir. 1992), but counsel must be present during any colloquy that the court considered as evidence of the juror's disability. Here, the court's finding of disability was entirely based on a conversation with an unnamed individual that occurred when counsel was not there to question her. Counsel did not have a reasonable opportunity to be heard on the matter in court after the unrecorded ex parte conversation took place because he did not know what was said.

The trial court violated appellant's right to be present at a critical stage of her trial when it engaged an ex parte communication about the juror's disability. Crow v. State, 89 Tex.Crim. 149, 230 S.W. 148 (1921); State v. White, 153 So.2d 401, 408 (La. 1963). "There is no question that an accused in a capital case has a constitutional right to be continuously present at all stages of the proceedings from arraignment to final sentence, including a proceeding where jurors for the trial are challenged the their qualifications inquired into." Welch v. Holman, 246 F.Supp. 971, 973-74 (M.D. Ala. 1965), aff'd, 363 F.2d 36 (5th Cir. 1966)(citing Hopt v. Utah, 110 U.S. 574, 579 (1884)). That right is also protected by Texas statutes. Adanandus v. State, 866 S.W.2d 210, 219 (Tex.Crim.App. 1993).

In Upchurch v. State, 36 Tex.Crim. 624, 38 S.W. 206 (1896), the trial court violated the defendant's right to be present at a critical stage of her trial under circumstances that are factually indistinguishable from this case. There, a juror approached the judge during an overnight recess and reported that his wife was ill. The defendant was present in court on the following morning when the judge announced that the juror was discharged and his counsel objected to that decision, as happened here.

The violation of Appellant's right to be present with counsel during the court's ex parte communication with the unnamed person who provided evidence of the juror's disability cannot be harmless because no record was made. Santiago v. United States, 977 F.2d at 522; Henderson v. Lane, 613 F.2d 175, 179 (7th Cir. 1980). A reviewing court can determine beyond a reasonable doubt that the absence of the defendant made no contribution to the verdict only when there is a "precise record from which to determine prejudice" and counsel was present to protect her rights. Henderson v. Lane, 613 F.2d at 179. It may also be possible to determine that the absence of counsel was harmless if the record shows that the juror's disability was beyond dispute, Santiago v. United States, 977 F.2d at 522, but there is nothing here upon which to base a finding of no harm.

The risk of actual prejudice was quite substantial. The juror might have lied to the judge about her illness because she wanted to avoid the trauma or inconvenience of jury service in a lengthy capital trial. The report of her sickness may have been exaggerated by mistake or design as it was passed from the juror to a spouse who called the judge. Further questioning of the juror by or at the suggestion of counsel may have established that the juror would have recovered from her illness more quickly than the judge believed. These concerns would not exist if the juror's disability was established with competent evidence on the record in a judicial proceeding in the presence of the defendant and her lawyer.

The trial court also abused its discretion under Art. 36.29 to replace a disabled juror with an alternate because there was no evidence that juror number 12 was disabled. A finding of disability under Art. 36.29 must be supported by sufficient evidence in the record. Marquez v. State, 620 S.W.2d 131, 133 (Tex.Crim.App. 1981). There is no presumption from a silent record that the juror was properly excused. Bates v. State, 843 S.W.2d 101, 103 (Tex.App. - Texarkana 1992, no pet.). The juror's disability must be established by questioning him or introducing other competent proof of that fact. Valdez v. State, 952 S.W.2d 622 (Tex.App. - Houston [14th Dist.] 1997, pet. ref'd). The trial court's memory of an unsworn, unrecorded ex parte communication with an unnamed person was not evidence.

In State v. Lehman, 321 N.W.2d 212 (Wisc. 1982), the Wisconsin Supreme Court held that it was an abuse of discretion for a trial judge to discharge a juror who claimed that she was ill in circumstances that closely resemble the facts of this case:

> The record is totally devoid of any indication of how or when the circuit court became aware of the juror's illness; whether it was the circuit judge, the clerk of the court or the bailiff who discharged the juror; or whether the juror was questioned to determine how ill she was or whether she might be able to rejoin the jury within a short time. Moreover, neither the defendant nor the state was given an opportunity to be present when the ill juror was discharged. We cannot determine from the record in the instant case whether or not the circuit court exercised its discretion to discharge the juror or on what basis the court reached its decision. Under these circumstances, we can reach only one conclusion, namely that the circuit court abused its discretion in discharging the regular juror in the instant case.

