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08-16-00153-CR
EIGHTH COURT OF APPEALS
EL PASO, TEXAS
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DENISE PACHECO
CLERK

Nos. 08-16-00153-CR

IN THE

COURT OF APPEALS

FOR THE

EIGHTH DISTRICT OF TEXAS
(On transfer from the Second Court of Appeals)

FILED IN
8th COURT OF APPEALS
EL PASO, TEXAS
2/7/2017 1:48:25 PM
DENISE PACHECO
Clerk

TERRY LEE MORRIS, Appellant

V.

THE STATE OF TEXAS

Appeal in Cause No. 138239D

Criminal District Court Number 396TH, Tarrant County

The Honorable George Gallagher, Presiding

BRIEF FOR APPELLANT

February 7th, 2016

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF THE CASE

This is an appeal from a sexual performance of a child conviction. Tr. – 182, 197. Appellant plead not guilty, the jury found Appellant guilty and, finding the habitual enhancement count true, assessed punishment at sixty years confinement. Tr. – 197.

Appellant timely filed notice of appeal and the trial court certified Appellant's right to appeal. Tr. – 202, 204. A Motion for New Trial was filed which was overruled by operation of law. Tr. – 210. The case was transferred from the Second Court of Appeals to the Eighth Court of Appeals on June 21st, 2016. Tr. – 225 – 227. After an extension to file, Appellant's brief is presently due on February 7th, 2017 and will be timely filed.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE:
THE TRIAL COURT ABUSED ITS DISCRETION BY PLACING A STUN BELT ON APPELLANT AND REPEATEDLY SHOCKING HIM FOR NON-RESPONSIVE ANSWERS RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION

POINT OF ERROR NUMBER TWO:
THE TRIAL COURT ABUSED DICRETION IN NOT CONDUCTING A HEARING AND DENYING COUNSEL'S REQUEST TO WITHDRAW DUE TO CONFLICT

POINT OF ERROR NUMBER THREE:
THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT A COMPETENCY INQUIRY AND HEARING

POINT OF ERROR NUMBER FOUR:
THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE SEARCH OF APPELLANT'S CELL PHONE

STATEMENT OF FACTS

Sufficiency of the evidence is not challenged, thus a brief recitation of fact is rendered. The evidence reflected Appellant dated the victim's mother and, after they broke up, Appellant and the victim began a Facebook friendship. R. Vol. V – 54 – 56. The victim was fifteen years old. R. Vol. V – 34. Appellant and the victim exchanged phone numbers and started texting, with the texts turning mutually romantic and sexual. R. Vol. V – 57- 58, 64, 74. Ultimately, Appellant and the victim exchanged explicit photographs and Appellant requested the victim send him nude photos, which she did, culminating in the instant charge. R. Vol. V – 34, 58 – 59, 70, 78.

At punishment, the defense introduced Appellant's mental health history through approximately 1000 pages of MHMR and JPS records and his testimony. R. Vol. VIII – 73 - 74. The State introduced the testimony of two extraneous victims involving indecency and a solicitation of minors and prior felony convictions to prove the habitual count, resulting in the sixty year sentence. R. Vol. VIII- 79 – 80.

SUMMARY OF ARGUMENT

Point of Error Number One:

THE TRIAL COURT ABUSED ITS DISCRETION BY PLACING A STUN BELT ON APPELLANT AND REPEATEDLY SHOCKING HIM FOR NON-RESPONSIVE ANSWERS RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION

While being arraigned before the jury, Appellant spoke out of turn by making objections. R. Vol. V – 16 – 18. After sending the jury out, the court admonished Appellant and asked him if he would behave. R. Vol. V – 16 – 21. When Appellant responded by making another objection, the trial court ordered the bailiff to shock him, ultimately three separate times, with a stun belt and then removed him from the courtroom. R. Vol. V – 16 – 21.

After being shocked, Appellant was afraid to return to the courtroom. R. Vol. V – 92. Because of this, he was not present for the entirety of the state's witnesses in his trial and could not aid in his defense or confront the witnesses. Thus, the court's conduct of placing the shock belt on Appellant and shocking him numerous times denied Appellant his constitutional rights to due process, a fair trial, to confront the witnesses, to confer with counsel, to be present at trial, and to participate in his defense.[1]

Point of Error Number Two:

THE TRIAL COURT ABUSED DICRETION IN NOT CONDUCTING A HEARING AND DENYING COUNSEL'S REQUEST TO WITHDRAW DUE TO CONFLICT

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1 *See Wrinkles v. State*, 749 NE2d 1179 (Ind. 2001), *cert den*, 535 US 1019 (2002) (ban on stun belts because "[a] pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law"

From the very beginning, it was clear the attorney-client relationship was abridged. The trial court abused discretion when it denied counsel's motion to withdraw without a hearing, resulting in representation that was not conflict-free.[2] The conflicts were numerous and included a federal lawsuit Appellant had filed against counsel as well as the trial court. R. Vol. II – 5, 7 – 12; R. Vol. III – 7 – 10. Evidence that these conflicts 'adversely affected' counsel's representation at trial is most starkly reflected in the fact Appellant was fitted with a shock belt and repeatedly electrically shocked for non-responsive answers without a single objection by defense counsel.[3]

Point of Error Number Three:

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT A COMPETENCY INQUIRY AND HEARING

The trial court erred in failing to investigate Appellant's competency before proceeding to trial. Specifically, appellant's documented mental health history, non-responsive answers and objections to counsel and the court, and his rambling and somewhat illogical testimony was sufficient evidence to suggest appellant may not be competent to stand trial. Therefore, the trial court was required to conduct an inquiry as to appellant's competency and it was an abuse of discretion for the court to fail to do so.

Point of Error Number Four:

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE SEARCH OF APPELLANT'S CELL PHONE

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2 *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45,100 S. Ct. 1708, 1716-17, 64 L. Ed. 2d 333 (1980).

3 See Point of Error Number One

The warrant affidavit reflected probable cause to search Appellant's phone for nude photographs. However, the warrant authorized a full scale search of everything on Appellant's phone including information that was not photos, i.e., word texts, contacts lists, phone call logs. From the four corners of the affidavit, probable cause did not exist to search the entirety of Appellants phone.[4] Tr. – 122 – 124 (motion to suppress); R. Vol. III – 15 – 30 (hearing on motion to suppress). There was no evidence reflecting a "'fair probability'" or "'substantial chance'" that contraband or evidence of a crime would be found in any other location in the phone other than where photographs could be kept.[5] Thus, the search and complete download of the entirety of his phone was not supported by probable cause and admission of this illegally obtained evidence requires reversal.

4 At trial, the State offered into evidence the entire forensic download of Appellant's phone wherein *everything* contained on his phone had been searched including contact lists, text messages, photographs and phone calls. R. Vol. V – 72 – 73.

5 *See Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004); *Nichols v. State*, 877 S.W.2d 494, 497 (Tex. App.--Fort Worth 1994, pet. ref'd); *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 257 n.13, 103 S. Ct. 2317, 2332, 2342 n.13, 76 L. Ed. 2d 527 (1983)).

ARGUMENTS

Appellant's Point of Error Number One:

THE TRIAL COURT ABUSED ITS DISCRETION BY PLACING A STUN BELT ON APPELLANT AND REPEATEDLY SHOCKING HIM FOR NON-RESPONSIVE ANSWERS RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION

Applicable law:
Use of a stun belt[6] is constitutionally prohibited unless legitimately necessitated

One of the most basic rights guaranteed by Due Process and the Confrontation Clause is the defendant's right to participate at every stage of his trial.[7] This most fundamental protection allows every defendant the right to be present throughout his trial, confer with counsel, confront witnesses, and participate in his defense as a due process mandate.[8] The Supreme Court has held that any type of physical restraint placed upon a defendant in trial, whether it be shackles, gags,

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6 A stun belt is an electronic device secured around the waist or leg with prongs attached to the left kidney that is activated remotely delivering a 50,000 volt electrical shock to the wearer lasting eight seconds and causing incapacitation in the first few seconds and severe pain during the entire period. *See State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd); *Chavez v. Cockrell*, 310 F.3d 805, 807 n.1 (5th Cir. 2002); *People v. Mar*, 52 P.3d 95, 103 (Cal. 2002); *Hawkins v. Comparet-Cassani*, 251 F3d 1230, 1234 (9th Cir. 2001); *United States v. Durham*, 219 F. Supp. 2d 1234, 1239 (N.D. Fla. 2002).

7 Tex. Const, Art. I, sec. 10; U.S. Const., amends. V, VI, XVI; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Lewis* v. *United States*, 146 U.S. 370 (1892); *Gideon* v. *Wainwright*, 372 U.S. 335, 340-341, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd).

8 *Id.*

handcuffs, armed guards, removal from courtroom or stun belt, has the potential of contravening these foundational constitutional rights[9]. The use of physical restraints diminishes and interferes with the accused's "ability to communicate" with his lawyer and participate in his own defense and a stun belt restraint specifically "imposes substantial burdens upon a defendant's constitutional rights".[10]

Stun belts are not the appropriate remedy for general disruption or speaking out of turn.

The application of a stun belt has come under strict scrutiny with severe limitations by a number of courts.[11] Only under extremely restricted settings and where "exceptional

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9 *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970) (binding and gagging only allowed where necessary to conduct courtroom order); *United States v. Durham*, 287 F.3d 1297, 1305-06 (11th Cir. 2002) (wearing stun belt has capacity to disrupt most fundamental constitutional rights to be present at trial and to participate in defense); *Long v. State*, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001) (stun belt unconstitutional if used for verbal outburst); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997) (stun belt allowed where ***significant risk of violence*** and escape posed); *United States v. Edelin*, 175 F. Supp.2d 1, 7-8 (Dist. D.C. 2001) (stun belts can be used for proven security need); *United States v. McKissick*, 204 F.3d 1282 (10th Cir. 2000) (use allowed only when required to prevent disruption); *Holbrook v. Flynn*, 475 U.S. 560 (1986). *See State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd);

10 *United States v. Durham*, 287 F.3d 1297, 1305-06 (11th Cir. 2002); *Id.*; *Allen*, 397 U.S., at 344, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (the use of shackles at trial "affronts" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold.")

11 A number of courts throughout the nation have determined that wearing stun belts violate constitutional rights and are either outright banned use or only allowed used in the most extreme circumstances: *United State v. Durham*, 287 F3d 1297 (11th Cir. 2002) (stun belt prohibited for non-security reasons); *People v. Mar*, 52 P3d 95 (Cal. 2002) (stun belt prohibited where no threat of violence shown); *Hawkins v. Comparet- Cassani*, 251 F3d 1230 (9th Cir. 2001) (use of stun belt to control verbal courtroom outbursts unconstitutional and judges' statements after the fact

circumstances or a manifest need for such restraint" is shown, can constitutional rights be subjugated by the application of a stun belt.[12] Courts must indulge every reasonable presumption against the abridgement of constitutional rights; thus, the use of restraints are subject to close judicial inspection.[13] The restraints must further a legitimate state interest and be proportionate to the need or threat.[14] In the case of stun belts, it is incumbent upon the court to explore less punishing measures to accomplish safety in the courtroom.[15] Stun belts are considered the

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that activation was for security reasons unsupported by the record); *Wrinkles v. State*, 749 NE2d 1179(Ind. 2001), *cert den*, 535 US 1019 (2002)(outright ban on the use of stun belts in Indiana courts because "[a] pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law"). *See also* Shelly A. Nieto Dahlberg, Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether its Use is Permissible Under the United States and Texas Constitutions*, 30 St. Mary's L.J. 239 (1998); Philip H. Yoon, *The "Stunning" Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill*, 15 Cap. Def. J. 383 (2003); Minerva Canto, *Federal Government Investigates Use of Stun Belt*, Lansing State Journal, August 17, 1998, p. 4A. Because the Texas Court of Criminal Appeals has not directly weighed in on this issue, it appears ripe for discretionary review.

12 *Id*., *Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994) (shackles permitted where safety need is shown); *Fountain v. United States*, 211 F.3d 429, 436 (7th Cir. 2000) (shackled in the presence of the jury allowed only in cases of "extreme need," when "necessary to maintain the security of the courtroom"); *Wilkerson v. Whitley*, 16 F.3d 64, 67 (5th Cir. 1994) (handcuffs allowed where a risk of escape and injury shown); *Hernandez v. Beto*, 443 F.2d 634, 636 (5th Cir. 1971);*United States v. Collins*, 109 F.3d 1413, 1417-18 (9th Cir. 1997) (upholding use of shackles in case where legitimate flight risk shown); *Long v. State*, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991).

13 *Culverhouse v. State*, 755 S.W.2d 856, 859-60 (Tex. Crim. App. 1988); *Mendoza v. State*, 1 S.W.3d 829, 830-31 (Tex. App.-Corpus Christi 1999, pet. ref'd); *State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd); *Holbrook v. Flynn*, 475 U.S. 560, 568, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

14 *Id.*

15 For example, the Supreme Court has held that binding and gagging an "obstreperous defendant" is permissible to maintain courtroom order. *Illinois v. Allen*, 397 U.S. 337 (1970).

extreme consequence and are ***not*** the appropriate remedy for general disruption or speaking out of turn.[16] Rather, stun belts are only to be evoked where security concerns are involved.[17]

The court is required to have a hearing and justify necessity before a stun belt can be employed

Before a trial court is authorized in ordering the physical restraint of an accused, he should conduct a hearing outside the presence of the jury and set forth with specificity the reasons supporting his decision.[18] The record must clearly and affirmatively reflect the trial judge's reasons for imposition of restraints.[19] The decision to use physical restraints must be proportional and made on a case-by-case basis relative to the risk factors involved.[20] The trial

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The Fifth Circuit has held plain clothes deputies sitting next to a defendant for safety allowed. *United States v. Nicholson*, 846 F.2d 277 (5th Cir. 1988).

16 *United States v. Durham*, 287 F.3d 1297, 1305-06 (11th Cir. 2002) (wearing stun belt has capacity to disrupt most fundamental constitutional rights); *Long v. State*, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001) (use of stun belt to control verbal courtroom outbursts unconstitutional); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997) (stun belt allowed where ***significant risk of violence*** and escape posed); *United States v. Edelin*, 175 F. Supp.2d 1, 7-8 (Dist. D.C. 2001) (stun belts can be used for proven ***security*** need).

17 *Id.*

18 *Id.*; *Simms v. State*, 127 S.W.3d 924 (Tex. App. – Corpus Christi 2004, pet. ref'd) (trial court abused its discretion by not making a record of specific reasons for authorizing restraint); *Gammage v. State*, 630 S.W.2d 309, 314 (Tex. App.-San Antonio 1982, pet ref'd). *Long*, 823 S.W.2d at 282 (citing *Cooks*, 844 S.W.2d at 722) (trial judge must set forth with specificity the reasons supporting his decision to restrain the defendant); *State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd).

19 *Id.*; *Cooks v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992); *Long*, 823 S.W.2d at 282.

20 *Simms v. State*, 127 S.W.3d 924 (Tex. App. – Corpus Christi 2004, pet. ref'd) (trial court

court abuses discretion where such findings are not on the record or where necessity is not justified.[21] The use of restraints will require reversal where the decision constitutes an abuse of discretion causing harm.[22]

Application of Law to Facts: Cruel and unnecessary use of a stun belt occurred when the court repetitively shocked Appellant for not answering questions

In the instant case, approximately two weeks prior to trial, a hearing was held regarding the filing of records. R. Vol. II – 5. Defense counsel wanted to file Appellant's mental health records and requested his consent. R. Vol. II – 5-7. At the hearing, Appellant expressed apprehension over filing his personal records and his desire to fire his attorney. R. Vol. II – 7. (hearing attached as Exhibit A). During this hearing, Appellant testified and voiced his concerns about his attorney and requested his removal from the case. R. Vol. II – 7 - 9. (hearing attached as Exhibit A). His request was denied. R. Vol. II - 9. Throughout the proceeding, Appellant exhibited a layman's lack of understanding and, although he was non-responsive at times in that

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abused its discretion by not making a record of specific reasons for authorizing restraint); *Gammage v. State*, 630 S.W.2d 309, 314 (Tex. App.-San Antonio 1982, pet ref'd). *Long*, 823 S.W.2d at 282 (citing *Cooks*, 844 S.W.2d at 722) (trial judge must set forth with specificity the reasons supporting his decision to restrain the defendant); *State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd). *See also Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001) (stun belt unconstitutional if used for verbal outburst); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997) (stun belt allowed where ***significant risk of violence*** and escape posed); United States v. Fields, 483 F3d 313 (5th Cir. 2007)(danger of escape or violence required to be reflected somewhere in record).

21 *Id.*

22 *Simms v. State*, 127 S.W.3d 924 (Tex. App. – Corpus Christi 2004, pet. ref'd); *Gammage v. State*, 630 S.W.2d 309, 314 (Tex. App.-San Antonio 1982, pet ref'd).

he asked a number of questions in response to the attorneys and courts questions, he was in no way disrespectful, threatening, aggressive or violent. R. Vol. II – 7. (hearing attached as Exhibit A). The court did not feel the need to hold him contempt nor admonish him in any regard.

A few days prior to trial another hearing was held to arraign the Appellant and address the motion to suppress. R. Vol. III. Appellant testified and was present throughout. R. Vol. III- 6 – 24; 26 - 31. Once again Appellant exhibited a general lack of understanding of the procedures[23], asserted questions and expressed his desire to fire his attorney, but was in no way aggressive, violent or threatening and was not admonished nor held in contempt by the court. R. Vol. III – 6-24; 26 - 31. Appellant addressed the court with respect throughout, asked to have the opportunity to ask questions before he spoke and used "yes sir" and "no sir" in his responses. R. Vol. III – 6-24; 26 - 31. He also told the court that he had filed a federal lawsuit against his attorney and the trial court which was pending and asked for his attorney to be recused due to the conflict of interest caused by the lawsuit. R. Vol. III – 35 – 36; R. Vol. IV – 4 - 6. The request was denied. R. Vol. III – 36.

The first mention of using a stun belt occurred at this hearing in the context of whether Appellant wanted to wear dress clothes for trial. The following discussion took place:

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23 It was at this juncture the court questioned Appellant's competency status. R. Vol. III – 5. A discussion was had wherein the defense stated Appellant had a mental health history with hospitalizations in the past. R. Vol. III – 9 – 13. The court asked if Appellant had been evaluated for competency and the defense stated that in May 2015, over a year earlier, Appellant was evaluated and found competent and seven months earlier he was evaluated by the defense expert and found competent. R. Vol. III – 9, 18. Based on this, the judge found Appellant competent to stand trial. R. Vol. III -11. See Point of Error Three.

THE COURT: All right. So are you saying you do or you do not want to wear jail clothes?

THE DEFENDANT: Doesn't matter to me, sir.

THE COURT: Well, the law is I have to have you wear civilian clothes unless you tell me no. And if you say, I'm not going to tell you, then I have to make you wear civilian clothes, which means we're going to forcibly put clothes on you. And that's what I'm trying to avoid. If you don't want to wear them, that's fine with me. I just need to know one way or the other.

THE DEFENDANT: I don't know what to say really. I really don't know. I –

THE COURT: All right. Well here's what we'll do. Here's what we'll do –

THE DEFENDANT: -- stand here with this guy.

THE COURT: Here's what we'll do next week. We need to get the sheriff involved, we will get a shock belt and we'll put -- we're going to put a shock monitor on your leg. Okay? Because then if you don' don't behave and do what the bailiffs ask you to do, **then we can shock you to where we put you down on the ground and we'll forcibly put clothes on you.** So I don't want to do that. That's why I'm asking you. Do you want to just tell me right up front, do you want to agree to wear the clothes or not wear the clothes? Because otherwise, I'm going to have to do some extraordinary methods. I'm going to have to do some extraordinary things to make sure that I comply with the law. So –

THE DEFENDANT: Do I have to wear them?