321 N.W.2d at 217.

The trial court did not cure the problem by putting two unauthenticated letters from doctors in the record on the day after juror number 12 was discharged. Court's Exhibit No. 1, S.Ex.1, Court's Exhibit No. 1, S.Ex.2; RR.36: 2779-80. It was too late for the court to receive evidence of the juror's disability and the unauthenticated letters were not competent evidence of that fact in any event. The court commented that one of the letters was "obviously [from] a physician" because "no one can read it", but that humorous unsworn remark was not a substitute for authentication of the document. RR.36: 2780. There was a colorable question about authenticity of the letters because they were signed by different doctors who disagreed about the juror's illness. One physician recommended that the juror should be temporarily excused from her duties until further notice because she had bronchitis. The other doctor asked the court to release her from jury service because she had the flu. It is impossible to exclude the possibility that the juror forged the letters or persuaded a friendly physician to provide the proverbial "doctor's note" because she did not want to perform an unpleasant, time consuming civic duty.

It's not really even clear which "Court's #1" in the record was being referred to in the trial court's statement about "the Xerox from the physician." RR.36: 2779. This is because there are two such exhibits referencing the excused juror, one of which is dated (but not file-marked) "1-17-97," S.Ex.2, while the other is undated and not file-marked, S.Ex.1.

The violation of Art. 36.29 cannot be harmless under TEX.R.APP.P. 44.2(a), because it affected a substantial right and it is impossible to determine from the record whether the discharged juror would have rendered a different verdict on guilt or punishment than the one who replaced her. See Cain v. State, 947 S.W.2d 262, 264 (Tex.Crim.App. 1997). This Court held in Jones v. State, 982 S.W.2d 386 (Tex.Crim.App. 1998), that the erroneous disqualification of a prospective juror was harmless under Rule 44.2(b), because the defendant had no right to have that particular juror serve, but that rationale for disregarding error does not apply here. Appellant had a "valued right to have h[er] trial completed by a particular tribunal" after the jury was sworn and the trial began. United States v. Jorn, 400 U.S. 470, 480 (1970). "The defendant's right to have the jury pass upon his case was one which should not have been set aside except for a very compelling and cogent reason and in such circumstances the defendant and his counsel had the right to have the [evidence of the juror's disability] declared in open court." Yarborough v. State, 210 P.2d 375, 378 (Okla.Crim.App. 1949) (error to discharge juror who was examined by judge off the record and outside of counsel's presence). Appellant's conviction must therefore be reversed.[41] [41]

POINT OF ERROR NUMBER ELEVEN
(Restated)

THE TRIAL COURT VIOLATED TEX.CODE CRIM.PROC. ANN.ART. 36.27, BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF

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[41] [41] The violations of Appellant's right to counsel and right to be present were preserved without an objection on those specific grounds because the State must show that she personally made a voluntary and intelligent waiver of those constitutional rights and the record contains no evidence that she did so.

DARIN ROUTIER'S TESTIMONY WHEN APPELLANT WAS NOT PRESENT.

POINT OF ERROR NUMBER TWELVE
(Restated)

THE TRIAL COURT VIOLATED TEX.CODE CRIM.PROC. ANN.ART. 33.03, BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF DARIN ROUTIER'S TESTIMONY WHEN APPELLANT WAS NOT PRESENT.

POINT OF ERROR NUMBER THIRTEEN
(Restated)

THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF HER TRIAL BY PROVIDING THE JURY WITH AN INACCURATE TRANSCRIPT OF A CRUCIAL PART OF HER HUSBAND'S TESTIMONY WHEN SHE WAS NOT PRESENT.

ARGUMENT AND AUTHORITIES

In the interest of brevity, Appellant will argue Points of Error Nos. Eleven, Twelve, and Thirteen together.

The trial court violated Appellant's statutory and constitutional right to be present at a critical stage of her trial by providing an inaccurate transcript of Darin Routier's testimony about a crucial issue to the jury when she was not present.

The due process clause of the Fourteenth Amendment requires the defendant's presence at any stage of her trial when her presence has a reasonably substantial relationship to her ability to defend herself. Adanandus v. State, 866 S.W.2d 210, 219 (Tex.Crim.App. 1993).

TEX.CODE CRIM.PROC.ANN.art. 33.03, requires the defendant's presence at every stage of her trial. Mares v. State, 571 S.W.2d 303, 307 (Tex.Crim.App. 1993).