THE COURT: You don't have to if you don't want to.

THE DEFENDANT: I don't want to.

THE COURT: All right. That's very good. That's very good. Then we'll let you appear in your jail clothes.

THE DEFENDANT: Great.

R. Vol. III – 22 -23.

A few days later, on the day trial was set to begin, defense counsel filed a motion to withdraw due to the conflict from the pending lawsuit Appellant filed.[24] R. Vol. IV - 4. Tr. – 161 – 162. The request was denied. R. Vol. IV - 6. Afterward, a full day of voir dire was conducted and a jury was seated. Appellant was present throughout the proceedings, answered questions politely and appropriately and no problems were reflected on the record. R. Vol. IV.

The trial formally began the next day and, without a hearing delineating any reason therefore, Appellant had been equipped with a stun belt. R. Vol. V – 16 – 21. As the court was giving its general instructions to the jury, Appellant made a verbal objection which was ignored. R. Vol. V – 11. Appellant was then arraigned in front of the jury and when asked by the court to enter his plea the following colloquy occurred:

> THE COURT: To this charge you may plead guilty or not guilty. What is your plea?
>
> THE DEFENDANT: Sir, before I say that, I have the right to make a defense.
>
> THE COURT: The –
>
> THE DEFENDANT: It was brought to my attention by the United States district court to do this. And before the Court -- for the information of the Court, yesterday you gave this man orders to put a shock rag or a shock collar on my ankle to prevent me from saying anything in my defense. If it happens, it happens. But let me just say for the record –
>
> THE COURT: No, wait just a minute.
>
> THE DEFENDANT: -- lawsuit pending against this judge.
>
> THE COURT: Jury, go to the jury room.

24 See Point of Error Number Two.

THE DEFENDANT: I have a lawsuit pending against this attorney. I've asked this judge to recuse himself off my case. It's in relation to the Ken Paxton case, Attorney General Ken Paxton. I've asked this attorney to recuse himself off my case. They both refused to. I have that right.

(Jury leaves courtroom)

THE DEFENDANT: The defendant has a right to object to procedures whereby a party asserts a piece of evidence or other matters –

THE COURT: Mr. Morris. Mr. Morris. I am –

THE DEFENDANT: That's the law.

THE COURT: Mr. Morris, I am giving you one warning. You will not make any additional outbursts like that, because two things will happen. Number one, I will either remove you from the courtroom or I will use the shock belt on you.

THE DEFENDANT: All right, sir.

THE COURT: Now, are you going to follow the rules?

THE DEFENDANT: Sir, I've asked you to recuse yourself.

THE COURT: Are you going to follow the rules?

THE DEFENDANT: I have a lawsuit pending against you.

THE COURT: **Hit him**.

(Deputy complies)

THE COURT: Are you going to behave?

THE DEFENDANT: I'm an MHMR client.

THE COURT: Are you going to behave?

THE DEFENDANT: I have a history of mental illness.

THE COURT: **Hit him again**.

(Deputy complies)

THE DEFENDANT: I have a history of mental illness. You're wrong for doing this.

THE COURT: Are you going to behave?

THE DEFENDANT: ***You're torturing an MHMR client***. I have agoraphobia. I'm under medication.

THE COURT: Are you going –

THE DEFENDANT: I take 17 pills a day for my disability, my MHMR disability. You have no right to do this.

THE COURT: Are you going to behave?

THE DEFENDANT: I have the right –

THE COURT: You have no right to disrespect the Court.

THE DEFENDANT: I have the right. Nobody is –

THE COURT: I'm going to give you the option to do one of two things. You can either behave in the courtroom –

THE DEFENDANT: I don't have an attorney. I'm firing this man. I've told him to get off my case. And the defendant has a right to refuse counsel. I have the right to represent myself in this case, and I shall.

THE COURT: All right. Let's talk about that. Counsel may be seated. How far did you go in school?

THE DEFENDANT: Sir, that's beside the point. There's serious allegations that I have in the United States District Court against this man. No one wants to be represented by someone they have a lawsuit against. No one wants a judge to preside over their case who the lawsuit is against. ***No one wants to be tortured*** because they're an MHMR defendant prevented from saying anything in the Court in front of the jury pertaining to any such cases such as the grand jury –

THE COURT: Mr. Morris, are you going to answer my question?

THE DEFENDANT: I've asked you, I've filed a motion asking –

THE COURT: Would you **hit him again**.

(Deputy complies)

THE DEFENDANT: -- to recuse yourself from the Bench off my case.

THE COURT: Are you going to answer my questions?

THE DEFENDANT: You refuse to –

THE COURT: Are you going to answer my questions? Yes or no. I need an answer.

THE DEFENDANT: I'm a MHMR client.

THE COURT: Put him up.

THE DEFENDANT: No, sir.

THE BAILIFF: Sir, you do not want to do this.

(Defendant leaves courtroom)

THE COURT: There is a folder or something on the floor.

MR. RAY: That's his stuff.

THE COURT: ***The Court will find that the defendant refused to answer the Court's questions.*** The Court will find that the defendant's demeanor in the presence of the jury as well as outside the presence of the jury towards counsel and towards the Court is sufficient enough to have the defendant removed from trial and he will not be present in the courtroom until he continues -- until he exhibits appropriate behavior or demeanor or wishes to come back into the courtroom. The Court will proceed without him. The Court will enter a plea of not guilty to the charges. And we are ready to proceed with the jury. Is the State ready?

MS. RISINGER: Yes, Your Honor.

THE COURT: Defense?

MR. RAY: I just want to make sure that the record's clear. He's got a right to be here until the trial begins. And we were kind of in the middle of his plea, which after the prosecutor read the indictment, he wouldn't answer, and you were trying to enter a plea of not guilty for him when he interrupted you.

THE COURT: Correct.

MR. RAY: I don't know if that's the impression you got. That's what I saw.

THE COURT: Yes. So in the presence of the jury, the Court will enter a plea of not guilty on his behalf.

R. Vol. V – 16 – 21 (emphasis supplied).

Testimony was heard from two witnesses, the court took a recess and Appellants' attorney asked Appellant if he wanted to come back into the courtroom, after being shocked three times, to which he declined. R. Vol. V – 46. At that point the court decided to state the following for the record:

THE COURT: All right. For purposes of the record, before we go any further, the Court would like to place into the record, when Mr. Morris began his statements in the presence of the jury and before I was able to send the jury back out, the defendant had gone from merely standing next to counsel to beginning to move to his right just a little bit towards the edge of the table and his agitation continued to increase. Once the jury was outside the presence --once the jury was outside of the courtroom and outside the presence of the jury, the record will adequately reflect that the defendant continually refused to talk -- to answer the Court's questions and his demeanor continued to escalate. Let the record reflect that within about five feet from where the defendant was standing there is an 87-inch electronic Smart Board that weighs over 200 pounds that is readily within reach of the defendant, that had he grabbed that board, could have brought it over to the counsel table to affect the safety of the lawyers, Mr. Ray and the two prosecutors that would be sitting within anywhere from three to five feet if he went the other way. It was based on the totality of his continuing escalation and his movements that the Court ordered that the shock belt be initiated. It was done for the safety of all of the lawyers and all of the participants. Are y'all ready for the jury?

R. Vol. V – 46 – 47.

Appellant remained in the holdover and not present for the remainder of the guilt-innocence phase of the trial. R. Vol. V. He was not present to confront the victim nor hear her

testimony. R. Vol. V. At the lunch break, the bailiff asked Appellant if he wished to return to court and he declined. R. Vol. V – 91 – 92. Defense counsel stated the following:

> [DEFENSE COUNSEL]: I asked him if he wanted to come in court and be present. He said he didn't want to. ***He said he was scared***. I told him he didn't have anything to be scared about. But he would have to behave, that he couldn't run his mouth to the Court, in front of the jury, or anything else. He had to be quiet. That didn't change his opinion about what he wanted to do. Then I told him if he did change his mind, to let the bailiff -- you got a bailiff back in the holdover cell with him, let the bailiff know and I'd bring that to your attention.

R. Vol. V – 92 (emphasis supplied). Appellant did not return to court until a few days later, after the guilty verdict was rendered and after numerous punishment witnesses testified. R. Vol. VII. Thus, Appellant was denied his confrontation rights to the entirety of trial.

Ultimately, Appellant testified at the punishment phase, after hearing none of the evidence or testimony of the state's witnesses. R. Vol. VIII – 47 – 65. During his testimony he described a history of mental illness and sexual and physical abuse. R. Vol. VIII – 47 – 65. At times his testimony did not make logical sense, and reflected evidence of mental illness in his ramblings. R. Vol. VIII – 47 – 65. He also would blurt out objections from time to time or make statements; however, he did not exhibit any violent, aggressive or threatening behavior. R. Vol. VIII – 47 – 65.

Repeated electrical shocks were an inhumane and disproportionate reaction to Appellant's non-responsive answers

The trial court initially abused its discretion by compelling Appellant to wear the shock belt restraint without a hearing and giving no reason therefore. Before a trial court is authorized to order the physical restraint of an accused, he should conduct a hearing to assist the appellate court in its review and "the record must clearly and affirmatively reflect the trial judge's reasons

therefor."[25] No hearing was held in the instant case and there is nothing in the record that legitimizes the courts conduct.

While Appellant's behavior at times was obstreperous, nothing in the record reflects that he was violent, aggressive, threatening or a flight risk. The court did not explain any manifest need to affix the shock belt restraint on Appellant or why any of a number of less abusive restraints would not suffice. There was absolutely no security based reason for the stun belt restraint; thus, placing it on Appellant at the outset was a clear abuse of discretion.[26]

Further, and most abhorrent, the court actually ordered the shocking of Appellant on three separate instances, *not* for any threats of violence, but ***because Appellant would not answer the court's questions***. Such abusive action borders on torture and cannot be countenanced by our law.[27]

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25 *Long*, 823 S.W.2d at 282 (citing *Cooks*, 844 S.W.2d at 722) (trial judge must set forth with specificity the reasons supporting his decision to restrain the defendant); *Gammage*, 630 S.W.2d at 314; *Simms v. State*, 127 S.W.3d 924 (Tex. App. – Corpus Christie, 2004, pet. ref'd) (trial court abused its discretion by not making a record of specific reasons for authorizing restraint).

26 *Id*.; *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001) (use of stun belt to control verbal courtroom outbursts unconstitutional); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997) (stun belt allowed where ***significant risk of violence*** and escape posed); *United States v. Edelin*, 175 F. Supp.2d 1, 7-8 (Dist. D.C. 2001) (stun belts can be used for proven security need).

27 *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970) (binding and gagging only allowed where necessary to conduct courtroom order); *United States v. Durham*, 287 F.3d 1297, 1305-06 (11th Cir. 2002) (wearing stun belt has capacity to disrupt most fundamental constitutional rights to be present at trial and to participate in defense); *Long v. State*, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001) (stun belt can be used for security, but ***not to control disruption***); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997) (stun belt allowed where ***significant risk of violence*** and escape posed); *United States v. Edelin*, 175 F. Supp.2d 1, 7-8 (Dist. D.C. 2001) (stun belts can be used for proven security need).

Although the court has wide discretion to protect the sanctity, safety and decorum of the courtroom, such discretion cannot extend to the level of sending ***three***, eight second, 50,000 volt electrical currents through an individual's body as a repercussion for speaking out of turn or being non-responsive to the court's questions.[28] The use of electrical shock to control verbal courtroom outbursts is disproportionate and unconstitutional.[29] Many other appropriate, non-violent and non-abusive measures are available to protect court decorum- admonishment, contempt and removal from the court, to name a few. Simply stated, the infliction of physical pain for the sole purpose of silencing a defendant is constitutionally untenable.[30]

The Court's post-shock justifications are not supported by the record

After being shocked, Appellant refused to return to the courtroom because of fear. R. Vol. V – 92. It was only *after* Appellant refused to return that the court stated on the record why he felt the need to shock Appellant. He then attempted to justify the shocks by stating that

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28 *Id.*

29 *Hawkins v. Comparet- Cassani*, 251 F3d 1230 (9th Cir. 2001) (use of stun belt to control verbal courtroom outbursts unconstitutional and judges' statements after the fact that activation was for security reasons unsupported by the record); footnote 5 above.

30 ***Appellant urges this Court to impose a per se reversal when trial court's force defendant's to wear stun belts, and particularly when they are deployed, without any showing of a manifest security based need.*** "[T]he evolving standards of decency that mark the progress of a maturing society" reflect widespread rejection of the use of this device as an implement of torture. Quote from *Atkins v. Virginia*, 536 U.S. 304 (2002). See, e.g. *Hawkins v. Comparet- Cassani*, 251 F3d 1230 (9th Cir. 2001) (use of stun belt to control verbal courtroom outbursts unconstitutional and judges' statements after the fact that activation was for security reasons unsupported by the record); *Wrinkles v. State*, 749 NE2d 1179(Ind. 2001), *cert den*, 535 US 1019 (2002)(stun belts banned in Indiana courts because "[a] pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law"); footnote 5 above.

Appellant was getting agitated and *could* reach items in the courtroom to cause harm to the litigants. R. Vol. V – 46 - 47. Once again, much more appropriate remedies were available to address this concern- shackles, handcuffs, bailiffs in close proximity.

Of more importance, the record itself bears out the electrical shocks were delivered because Appellant was refusing to answer the court's questions and ***not*** because he was agitated or threatening anyone.[31] The context of the shocks was directly related to the court's questioning. The exchange went as follows:

THE COURT: Are you going to follow the rules?

THE DEFENDANT: I have a lawsuit pending against you.

THE COURT: **Hit him**.

(Deputy complies)

THE COURT: Are you going to behave?

THE DEFENDANT: I'm an MHMR client.

THE COURT: Are you going to behave?

THE DEFENDANT: I have a history of mental illness.

THE COURT: **Hit him again**.

(Deputy complies)

THE DEFENDANT: I have a history of mental illness. You're wrong for doing this.

THE COURT: Are you going to behave?

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31 This situation is directly analogous to the *Hawkins* case where the trial judge ordered activation of the stun belt and later sought to justify the action by stating she was afraid the defendant would attack someone. The *Hawkins* court found this justification to ***not*** be born out in the context of the record. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir, 2001).

THE DEFENDANT: You're torturing an MHMR client. I have agoraphobia. I'm under medication.

… .

THE DEFENDANT: I don't have an attorney. I'm firing this man. I've told him to get off my case. And the defendant has a right to refuse counsel. I have the right to represent myself in this case, and I shall.

THE COURT: ***All right. Let's talk about that. Counsel may be seated. How far did you go in school?***

… .

THE COURT: Mr. Morris, are you going to answer my question?

THE DEFENDANT: I've asked you, I've filed a motion asking –

THE COURT: Would you **hit him again**.

(Deputy complies)

THE DEFENDANT: -- to recuse yourself from the Bench off my case.

THE COURT: Are you going to answer my questions?

THE DEFENDANT: You refuse to –

THE COURT: Are you going to answer my questions? Yes or no. I need an answer.

THE DEFENDANT: I'm a MHMR client.

THE COURT: Put him up.

R. Vol. V – 18 – 21 (emphasis supplied). Had the judge been seriously concerned for the safety of the court participants or the "escalation" of Appellant's demeanor, he would never have continued a discussion with Appellant. After shocking Appellant twice, the court actually told the lawyers to "be seated" and began a discussion with Appellant about self- representation. This would not have occurred if Appellant was agitated and violent. The court would have simply

removed Appellant from the courtroom, as he ultimately did. Lastly, the court was very clear just after he had shocked Appellant as to why he did so. The court stated, *"**[t]he Court will find that the defendant refused to answer the Court's questions".***

This conduct quite candidly shocks the conscience. There was no manifest security need to place the stun belt on Appellant, let alone shock him. The record itself belies the retroactive statements attempting to justify the same. The repeated electrical shocks imposed upon Appellant were an abhorrent and disproportionate response to his conduct of speaking out of turn.

The repetitive shocks and use of stun belt vitiated Appellants constitutional rights

After being shocked, Appellant was afraid to return to the courtroom. R. Vol. V – 92. Because of this, he was not present for the entirety of the state's witnesses in his trial and in no way could aid in his defense or confront these witnesses. Thus, the court's conduct of placing the shock belt on Appellant and shocking him numerous times denied Appellant his constitutional rights to a fair trial, to confront the witnesses, to confer with counsel, to be present at trial, to participate in his defense and to have even a modicum of due process of law.[32] Appellant was incapacitated and unable to participate in his trial, confer with his counsel during the trial, or aid in the cross examination of the victim in the case. Just as in *Durham*, a case where the court found the defendant was impeded by only having to *wear* the shock belt, Appellant's anxiety

32 *See Wrinkles v. State*, 749 NE2d 1179 (Ind. 2001), *cert den*, 535 US 1019 (2002) (ban on stun belts because "[a] pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law"

about actually being electrically shocked and “tortured” by the court, made him afraid to enter the courtroom, impinged his ability to confer with counsel and have any meaningful participation in his trial.[33] “A pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law".[34] For all these reasons, the trial court abused its discretion by placing a stun belt on appellant and repeatedly shocking him for non-responsive answers resulting in harm from a denial of his constitutional rights to due process and confrontation. Reversal is required.

Appellant’s Point of Error Number Two:

THE TRIAL COURT ABUSED DICRETION IN NOT CONDUCTING A HEARING AND DENYING COUNSEL’S REQUEST TO WITHDRAW DUE TO CONFLICT

Applicable law:
Standard of Review for Motion to Withdraw

An attorney may not withdraw without the permission of the trial court.[35] The decision whether to permit counsel to withdraw is within the trial court's sound discretion.[36] The court of

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33 *United States v. Durham*, 287 F.3d 1297, 1305-06 (11th Cir. 2002) (stun belt's capacity to disrupt defendants' constitutional rights to be present at trial and to participate in their defense).

34 *Id.* at note 22.

35 *Ward v. State*, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987).

36 *Green v. State*, 840 S.W.2d 394, 408 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 1020, 113 S. Ct. 1819, 123 L. Ed. 2d 449 (1993).

appeals will not disturb that decision absent an abuse of discretion.[37]

The Right to Conflict-Free Assistance of Counsel

The Sixth Amendment of the United States Constitution guarantees the right to reasonably effective, conflict-free assistance of counsel.[38] Although a defendant does not have the right to his choice of court-appointed counsel, counsel must be allowed to withdraw where there is an adequate reason and the defendant has brought the matter to the trial court's attention and shown he is entitled to new counsel.[39]

A hearing is required

When a defendant brings a potential conflict of interest to the attention of the trial court, the trial court has an obligation to investigate and determine whether the risk of the conflict of interest warrants remedial action.[40] The failure to conduct such an inquiry is reversible error if the defendant establishes that the conflict of interest adversely affected his counsel's performance.[41]

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37 *Id.*

38 U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45,100 S. Ct. 1708, 1716-17, 64 L. Ed. 2d 333 (1980).

39 *McKinny v. State*, 76 S.W.3d 463, 477 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Garner v. State*, 864 S.W.2d 92, 98 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)).

40 *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 1179, 55 L. Ed. 2d 426 (1978); *Dunn*, 819 S.W.2d at 519 (extending *Holloway* beyond multiple representations).

41 *Mickens v. Taylor*, 535 U.S. 162, 173-74, 122 S. Ct. 1237, 1244-45, 152 L. Ed. 2d 291 (2002); *see also Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003).