TEX.CODE CRIM.PROC.ANN.art. 36.27, provides that the trial judge "shall use reasonable diligence to secure the presence of the defendant and his counsel" when it receives a communication from the jury and prohibits the judge from responding to a question from the jury when the defendant and her lawyer are not there, unless "he is unable to secure" their presence. (Emphasis added.) This statute applies to communications from the jury about the evidence as well as the law. Nichols v. State, 494 S.W.2d 830, 835 (Tex.Crim.App. 1973).

In the present case, the court received a note from the jury that asked, "Did Darin lock the utility room door before he went to bed." CR.1A: 151. The court gave the jury a written instruction that they could not rehear part of a witness' testimony unless they certified that they disagreed about what he said. CR.1A: 152-3. The jury sent the court another note which stated, "some of us 'remember' Darin say [sic] that he did not lock the door from the utility room to the garage before he went to bed 6/5/96- the rest of us 'remember' that Darin said he locked this door." CR.1A: 154. (Emphasis in original.)

The court read the jury's question to the prosecutor and counsel in chambers and informed them that the court reporter had "looked that up." RR.46: 5358. The court asked the attorneys whether they had any objection to "the reply" which consisted of three pages of Darin Routier's testimony on cross-examination. CR.1A: 155-57. The prosecutor and counsel did not object and then the court stated, "just for the record purposes, Miss Darlie Lynn Routier is not here for this hearing." RR.46: 5358. The court asked counsel, "do you wish to waive her presence" and her counsel responded that he did. RR.46: 5358. The court then answered the jury's note by sending the three pages of Darin Routier's testimony to the jury. RR46: 5359.

Appellant had a right under Art. 33.03 to be present when the court responded to the jury's request for this testimony because it was part of her trial. Hill v. State, 54 Tex.Crim. 646, 114 S.W. 117, 118 (1909) (Upon trial for murder it was reversible error to permit the reproduction of certain testimony on request of the jury in the absence of the defendant although counsel waived defendant's presence because the statute required his presence); Conn v. State, 11 Tex.Ct.App. 427 (1882) (same).

Appellant also had a constitutional right to be present at that critical stage because it had a reasonably substantial relationship to her ability to defend herself. Adanandus v. State, 866 S.W.2d at 219. The testimony that the jurors disagreed about "did not relate to trivial, insubstantial matters, but involved vital issues in the case." Evans v. United States, 284 F.2d 393 (6th Cir. 1960). Appellant and the children could not have been attacked by an intruder, as she testified, if Darin Routier locked the door from the utility room to the garage because there was no sign of a forced entry at that point. There are numerous discrepancies between the transcript of that crucial part of Darin's testimony that the jury received and the reporter's record of the same testimony that Appellant did not have an opportunity to correct.[42] [42] Appellant probably had a greater ability than her lawyers to recognize these mistakes in a transcript of her own husband's testimony about locking doors and windows in the house where they lived because she knew the witness and the facts.

The violation of Appellant's constitutional right to be present at this critical stage of her trial was not harmless beyond a reasonable doubt. Adanandus v. State, 866 S.W.2d at 219. When the defendant's presence during the court's communication with the jury about a material issue was substantially related to her ability to defend herself, it is impossible to be sure that her absence at that critical stage made no contribution to the verdict. United States v. Neal, 320 F.2d 533 (3d Cir. 1963). This is especially true when the court gave the jury inaccurate information about a material issue in the defendant's absence, as happened here. United States v. Glick, 463 F.2d 491, 494 (2d Cir. 1972). Indeed, the risk of prejudice was high enough to negate a finding that the violation of Appellant's statutory right to be present was harmless under the more forgiving standard of Rule 44.2(b).

The trial court also violated Art. 36.27 by responding to the jury's request for this testimony without making an effort to secure Appellant's presence. After all, she wasn't on bond. Counsel did not procedurally default the claim by waiving Appellant's presence because "[t]his Court has held in many cases that the presence of the accused...cannot be waived by the attorney." White v. State, 149 Tex.Crim. 419, 195 S.W.2d 141, 142 (1946); accord Adanandus v. State, 866 S.W.2d at 217 n.5; Hill v. State, 114 S.W. at 119.

In White v. State, the Court held that counsel could not waive the defendant's right under former Art. 679 of the Code of Criminal Procedure to be present when it responded to a question from the jury even though counsel promised not to raise the issue on appeal. The reasoning of that case applies with equal force to Art. 36.27 because "these are mandatory provisions and should be strictly adhered to." White v. State, 195 S.W.2d at 142.