An actual conflict of interest exists where “counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest."[42] When a criminal defendant files a legal proceeding against his court-appointed counsel, it does not necessarily give rise to an actual conflict of interest, even though the defendant and his counsel may be adversaries in other legal proceedings.[43] Courts have been weary of the possibility of defendants filing lawsuits to delay legal proceedings or force a change of counsel.[44]

In in *Cuyler v. Sullivan*, the United States Supreme Court set forth the standard to determine whether harm resulted from a conflict of interest. There must be a showing that (1) counsel "actively represented conflicting interests" and (2) counsel's performance at trial was "adversely affected" by the conflict of interest.[45] The possibility of conflict is not sufficient to impugn a jury's conviction; instead, a defendant must establish an actual conflict.[46] Once the defendant shows an actual conflict and that the conflict adversely affected the adequacy of his representation, the defendant need not demonstrate prejudice for reversal.[47]

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42 *Acosta*, 233 S.W.3d at 355 (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997)).

43 *See Dunn v. State*, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991); *Perry v. State*, 464 S.W.2d 660, 664 (Tex. Crim. App. 1971); *McKinny*, 76 S.W.3d at 477-78; *Garner*, 864 S.W.2d at 99.

44 *Perry*, 464 S.W.2d at 664.

45 *Sullivan*, 446 U.S. at 349-50, 100 S. Ct. at 1719; *Acosta v. State*, 233 S.W.3d 349, 352-53 (Tex. Crim. App. 2007).

46 *Id.*

47 *Id.*

Application of Law to Fact

From the very beginning, it was clear that the attorney-client relationship was abrogated. The trial court erred when it denied counsel's motion to withdraw, resulting in representation that was not conflict-free.[48] The conflicts were numerous and resulted over Appellant's belief counsel had lied to him, violated the law and not represented his best interest, as well as due to a federal lawsuit Appellant had filed against him and the trial court. R. Vol. II – 5, 7 – 12; R. Vol. III – 7 – 10. Evidence that this conflict 'adversely affected' counsel's representation at trial is most starkly reflected in the fact Appellant was fitted with a shock belt and repeatedly electrically shocked for non-responsive answers without a single objection by defense counsel.[49]

In the instant case, Appellant repeatedly requested counsel be removed from the case. R. Vol. II – 5, 7 – 12; R. Vol. III – 7 – 10. (Vol. II attached as Exhibit A). From the outset, he voiced concerns counsel had conducted himself illegally and wanted him removed. R. Vol. II – 7 – 10. Appellant distrusted his attorney and did not know what was in his own best interest because counsel had lied to him, screamed at him and did not show him all the evidence in the case. R. Vol. II – 7-11. Appellant also noted a conflict in that the attorney refused to file motions he requested. R. Vol. II – 10 – 12. After very minimally inquiring about the conflict, the court denied Appellant's request. R. Vol. II – 9.

A few weeks later a pre-trial hearing was held wherein Appellant again urged his attorney be removed. R. Vol. III – 24. Appellant told the court he had a pending lawsuit filed in federal

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48 *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45,100 S. Ct. 1708, 1716-17, 64 L. Ed. 2d 333 (1980).

49 See Point of Error Number One

court against the court and his attorney and requested removal due to a conflict of interest. R. Vol. III – 35 - 36. The court noted he had not been served with a lawsuit and ended the proceedings stating "[i]'m not aware of that so we're going forward. R. Vol. III – 36.

Trial was set to begin a few days later and, prior to voir dire, counsel filed a Motion to Withdraw from Appellant's case citing the conflict of interest from the federal lawsuit. Tr. – 161 – 162. Trial counsel verified the lawsuit against himself and the court was presently pending and had been formally filed by Appellant. Tr. – 161- 162. Counsel then requested to withdraw from the case due to the pending lawsuit and conflict of interest. R. Vol. IV – 4 – 6. His motion was denied. R. Vol. IV – 6.

After a jury was seated and testimony was set to begin, Appellant was arraigned in front of the jury and once again reiterated his desire to remove his attorney as well as recuse the judge. R. Vol. V – 17 – 19. Appellant also urged his right to represent himself. R. Vol. V – 17 – 19. Appellant stated, "I don't have an attorney. I'm firing this man. I've told him to get off my case. And the defendant has a right to refuse counsel. I have the right to represent myself in this case, and I shall. …. There's serious allegations that I have in the United States District Court against this man. No one wants to be represented by someone they have a lawsuit against. No one wants a judge to preside over their case who the lawsuit is against". R. Vol. V – 19 - 20. During this proceeding Appellant was shocked a number of times for giving non-responsive answers and ultimately removed from the courtroom. R. Vol. V – 15 – 20. The court did not conduct a hearing on the conflict issue nor make any further inquiries regarding the same.

The federal civil action Appellant filed against counsel is one level of conflict that arose

in the case requiring the court to allow counsel to withdraw.[50] Although the federal lawsuit does not create a *per se* actual conflict, counsel's conduct through the trial as well as his concession that there was a conflict in his request to withdraw does.[51] The lawsuit attacking counsel created an actual conflict between counsel's interest in the civil action and ***against*** Appellant, contravening any interest in protection of Appellant in his trial. R. Vol. IV – 4 – 6.

Counsel was conflicted in making a choice between defending Appellant's interest in a fair trial or advancing his own interest in the civil litigation to the detriment of Appellant's interest. For example, he could be compelled to furnish testimony in the federal suit that would be against and substantially adverse to Appellant. Similarly, counsel's position in a federal lawsuit could be greatly benefitted from a defendant whom is convicted and sentenced to the penitentiary for a substantial period of time. Lastly, counsel and Appellant clearly had a hostile and unworkable relationship due to the conflicts in total. For all these realities of conflict, counsel prudently requested removal and the court abused its discretion in denying the request. R. Vol. IV – 4 – 6.

Additionally, conflict is evident in the fact Appellant did not trust counsel, felt counsel had lied to him and was not protecting him. R. Vol. II – 5, 7 – 12; R. Vol. III – 7 – 10. (Vol. II attached as Exhibit A). The attorney-client relationship further deteriorated after the lawsuit was filed with counsel not placing Appellant's best interests forward. The most obvious evidence of this is counsel's complete lack of action when Appellant was forced to wear a stun belt. R. Vol.

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50 *Acosta*, 233 S.W.3d at 355 (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997)).

51 *See Dunn*, 819 S.W.2d at 519; *Perry*, 464 S.W.2d at 664; *McKinny*, 76 S.W.3d at 477-78.

V- 15 – 21. The law is clear that a hearing is required before the court can do so.[52] Yet counsel did not raise a single objection nor request a hearing. R. Vol. V- 15 – 21. Further, when Appellant was ***electrically shocked three separate times***, counsel stood moot. R. Vol. V- 15 – 21. In this regard, the record reflected there existed a conflict of interest which actually affected the adequacy of Appellant's representation by his court-appointed counsel requiring reversal.[53]

Inquiry by the Trial Court

The trial court failed to make an adequate inquiry into the potential conflict created by Appellant's lawsuit. When a criminal defendant brings a potential conflict of interest to the attention of the trial court, the trial court has an obligation to investigate and determine whether the risk of the conflict of interest warrants remedial action.[54] The failure to conduct such an inquiry, when necessary, is reversible error where the conflict of interest adversely affected counsel's performance.[55]

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52 *Simms v. State*, 127 S.W.3d 924 (Tex. App. – Corpus Christi 2004, pet. ref'd) (trial court abused its discretion by not making a record of specific reasons for authorizing restraint); *Gammage v. State*, 630 S.W.2d 309, 314 (Tex. App.-San Antonio 1982, pet ref'd). *Long*, 823 S.W.2d at 282 (citing *Cooks*, 844 S.W.2d at 722) (trial judge must set forth with specificity the reasons supporting his decision to restrain the defendant); *State v. Belcher*, 183 S.W.3d 443 (Tex. App. – Houston 14th Dist. 2005, pet. ref'd).

53 See *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45,100 S. Ct. 1708, 1716-17, 64 L. Ed. 2d 333 (1980).

54 *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 1179, 55 L. Ed. 2d 426 (1978); *Dunn*, 819 S.W.2d at 519.

55 *Mickens v. Taylor*, 535 U.S. 162, 173-74, 122 S. Ct. 1237, 1244-45, 152 L. Ed. 2d 291 (2002); *see also Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003).

The trial court had clear knowledge of the conflict of interest between Appellant and counsel because of Appellant's repeated requests and counsel's motion to withdraw. R. Vol. II – 5, 7 – 12; R. Vol. III – 7 – 10. (Vol. II attached as Exhibit A). The trial court conducted an extremely brief inquiry on the motion to withdraw, i.e., he only asked a single question: whether counsel had been formally served with the lawsuit. R. Vol. IV – 4 – 6. This type of inquiry does not suffice.[56] The court never questioned counsel about whether he personally felt conflicted in any way nor did he give Appellant the appropriate opportunity to explain the basis of the conflicts. The failure to conduct such an inquiry is an abuse of discretion and reversible error.

Appellant's Point of Error Number Three:

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT A COMPETENCY INQUIRY AND HEARING

Applicable law:
Standard of Review

When some evidence of incompetency is raised by any source, the burden is on the trial court to conduct an informal inquiry concerning competence.[57] The court's failure to conduct a meaningful inquiry is reviewed under an abuse of discretion standard.[58] A trial court's first-hand factual assessment of a defendant's competency is entitled to deference on appeal.[59] Under an

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56 *Id.*

57 Tex. Code Crim. Proc. art. 46B.004

58 *See Criswell v. State*, 278 S.W.3d 455, 457 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999).

59 *See Ross v. State*, 133 S.W.3d 618, 627 (Tex. Crim. App. 2004) (citing *McDaniel v. State*, 98 S.W.3d 704, 713 (Tex. Crim. App. 2003).

abuse of discretion standard, the appellate court determines whether the trial court acted without reference to any guiding rules or principles.[60]

Competency requirements

A defendant who is incompetent may not be put to trial without violating due process.[61] The constitutional standard for determining competency to stand trial in Texas is codified in Chapter 46B of the Texas Code of Criminal Procedure.[62] A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person.[63]

A defendant is presumed competent and incompetence must be shown by a preponderance of the evidence.[64] Any party, ***including the court on its own***, may question whether the defendant is incompetent to stand trial.[65] However, if evidence is brought to the attention of the court that suggests a defendant may be incompetent, the trial court is required to

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60 *See Criswell*, 278 S.W.3d at 457.

61 *Turner v. State*, 422 S.W.3d 676, 688 (Tex. Crim. App. 2013) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996)); *see Criswell*, 278 S.W.3d at 457.

62 *See id.* at 689.

63 Tex. Code Crim. Proc. art. 46B.003(a).

64 *Id.* art. 46B.003(b).

65 *See id.* art. 46B.004(a).

make inquiry as to competence.[66]

Upon a suggestion of incompetency, the trial court must determine by informal inquiry whether some evidence, from any source, exists that would support a finding of incompetency.[67] Thus, the threshold requirement for an informal inquiry is merely a suggestion of incompetency.[68] This suggestion may be established by a single representation that the defendant may be incompetent and initiating the inquiry does ***not require*** any further evidentiary showing.[69]

The trial court must consider only the evidence tending to show incompetency when making this determination by "putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla that rationally may lead to a conclusion of incompetency."[70] Finding a defendant competent at one point does not exclude the possibility that his condition has deteriorated; thus, a defendant's competence determination may require multiple evaluations.[71]

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66 *See id.* art. 46B.004(b).

67 *See id.* art. 46B.004(c).

68 *See id.* art. 46B.004(c—1).

69 *Id.*

70 *See Ex parte LaHood*, 401 S.W.3d 45, 52-53 (Tex. Crim. App. 2013) (citing *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. [Panel Op.] 1980)).

71 *Turner v. State*, 422 S.W.3d 676 (Tex. Crim. App. 2013).

Evidence suggesting the need for an investigation may be based on observations made in relation to a defendant's capacity to:

(1) rationally understand the charges against him and the potential consequences of the pending criminal proceeding;

(2) disclose to counsel pertinent facts, events, and states of mind;

(3) engage in a reasoned choice of legal strategies and options;

(4) understand the adversarial nature of criminal proceedings;

(5) exhibit appropriate courtroom behavior; and

(6) testify.[72]

Thus, when a defendant is mentally ill, the relevant inquiry is whether this mental instability resulted in the defendant's inability to understand the nature of, and object to, the proceedings against him, consult with counsel, and assist in preparing his defense.[73] Where the defendant's mental illness prevents him from pursuing his own best interests through engaging rationally with counsel or rationally understanding the proceedings against him, due process prevents him from being made to stand trial.[74] When evidence raises this possibility, an informal

72 *See* Tex. Code Crim. Proc. art. 46B.024(1).

73 *See Turner*, 422 S.W.3d at 689-91.

74 *See Turner*, 422 S.W.3d at 691.

inquiry is required, and if that inquiry reveals that the possibility is substantial, a formal competency trial is required.[75]

Application of law to fact:

Evidence suggesting Appellant's incompetence was brought to the court's attention through his documented mental health history, his repeated lack of understanding of the proceedings, his inability to make choices in his best interest and his rambling and, at times, non-lucid testimony. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31; R. Vol. IV – 4 – 6; R. Vol. V – 11, 16 – 21; R. Vol. VIII – 11 – 14, 47 - 65. Because this evidence suggested he may be incompetent to stand trial, the trial court was required to conduct an inquiry to determine whether some evidence from any source existed that would support a finding of incompetency and ultimately conduct a competency hearing.[76]

From the beginning of the pre-trial hearings, Appellant clearly appeared to have mental limitations in his understanding and processing of information. R. Vol. II (attached as Exhibit A). His answers to questions did not comport to normal court decorum. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31. He would make objections out of turn and was unable to stay on task to directly answer the court's questions. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31. He could not make decisions in his own best interests. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17. His attorney wanted his consent to file records in his behalf, and Appellant could not logically make the decision whether it was in his best interest to file them. R. Vol. II – 5 – 7. His testimony was disjoined and lacked logical sense at times. R. Vol. II; R. Vol. VIII – 11

75 *Id.*; Tex. Code Crim. Proc. Ch. 46B
76 *See* Tex. Code Crim. Proc. art. 46B.004(c).

– 14, 47 - 65. Further, the court was made aware that Appellant had a history of mental illness when the defense filed and discussed Appellant's extensive mental health documents. R. Vol. II – 5 – 7; R. Vol. III – 6-24. Although all of this evidence clearly suggested Appellant may be incompetent, no meaningful competency inquiry was made by the court.

At the formal arraignment and motion to suppress hearing, the court asked Appellant questions, many of which he did not understand. R. Vol. III – 4 – 6. Appellant testified and, once again his mental limitations in his understanding and ability to cogently articulate his thoughts were on display. Appellant made an effort to express his mental history as thus:

> I was released from Terrell State Hospital somewhere around 1981. Not released, but actually discharged by some family member who discharged me against medical advice and strangely put me out on the streets. Well, from there, I was hungry and didn't know how to live on the streets so, well, I went in a house and got me something to eat while I was on probation, which I really didn't have no idea what was going on then either. I was already under the influence of Haldol medication. And on top of that, went to something called a jury trial, Thomas B. Thorpe's court where a jury recommended that I go back to the state hospital, namely, Vernon, where the Judge went ahead and decided to send me to prison for 10 years first. For the next several years I didn't get no treatment whatsoever. That's where they completely ruined my life, beat me, did stuff to me you can't imagine and then eventually wondered what was wrong with me and finally put me on medication under MHMR.

R. Vol. III – 7-8. Although Appellant could recall events from his past, his testimony clearly reflected an inability to process the information in a logical fashion. The defense attorney then stepped in to explain Appellant's mental health history and stated, "[h]e does have a pretty good psychological history, without going all through it, and he's had several different diagnoses without saying -- he has had some what I would consider to be pretty extensive mental history. He has voiced some of that to me." R. Vol. III – 8-9.

It was at this point the judge asked whether Appellant had ever been evaluated for competency. R. Vol. III – 9. A discussion was had between the court and counsel and a determination was made that Appellant had a competency evaluation over a year earlier by a court ordered doctor and over seven months earlier by a defense appointed doctor[77]. R. Vol. III – 9 – 10. Both doctors found Appellant competent at the respective times. R. Vol. III – 10, 18. This was the end of the inquiry into competence. The court found that because Appellant had never been found incompetent, he was competent to proceed. R. Vol. III – 10- 11.

Throughout the remainder of the proceedings Appellant displayed a lack of ability to understanding the proceedings, to logically grasp the concepts and the charges and an inability to make decisions in his best interest in his case. R. Vol. III – 12-17. A good example is the following discussion that took place regarding whether Appellant wanted to dress out for court:

> THE COURT: All right. So are you saying you do or you do not want to wear jail clothes?
>
> THE DEFENDANT: Doesn't matter to me, sir.
>
> THE COURT: Well, the law is I have to have you wear civilian clothes unless you tell me no. And if you say, I'm not going to tell you, then I have to make you wear civilian clothes, which means we're going to forcibly put clothes on you. And that's what I'm trying to avoid. If you don't want to wear them, that's fine with me. I just need to know one way or the other.
>
> THE DEFENDANT: ***I don't know what to say really. I really don't know. I –***
>
> THE COURT: All right. Well here's what we'll do. Here's what we'll do –

77 Although the defense witness, Dr. Womack, (who examined Appellant seven months earlier and only observed his punishment testimony) testified outside the presence of the jury at the end of trial and stated that in his opinion Appellant was competent, this does not abrogate the court's duty to investigate incompetency raised at the beginning of trial. R. Vol. VIII – 14 – 18.

THE DEFENDANT: -- stand here with this guy.

THE COURT: Here's what we'll do next week. We need to get the sheriff involved, we will get a shock belt and we'll put -- we're going to put a shock monitor on your leg. Okay? Because then if you don' don't behave and do what the bailiffs ask you to do, then we can shock you to where we put you down on the ground and we'll forcibly put clothes on you. So I don't want to do that. That's why I'm asking you. Do you want to just tell me right up front, do you want to agree to wear the clothes or not wear the clothes? Because otherwise, I'm going to have to do some extraordinary methods. I'm going to have to do some extraordinary things to make sure that I comply with the law. So –

THE DEFENDANT: Do I have to wear them?

THE COURT: You don't have to if you don't want to.

THE DEFENDANT: I don't want to.

THE COURT: All right. That's very good. That's very good. Then we'll let you appear in your jail clothes.

THE DEFENDANT: Great.

R. Vol. III – 22 -23. His testimony reflected his inability to understand the simple appropriateness of dressing out for court and a true comprehension of the benefits of doing the same.

Lastly, Appellant testified at punishment and his inability to articulate logically and testify with any reasonable degree of rational understanding or make cogent statements was clear. R. Vol. VIII- 47 – 61. Once again, although Appellant appeared to recall events of past physical abuse, his recitation did not make sense at many times. A brief excerpt follows:

[DEFENSE COUNSEL]: What do you want the jury to do?

[DEFENDANT]. It don't really matter to me if I go to prison or not.

Q. Well, they're going to send you to prison. How long –

A. I don't care.

Q. How long do you want them to send you to prison for? Have you thought about that?

A. Okay. Number one, that's it, you just prejudged my case. I'd like to step down, please.

Q. They have to make that decision.

A. You know he did, sir, right there, sir. Right there.

THE COURT: Answer Mr. Ray's question.

THE DEFENDANT: You just prejudged my case. I have nothing else to say to you.

Q. (BY MR. RAY) You don't have to answer the question.

A. Doesn't matter if you sit there and delete it or not, you prejudged my case.

MR. RAY: I pass the witness.

THE DEFENDANT: Before the verdict. Before the verdict. That's it.