In Smith v. State, 474 S.W.2d 486 (Tex.Crim.App. 1971), the Court held that a formal written bill of exception reflecting the defendant's absence when the court answered a communication from the jury was not sufficient to establish that there was a violation of his right to be present under Art. 38.27 because the bill did not show that he "did not expressly waive the reading of the jury's note and the court's answer in open court and out of her presence." 474 S.W.2d at 488. This case is distinguishable from Smith v. State because the trial court solicited and accepted a recorded waiver of Appellant's presence

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[42] [42] See and compare CR.1A: 155-57 and RR.42: 4377-79.

from her attorney. There would have been no reason for the trial court to take that action if Appellant made an unrecorded personal express waiver of her right to be there.[43] [43]

The violation of Art. 36.27 cannot be disregarded under TEX.R.APP.P. 44.2(b) as an error that did not affect a substantial right because the "statutory requirement is mandatory," Edwards v. State, 558 S.W.2d 452, 454 (Tex.Crim.App. 1977), and it is not possible to determine its likely impact on the verdict. Cain v. State, 947 S.W.2d 262, 264 (Tex.Crim.App. 1997). Appellant's conviction must be reversed.

POINT OF ERROR NUMBER FOURTEEN

(Restated)

THE TRIAL COURT ERRED IN REFUSING TO RULE ON APPELLANT'S FORMAL BILL OF EXCEPTION.

ARGUMENT AND AUTHORITIES

On September 25, 2000, Appellant filed her Defendant's Formal Bill Of Exception No. 1. SCR.2: 282-5. TEX.R.APP.P. 33.2 mandates that a court, upon presentation of a formal bill of exception, set the matter for a hearing unless the parties agree to the bill.

The bill must be "presented" to the court for it to have a duty to comply with Rule 33.2. Spivey v. James, 1 S.W.2d 380, 385 (Tex.App. - Texarkana 1999, no writ). That Appellant's bill was presented to the court is conclusively shown in the court's order dated October 3, 2000, wherein the court ruled it had "[no] jurisdiction to consider" the bill. SCR.2: 281.

Appellant's bill set forth that a hearing had been scheduled for September 8, 2000, on Appellant's written objections to the appellate record in this cause, together with certain other facts not then appearing in the record.

The procedure set forth in Rule 33.2 is replete with mandatory language ("must") compelling the court's conduct when presented with a formal bill. The setting of the hearing and the cancellation of the same being potentially necessary for preservation of error purposes of Appellant's multiple complaints in this appeal about the legality and

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[43] [43] Smith v. State should be overruled because the case was based on the obviously erroneous premise that the absence of an express waiver of the defendant's presence is an element of a violation of Art. 36.27. 474 S.W.2d at 488. The statute requires a diligent effort to secure the defendant's presence and an express waiver of the defendant's right to have the answer to the jury's communication read in open court. When no effort was made to secure the defendant's presence, there was an error even if the answer was read in open court.

accuracy of the reporter's record, the cause should be remanded to the trial court for full compliance with the procedure required by Rule 33.2.

PRAYER

For the reasons stated, Appellant prays that the judgment of conviction be reversed and the cause remanded for a new trial and, as appropriate, that this Court order further hearings in the trial court as requested herein.

Respectfully submitted,

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SBN 04780100

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore- going document was served upon (1) Bill Hill, District Attorney, 133 N. Industrial Blvd., Dallas, Texas 75207; and (2) Matthew Paul, State's Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by depositing a copy of the same in the U.S. Mail, postage paid, on this the 23rd day of July, 2001.

J. STEPHEN COOPER

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44 [1] The original clerk's record in this cause is comprised of two volumes which the district clerk denominated "Volume 1 Part A" and "Volume 1 Part B." This portion of the clerk's record will be cited as "CR.1A: (page)" and "CR.1B: (page)." There is another two volume supplemental clerk's record which the district clerk labeled "Vol. 1 Pages 1-246A" and "Vol. 2 Pages 247-254 (sic)." (This second supplemental volume actually contains pages 247-574.) This supplemental two-volume clerk's record will be cited as "SCR.1: (page)" and SCR.2: (page)." Appellant believes there are two other very small supplemental clerk's records on file in this case but Appellant will not cite to those.