R. Vol. VIII – 58 – 59.

From the totality of the record it is clear Appellant did not competently understand the nature of the proceedings against him. He was unable to have any meaningful consultation with counsel in order to assist in preparing or presenting his defense. R. Vol. II – 5 – 8; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31; R. Vol. IV – 4 – 6; R. Vol. V – 11, 16 – 21; R. Vol. VIII – 11 – 14, 47 - 65. This exchange, as well as his conduct throughout, exemplified his inability to relate with counsel in order to present a plausible defense or articulate a reasonable version of events.[78]

78 *See McDaniel*, 98 S.W.3d at 712-13; *Kostura v. State*, 292 S.W.3d 744, 747-48 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The record reflected Appellant's mental illness prevented him from pursuing his own best interests through engaging rationally with counsel or in his testimony to the jury. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31; R. Vol. IV – 4 – 6; R. Vol. V – 11, 16 – 21; R. Vol. VIII – 11 – 14, 47 - 65. Though in no way violent, Appellant's behavior and comments throughout the trial displayed an incapacity to comply with basic courtroom decorum, an inability to communicate cogently nor appreciate the proceedings against him. R. Vol. II – 5 – 7; R. Vol. III – 4 – 9, 12 – 17, 22 – 23, 26 – 31; R. Vol. IV – 4 – 6; R. Vol. V – 11, 16 – 21; R. Vol. VIII – 11 – 14, 47 - 65. His answers were nonresponsive and inappropriate and consisted of unusual replies sometimes illogical, untimely, off topic and rationally not related to the questions proffered.[79]

All of this evidence was before the court throughout the trial which made it incumbent upon the court to consider only this evidence tending to show incompetency by "putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla that rationally may lead to a conclusion of incompetency."[80] Thus, the court erred when only pointing to the findings of competence concluded over a year and over seven months earlier. These earlier findings of competence at those points in time did not

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79 *Moore*, 999 S.W.2d at 395; Tex. Code Crim. Proc. art. 46B.004.

80 *See Ex parte LaHood*, 401 S.W.3d 45, 52-53 (Tex. Crim. App. 2013) (citing *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. [Panel Op.] 1980)).

exclude the possibility that his condition had clearly deteriorated. The court was required to make a more complete inquiry and require additional evaluation.[81]

Not only did evidence reflecting a bona fide doubt about Appellant's competency come from Appellant himself, extensive medical records were introduced raising the issue.[82] R. Vol. II – 5 -7. Although this evidence may not have been sufficient to find Appellant actually incompetent, it created "a real doubt as to the defendant's competency."[83] In this regard, the court was required to make further inquiry and conduct a competency hearing.[84] Because the court failed to do so, the defendant was deprived of his constitutional right to a fair trial.[85] For all these reasons, the trial court abused its discretion by proceeding to trial without conducting a serious inquiry into appellant's competency.

Appellant's Point of Error Number Four:

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE SEARCH OF APPELLANT'S CELL PHONE

Applicable law:

81 *Turner v. State*, 422 S.W.3d 676 (Tex. Crim. App. 2013); Tex. Code Crim. Proc. art. 46B.004.

82 *Brown v. State*, 129 S.W.3d 762, 765 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

83 *See Fuller v. State*, 253 S.W.3d 220, 228 (Tex. Crim. App. 2008).

84 Tex. Code Crim. Proc. art. 46B.004.

85 *See Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966).

The Fourth Amendment to the United States Constitution requires "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."[86] Likewise, Texas Code of Criminal Procedure article 18.01(c) requires a probable cause affidavit to set forth facts establishing that (1) a specific offense has been committed, (2) the item to be seized constitutes evidence of the offense or evidence that a particular person committed the offense, and (3) the item is located at or on the person, place, or thing to be searched.[87]

Under the Fourth Amendment and the Texas constitution, probable cause for a search warrant exists if, under the totality of the circumstances, there is at least a "'fair probability'" or "'substantial chance'" that contraband or evidence of a crime will be found at the specified location.[88] The affidavit must contain sufficient specific information to allow the issuing magistrate to determine probable cause because the magistrate's action "cannot be a mere ratification of the bare conclusions of others."[89] Boilerplate language in an affidavit, standing alone, does not supply probable cause sufficient to search a criminal suspect's cell phone.[90]

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86 U.S. Const. amend. IV.

87 Tex. Code Crim. Proc. Ann. art. 18.01(c); Tex. Const. art. I, § 9; TEX. CODE CRIM. PROC. ANN. art. 1.06.

88 *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004); *Nichols v. State*, 877 S.W.2d 494, 497 (Tex. App.--Fort Worth 1994, pet. ref'd); *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 257 n.13, 103 S. Ct. 2317, 2332, 2342 n.13, 76 L. Ed. 2d 527 (1983)).

89 *Gates*, 462 U.S. at 239, 103 S. Ct. at 2333; *Morris v. State*, 62 S.W.3d 817, 821 (Tex. App.—Waco 2001, no pet.).

90 *U.S. v. Ramirez*, 180 F. Supp. 3d 491, 494 (W.D. Ky. 2016) (affidavit's boilerplate

Whether probable cause exists to support the issuance of a search warrant is determined from the "four corners" of the affidavit alone.[91]

Review of a magistrate's decision to issue a warrant, is based upon a deferential standard in keeping with the constitutional preference.[92] No magical formula exists for determining whether an affidavit provides a substantial basis for a magistrate's probable cause determination.[93] The court of review should interpret the affidavit in a commonsense and realistic manner, recognizing reasonable inferences.[94]

However, a magistrate should not be allowed to read into an affidavit material information that does not otherwise appear on its face.[95]Deference afforded a magistrate's determination "is not boundless," and a reviewing court "will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'"[96] A reviewing court is to "conscientiously review the sufficiency

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language—that "[suspects] may keep text messages or other electronic information stored in their cell phones which may relate them to the crime and/or co-defendants/victim"—***does not*** demonstrate particularized facts supporting probable cause).

91 See note 87.

92 *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007); *Swearingen*, 143 S.W.3d at 810-11; *Farhat v. State*, 337 S.W.3d 302, 306 (Tex. App.--Fort Worth 2011, pet. ref'd).

93 See note 87.

94 *See Rodriguez*, 232 S.W.3d at 61; *see also Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006); *Nichols*, 877 S.W.2d at 498.

95 *Cassias v. State*, 719 S.W.2d 585, 590 (Tex. Crim. App. 1986).

96 *Kennedy v. State*, 338 S.W.3d 84, 93 (Tex. App.--Austin 2011, no pet.) (quoting *United States v. Leon*, 468 U.S. 897, 915, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677 (1984)).

of affidavits on which warrants are issued" to ensure that an abdication of the magistrate's duty does not occur.[97]

Application of Law to Fact

Restricting deferential review to the four corners of the instant search warrant, there was no substantial basis supporting probable cause to search Appellant's entire cell phone. R. Vol. IX – 1-7. The search warrant affidavit described an incident wherein the extraneous victims "saw a photo of a penis" on Appellant's cell phone. R. Vol. IX – 1 – 7. They also stated that, on the day before, Appellant had shown them photos of naked females, but did not specify whether these photos were on the cell phone or on a different device. R. Vol. IX – 1 – 7.

The only other information relevant to probable cause regarding the phone was generalized, boilerplate language. The affidavit stated that the affiant knows from:

> training and experience that it is common for individuals engaged in Sale, Distribute, or Display of Harmful Material to a Minor to [sic] cell phone devices as instruments or implements, to wit: to store or communicate electronically information that may be evidence of criminal activities. This data needs to be forensically examined to prevent alteration or damage. Based on the above facts and circumstances, Affiant requests authorization to conduct a forensic analysis of any cell phones, pagers, or computer devices that may be seized under the authority of the warrant sought herein.

R. Vol. IX – 7.

Based on these factors the magistrate found:

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97 *See Gates*, 462 U.S. at 239, 103 S. Ct. at 2333; *Leon*, 468 U.S. at 914-15, 104 S. Ct. at 3416; *Farhat*, 337 S.W.3d at 306.

> probable cause to believe that any cell phone, pagers or computer devices that may be seized under authority of this warrant may contain incriminating data relative to the object of this warrant. Therefore you are authorized to conduct a forensic analysis of any such items.

R. Vol. IX – 2.

From the four corners of this affidavit, probable cause did not exist to search the entirety of Appellants phone.[98] Tr. – 122 – 124 (motion to suppress); R. Vol. III – 15 – 30 (hearing on motion to suppress). There was no evidence reflecting a "'fair probability'" or "'substantial chance'" that contraband or evidence of a crime would be found in any other location in the phone other than where photographs could be kept.[99] Thus, the search and complete download of the entirety of his phone was not supported by probable cause.

Appellant's phone contacts, call logs and text messages that do not contain photographs were searched without probable cause to believe they would contain evidence of the crime, i.e. naked photos. The affidavit did not contain ***any*** specific information to allow the issuing magistrate to find probable cause to search these items within Appellant's phone, thus the warrant was issued without probable cause justifying the wholesale search.[100] Further, the boilerplate language that it is "common" for individuals "to store or communicate electronically

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98 At trial, the State offered into evidence the entire forensic download of Appellant's phone wherein *everything* contained on his phone had been searched including contact lists, text messages, photographs and phone calls. R. Vol. V – 72 – 73.

99 *See Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004); *Nichols v. State*, 877 S.W.2d 494, 497 (Tex. App.--Fort Worth 1994, pet. ref'd); *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 257 n.13, 103 S. Ct. 2317, 2332, 2342 n.13, 76 L. Ed. 2d 527 (1983)).

100 *Gates*, 462 U.S. at 239, 103 S. Ct. at 2333; *Morris v. State*, 62 S.W.3d 817, 821 (Tex. App.—Waco 2001, no pet.).

information that may be evidence of criminal activities" is wholly insufficient and vastly too general to be probative of cause to believe evidence of the crime, or photos, would be found in Appellant's word messages or his phone contacts.[101]

For all these reasons, the affidavit lacked probable cause for the search of Appellant's entire phone and as such, the trial court erred in denying the motion to suppress contravening Appellant's constitutional and statutory rights.[102] Use of this illegally seized evidence requires reversal. R. Vol. V – 72 – 73; 50 -77.