45 [2] The official new reporter's record that was certified by Susan Simmons is cited with the volume and page number in this format.

46 [3] The original court reporter filed a "Vol. 1 of 1 Vols" supplemental reporter's record which is of use now solely for the additional exhibits contained therein. There is no index to this volume nor page numbers. This supplemental exhibit volume will be cited as "S.Ex.1." This volume contains certain reporter's record pages not found in

Appellant's copy of the original reporter's record, together with the following exhibits in this order:

Court's Exhibit 1;

Court's Exhibit # (sic) B;

Court's Exhibit # (sic) C;

State's Exhibit A;

State's Exhibit B;

Defendant's Exhibit 70; and

Court's Exhibit # (sic) D.

There is a second, one-page supplemental exhibit volume purportedly containing the "second page" of Court's Exhibit 1 which will be cited "S.Ex.2." The Master Index does not reflect the existence of any "Court's Exhibit 1."

47 [4] Simmons refused to certify that Halsey's paper stenographic notes were a true and correct record of what happened in the courtroom because Simmons did not trust Halsey's work and Halsey lost, destroyed or concealed the audiotape of the proceedings that she made on the morning of October 21, 1996. SRR.26: 9-13, 19; 27: 3-4. After the original reporter's record was filed in this case, there were 28 hearings in the trial court which resulted from this Court's orders for the trial court to ensure the accuracy of the record. This supplemental reporter's record will be cited as "SRR.(Vol): (page)." The first hearing was styled as a SOLO VOLUME without a number, but it is cited as "SRR.1."

48 [5] The sock was probably the most important piece of evidence at the trial. The prosecutor contended that Appellant took the sock out of the house because for it to be found in the house would somehow incriminate her. RR.46: 5337-8. Appellant's attorneys argued that she could not have carried

the sock with the blood of both children on it out of the house to the place where it was found because there was substantial circumstantial evidence that she sustained deep knife wounds which bled profusely before either boy was cut, there was no blood between the house and location where the sock was found and she did not have enough time to carry it from the house to that location after the children were stabbed and then inflict her own wounds. RR.46: 5254, 5304-5.

49 **[6]** Although the Sandra Halsey reporter's record was ordered stricken by the trial court, the new reporter's record does not contain the actual exhibits introduced in the pre-trial hearing to hold Appellant without bond. RR.4, 5, and 6. The exhibits are found in Volume 6 of the Halsey record: "HR.6."

50 **[7]** The State used Darin's testimony to provide possible motives for Appellant to murder her children, place her in the room with the boys when they were killed, describe conditions at the crime scene that were allegedly inconsistent with her defense, and eliminate Darin as a suspect.

51 **[8]** If no hearing was conducted after counsel or the defendant made a timely objection to a potential conflict, a new trial is required without even determining whether "the alleged conflict actually existed." Cuyler v. Sullivan, 446 U.S. at 345 (explaining Holloway v. Arkansas, 435 U.S. at 489).

52 **[9]** A defendant has no burden to establish that his attorney's performance was adversely affected by an actual conflict of interest to obtain a new trial unless no one raised the issue at his trial and the trial court had no reason to be aware of it. Cuyler v. Sullivan, 446 U.S. at 348-49.

53 **[10]** The case at bar is distinguishable from James v. State for two important reasons: One, prejudice must be

presumed here because the court did not conduct a hearing when the prosecutor raised the issue of a conflict and, two, there was substantial evidence to support a plausible alternative defensive strategy in the record of the trial.

54 **[11]** Dr. DiMaio's trial testimony can be considered for the purpose of determining whether the trial court should have known that Mulder had an actual conflict because the trial court had a duty to conduct a hearing about it even if the existence of his conflict was not clear until "the closing moments of a trial." Lerma v. State, 679 S.W.2d at 497.

55 **[12]** Appellant's written statement and testimony left an opportunity for Darin to break the wine glass as he was walking from the Roman room to the kitchen, leave the murder weapon on the floor in the utility room, enter the garage, and then reach the bedroom on the second floor without being seen by Appellant again. When Appellant turned on the lights, picked up the murder weapon, and returned to the Roman room where she and the boys were stabbed, Darin could have slipped back into the kitchen, realized that the knife was not on the floor where he dropped it, raced back upstairs to the bedroom, and hope his wife finally succumbed to her wounds.

56 **[13]** A defense that shifted at least part of the blame to Darin would have been particularly convincing because it explained the facts which created the most doubt about the State's theory that Appellant murdered her children and staged the cover-up by herself. Darin could have inflicted knife wounds on Appellant that she could not have caused herself and carried the sock with the blood of both children on it to the alley without leaving any blood outside of the house to create the false impression that an intruder tried to kill everyone who was in the living room.

57 **[14]** The fact that Mulder asked Appellant's court appointed lawyers to represent Darin at the show cause hearing, RR.8: 8, is some indication that he was aware that he could have a conflict if he did so. Perillo v. Johnson, 205 F.3d at 805-06.

58 [15] The trial court discharged Halsey from her official duties after she gave false testimony to conceal the existence of audiotapes of the trial and invoked her Fifth Amendment right against self incrimination when she was questioned about it at a hearing on Appellant's motion to correct the record. SRR.3: 58-9; SRR.5: 10-11. The trial court made a finding that Halsey "is unable to certify the reporter's record in the case as true and correct." SCR.1: 21.

59 [16] The audiotapes were taken into the Court's possession and eventually turned over the Simmons without any evidence of authentication.

60 [17] The trial court scheduled a hearing for September 8, 2000, on Appellant's objections to the new record, SCR.2: 391, 465 but the hearing was cancelled by virtue of the issuance of an order at 3:15: p.m. on September 7th which referred the entire matter back to this Court. SCR.2: 368. Mulder and Halsey, among others, were subpoenaed to testify at the hearing, SCR.2: 372, 387, and the trial court refused to allow Appellant to make an offer of proof after it was canceled. SCR.2: 281, 286-291.

61 [18] Halsey however was mistaken as to having reported all the proceedings in this case. See RR.2.

62 [19] An appellate court may take judicial notice of facts which are notorious, well-known, or easily ascertainable. Eagle Trucking Co. v. Texas Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981).

63 [20] Appellant also raised questions about the accuracy of the record as to the presence of Appellant when certain jury note questions were addressed.

1 [21] Court's Exhibit AA is the trial proceedings prepared by Simmons, i.e., what is now filed in this Court as the official reporter's record for this case. Court's Exhibit BB is the Halsey record with Simmons' red-lined corrections which has been submitted to this Court as well. SRR.13: 59.

64 [22] This testimony reveals two important differences between the procedure that Simmons used and the standard procedure that she described. The standard procedure uses the unedited English translation of the stenographic notes that were actually typed during the trial as the primary source of the record and preserves the original stenographic record for comparison with the hard copy of the edited record that is filed with a court.

65 [23] Simmons did not say whether she made any use of the symbolic and English versions of the Halsey record on the computer edit disks or whether she compared them to each other. She may have believed that the disks were not of any use to her because Halsey could have changed them. SRR.13: 51-52.

1 [24] The handwritten language and lines found on this motion in the Supplemental Clerk's Record were not on the pleading as filed and Appellant is not positive who added these markings.

66[25] Appellant objected that Halsey's certificates on the original record could not be used to certify any part of the new one because she testified at her license revocation

hearing that she knew that her record was inaccurate when she signed them. SCR.2: 501-3. The trial court did not rule on that objection, but Halsey's certificates were not included in any of the volumes of the new record.

1 [26] Since the issue of "preservation" of an objection is an appellate court determination, perhaps the most that can be said about these findings is that the objections were specific enough to leave no doubt that the trial court understood them.

1 [27] This exhibit has a few erroneous citings to the record and it did not encompass the guilt and punishment phases. Appellant had a corrected and expanded version of this exhibit for introduction and use at the scheduled hearing of September 8, 2000.

67 [28] The docket sheet does not show that a hearing was scheduled on September 8, 2000, but Appellant filed a formal bill of exception to make a record of that fact. SCR.2: 282, 286. The trial court subsequently ruled that it did not have jurisdiction to approve her formal bill. SCR.2: 281. The State will not dispute that a hearing was set as alleged.

1 [29] Rule 613 was recodified in Rule 614 of the current version of the Texas Rules of Evidence that took effect on March 1, 1998.

1 [30] Stain LS1 near the left shoulder contained Darlie's and Damon's blood. RR.39: 3345. Stain LS3 near the left shoulder contained Darlie's and Devon's blood. RR.39: 3345. Stain T9 near the right shoulder contained Darlie's and Damon's blood. RR.39: 3344. Stain T10 near the right shoulder contained Darlie's and Devon's blood. RR.39: 3344.