101 *U.S. v. Ramirez*, 180 F. Supp. 3d 491, 494 (W.D. Ky. 2016) (affidavit's boilerplate language—that "[suspects] may keep text messages or other electronic information stored in their cell phones which may relate them to the crime and/or co-defendants/victim"—***does not*** demonstrate particularized facts supporting probable cause).

102 U.S. Const. amend. IV; Tex. Code Crim. Proc. Ann. art. 18.01(c); Tex. Const. art. I, § 9; TEX. CODE CRIM. PROC. ANN. art. 1.06.

CONCLUSION AND PRAYER

Wherefore, all premises considered, Appellant was denied his State and Federal constitutional and statutory rights such that he was denied a fair and impartial trial and due process of law. Tex. Const. art. I, sec. 19; U.S. Const. amends. V, VI, XIV; Tex. Code Crim. Pro., art. 1.04. Appellant was also denied his constitutional confrontation rights and severely prejudiced by the court's abuse of discretion in forcing him to wear a stun belt and shocking him, refusing to allow counsel to withdraw, not effectively determining competency and denying the motions to suppress. For all the reasons heretofore stated in this brief, Appellant prays this Honorable Court reverse his conviction and sentence as entered and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Mullen, do hereby certify that a true and correct copy of the foregoing Appellant's brief was mailed on February 7, 2017, to the interested parties listed below:

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CERTIFICATE OF COMPLIANCE

I, Lisa Mullen, pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, do hereby certify the word count of the applicable portions of this brief is 12,034 words and within the 15,000 word limit as required by the rules.

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APPENDIX

EXHIBIT A

REPORTER'S RECORD

VOLUME 2 OF 9 VOLUMES

TRIAL COURT CAUSE NO. 1382399D
COURT OF APPEALS CAUSE NO. 08-16-00153-CR

THE STATE OF TEXAS	)	IN THE 396TH JUDICIAL
vs.	)	DISTRICT COURT
TERRY LEE MORRIS	)	TARRANT COUNTY, TEXAS

HEARING ON PRETRIAL MATTERS

On the 13th day of May, 2016 the following proceedings came on to be heard in the above-titled and numbered cause before the Honorable George Gallagher, Judge Presiding, held in Fort Worth, Texas, reported by machine shorthand utilizing computer-aided transcription.

Lisa G. Morton, CSR
Official Court Reporter
396th Judicial District Court
Tarrant County, Texas

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VOLUME 2

HEARING ON PRETRIAL MATTERS

May 13, 2016

ALPHABETICAL INDEX OF WITNESSES

P R O C E E D I N G S

(Open court, defendant present)

THE COURT: These are Cause Numbers 1378144D, 1378370D, and 1382399D, all styled the State of Texas versus Terry Lee Morris. Mr. Ray.

MR. RAY: Judge, I had asked the Court to bring Mr. Morris over here because there are some records, mental health records that I've obtained. And I was -- Mr. Morris had kind of indicated to me that he might not want that type of evidence presented. So I wanted him to say on the record whether or not he wants me to actually file those, because the 14-day time limit is going to be getting pretty close to that before his trial date. And so we really didn't discuss that.

What he did tell me was he wanted another lawyer, so I thought we could kind of address both of those things.

THE COURT: Raise your right hand for me, Mr. Morris.

(Defendant sworn)

THE COURT: Lower your hand. Answer Mr. Ray's questions.

TERRY LEE MORRIS,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAY:

Q. Terry, I asked you that before, if you want the mental health records filed so they would be admissible in evidence. You remember that conversation?

A. Yes, sir.

Q. Okay. Do you want me to file them or do you want me not file them?

Just let me make it -- even if I file them, that doesn't mean we have to use them. Okay. It just means that they're not admissible in front of a jury if they're not filed. They'll be sealed. The State gets a copy of them, but they're not going to disclose them to anybody even after the trial.

Nobody will ever be able to get these records without a court order and Judge Gallagher or whoever might be sitting after he's no longer a judge isn't going to just let them go. It's not like you have a big secrecy problem, it's just that I can't get them in front of a jury if we want to offer them. Does that make sense?

A. Can I ask you a question?

Q. Sorry?

A. Can I ask you a question?
Q. Yes.
A. Is this court or this judge, are they aware that you filed a motion to suppress some kind of evidence?
Q. Yeah. We'll get to that in a minute. We need to get this question answered. So do you want me to file them or not? I think it's a bad idea to not file them.
A. I'd rather have you off my case.
Q. Okay. Well --
A. You did something you shouldn't have did and I've got proof right here, which you can't be trusted.
Q. Well, I think we're over something else now, so I'll just go ahead and file it.
A. Not over something else. What you did was illegal. I got proof.
THE COURT: What are you saying that Mr. Ray did that's illegal?
THE DEFENDANT: Almost two years ago I -- me and my family requested some records, search warrants. The search warrants that I got was only -- only ones they had on file, something called electronic case filing, all that stuff. And the one they gave me was search warrant 29497. That was it. Nothing else.
Well, me and him get in an argument about this particular iPhone and the visitation at Green Bay.

Literally an argument. I wanted to ask him some questions about my case, and he was jumping up and screaming at me. He said, you don't have to yell. I wasn't yelling.

But anyway, there's an iPhone, a few days later, he sends me this motion, motion to suppress items seized, with all three case numbers on top, with the numbers that are backwards; S29500 being first, 499 being second, calling SW29499 a warrant when initially it's an affidavit; saying that SW29497, the original and only warrant that was available two years ago, he was saying that was the warrant for my arrest. And suddenly PC29398 shows up for an arrest warrant and affidavit together subsequent.

None of that was right. That was all wrong. Even the motion you had written, whoever wrote it was wrong, backwards and everything else. Trying really hard to look like SW29497. That's why it was backward.

Now I don't trust you ever again for doing that. I've got all the warrants right here that you say you're not going to show me until trial date. I got every one of them right here. Every one of them.

THE COURT: How did you get the warrants?

THE DEFENDANT: I can't explain that, sir.

THE COURT: Well, I'm asking you to tell me how you got the warrants.

THE DEFENDANT: My family.

THE COURT: Okay. And how did they get them?

THE DEFENDANT: One of two ways, either online or they went downtown and purchased it.

THE COURT: Okay. And the sheriff just let you have those, have those up in your property?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So how did Mr. Ray commit a crime?

THE DEFENDANT: Somebody filed search warrants and arrest warrants that didn't even exist. They just created those. They just made those recently.

Two years ago I got the original search warrant, which was 497. He told me 497 was -- it was a warrant for my arrest, and that was it. But when I -- I got the paper right here, sir, if you let me show you, please.

THE COURT: No, that's fine. Here's the deal. Mr. Ray is your lawyer. He's going to be your lawyer. We're going to try this case on the 4th of June, I believe, or --

MR. RAY: June the 6th.

THE COURT: Ms. Risinger, is there any matters you wish to put in the record?

MS. RISINGER: Yes, Your Honor. I just wanted to extend an offer to Mr. Morris today. To dispose of his three cases, I would offer him 20 years TDC. And as the Court is aware, he is a habitual offender, so should the jury find his priors true, he would be looking at 25 to life.

THE COURT: You understand that?

Do you understand what the DA just said?

THE DEFENDANT: I'm not going to answer that, sir.

THE COURT: Well, you understand that she just made you an offer of 20 years, if you wanted to plead guilty to this, that she would waive the habitual count, where it would be five years potentially less than what you could get from a jury if you were found guilty. Do you wish to accept or reject that offer?

THE DEFENDANT: Which means 20 years?

THE COURT: Yes, you would have 20 years.

THE DEFENDANT: I'm 53 years old. That's a life sentence. But not only that, he's already explained some stuff about my case to me, using the extraneous offenses and stuff like that. And I've already asked him fill motions to counter that. He won't do that. There's other motions that's in regard to stuff he said to me before. I asked him to file motions to counter that too,

and he won't do it. He actually wrote me a letter saying I'm not filing no motions for you whatsoever.

And on the indictments that I was -- that I got, the grand jury foreman that signed -- that signed the indictment wasn't from a legal standpoint. That's all I'd like to say about that.

THE COURT: Okay. So you don't want the 20-year offer?

THE DEFENDANT: No, sir.

THE COURT: All right. Anything else -- did you -- do you want your medical -- do you want your mental health records filed or not filed?

THE DEFENDANT: Sir, I don't really know what's in my best interest because everything -- I can't get along with him. He keeps lying to me. He's filing illegal motions.

THE COURT: Mr. Morris, Mr. Ray explained it to you. In order for these records to be potentially helping you at trial or to be used in front of a jury, they have to be filed 14 days prior to the time that the trial begins.

THE DEFENDANT: So you're --

THE COURT: If you want those to potentially be used in trial, they have to be filed in these files that I'm holding in my hand. If you say, no,

I don't want those filed, they will not be filed, but they cannot be used at trial.

So the question I have is, do you want your mental health records on file or not? Yes or no.

THE DEFENDANT: Well, before I answer that, can I answer ask you a question?

THE COURT: No, sir. Answer the question yes or no.

THE DEFENDANT: I'm not really sure what's in my best interest, I don't know.

THE COURT: Well, then, Mr. Ray, I think in order to protect his interest you need to file them.

MR. RAY: I'll file them and we'll go from there.

THE COURT: We'll go from there. Thank you. That's the order of the Court.

(Proceedings adjourned)

STATE OF TEXAS

COUNTY OF TARRANT

I, Lisa G. Morton, Official Court Reporter in and for the 396th District Court of Texas in and for Tarrant County, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties, if requested.

I further certify that the total cost for the preparation of this Reporter's Record will be included in the final volume of this record.

WITNESS MY OFFICIAL HAND, on this the 30th of September, 2016.

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