1 [31] The unsworn statements that Appellant's attorneys made about their failure to anticipate that they would need to

have Harrell testify about Bevel's prior inconsistent statement must be accepted as true because the court and the prosecutor did not dispute them. Hicks v. State, 525 S.W.2d 177, 178 (Tex.Crim.App. 1975).

1 [32] In Tell v. State, the Court of Appeals held that the trial judge abused his discretion by excluding the testimony of a defense investigator about a prior inconsistent statement that a prosecution witness made to him because there was no evidence that the defendant's attorney anticipated using the investigator as a witness when the State invoked the rule. 908 S.W.2d at 541. Counsel knew that the investigator interviewed the witness about his failure to identify the defendant at a lineup, but there was nothing in the record to indicate that counsel anticipated that the witness would actually contradict his statement to the investigator.

1 [33] The one cast off stain that was definitely made by a single mixed drop of Appellant's blood and Damon's blood did not even establish that she must have been cut before Damon because it could have been cast off the knife to her shirt when she cut herself with the knife that she used to cut him. That hypotheses could not be stretched to explain how she could have stabbed both children before she cut herself if the four cast off stains on her shirt were each made with a single drop of her blood and a child's blood. None of the stains would have been made with a single mixed drop of her blood and the blood of the first child who was stabbed because that child's blood would have been wiped off the knife or mixed with the blood of the second child when the blade was repeatedly inserted into him.

1 [34] This nine minute survival period is almost unreasonably generous to the State. The medical examiner testified that it was "conceivably a little longer" than five minutes. When she was asked whether the boy could have survived for eight or nine minutes, she replied, "you can't tell." RR.28: 138.

[1] [35] Darin was with Appellant during the entire conversation and Officer Waddell was there for a substantial part of it.

[1] [36] This figure is also generous to the State. The paramedics arrived with Walling, but he testified they had to wait outside for one or two minutes while he and Waddell searched every room of the two story house to make sure that the intruder was not hiding there. RR.29: 412, 427-31, 438; RR.30: 550, 560, 693-95; RR.32: 1427-8. At least 10 seconds must have elapsed between the time that Walling invited the paramedics to enter the house and Damon's death. RR.32: 1432-33.

[1] [37] Appellant's testimony and written statement were consistent with the time line. She only had to follow the intruder to the utility room, turn on the kitchen light, pick up the knife, put it on the counter, return to the family room where she saw the bodies, go the entrance hallway, scream for Darin, wait for him to come down the stairs and call 911 between after Damon was stabbed. There was a two minute and six second window of opportunity for her to do these things because a paramedic or police officer could have rolled the vacuum through her blood in the kitchen several minutes after she bled there.

[1] [38] Former Rule 612(a) is now codified in Rule 613(a) of the Texas Rules of Evidence.

[1] [39] In Grunsfield v. State, 813 S.W.2d 158 (Tex.App. - Dallas 1991), aff'd on other grounds, 843 S.W.2d 521 (Tex.Crim.App. 1992), the Court of Appeals held that the State did not open the door to the contents of a written statement that a witness made to a police officer by merely questioning the officer about the fact that the statement was made, but that case is distinguishable from this one. The only probative inference that the Grunsfield jury could have drawn was that the prosecutor chose not to ask the officer what the witness told him because it would not have helped his case. Counsel's failure to question the officer about the contents of the witness' statement would not have been prejudicial because the jury had no reason to believe that counsel knew what the witness said. Here, the shoe was on the other foot: counsel knew what Bevel

said to them and the jury had no reason to suspect that the prosecutor was aware of it.

1 [40] Hamilton processed the kitchen counter where the knife rack was located for fingerprints, but he could not remember what specific items on the counter he dusted. RR.34: 2078.

1 [41] The violations of Appellant's right to counsel and right to be present were preserved without an objection on those specific grounds because the State must show that she personally made a voluntary and intelligent waiver of those constitutional rights and the record contains no evidence that she did so.

1 [42] See and compare CR.1A: 155-57 and RR.42: 4377-79.

1 [43] Smith v. State should be overruled because the case was based on the obviously erroneous premise that the absence of an express waiver of the defendant's presence is an element of a violation of Art. 36.27. 474 S.W.2d at 488. The statute requires a diligent effort to secure the defendant's presence and an express waiver of the defendant's right to have the answer to the jury's communication read in open court. When no effort was made to secure the defendant's presence, there was an error even if the answer was read in open court.