No. 01-24-00716-CR

In The Court of Appeals
For the 1st District of Texas

Brandon Gregory,
Appellant

v.

The State of Texas,
Appellee

On Appeal from Cause Number 1705564
From the 351st District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument but would welcome the opportunity should the Court determine argument would be helpful to its deliberations and decision.

STATEMENT OF THE CASE

On August 29, 2024, a jury found Appellant guilty of murder (6 R.R. 42). On September 11, 2024, the jury assessed punishment at 35 years TDCJ (8 R.R. 150). Notice of Appeal was filed on September 11, 2024 (C.R. 499). A motion for new trial was filed on October 10, 2024 (C.R. 503-511) and denied after a hearing on November 15th, 2024 (9 R.R. 28-29). This appeal follows.

ISSUES PRESENTED

1. When the State concealed the reading of a lengthy passage of the Quran regarding divine retribution for violent crimes in the form of a leading question, did the court err in overruling Appellant's objection that the question called for the witness to speculate based on information that, based on the witness's prior testimony, was clearly not within her personal knowledge?

2. Did Appellant's counsel render deficient performance when failing to object to the State's continued cross examination of Appellant's mother using scripture from the Quran and the Bible, and when failing to object to the State's reference to the Quran during closing argument, all of which suggested to the jury that they base their sentencing decisions on considerations of divine retribution?

STATEMENT OF FACTS

This is a case in which the police had to identify a suspect in a shooting from piecing together forensic and circumstantial evidence. Prior to going

through the decedent's phone to read his snapchat messages, law enforcement admitted they "did not have anything" to identify a suspect in the shooting of Devon Davis (4 R.R. 29).

Brandon Gregory became a suspect in Davis's murder when law enforcement connected him to a snapchat message, "5730 Timber Creek Place Dr." giving Davis the address to the Town Lake Apartments. (SX 93, 10 R.R. 192[1]). The Town Lake Apartments are on the other side of Timber Creek Place Dr. from the Timberwalk Apartments where Devon Davis was shot (see SX 150, Slide 27-28). Law enforcement referred to the general area as "Timber Creek Apartment complex area" and described it as a "high crime" area (3 R.R. 132).

Brandon Gregory's cell phone records placed him in the general Timber Creek Apartments area between 8:40 pm and 10 pm (5 R.R. 168-169). He also admitted to law enforcement that he had messaged Devon Davis to meet him but distanced himself from the events of the evening by claiming that Davis never showed at the address he sent him (4 R.R. 92). The snapchat messages

[1] For ease of reference, exhibits in Reporter's Record Volumes 10 and 11 are identified by exhibit number and the PDF page number where they appear in the record.

showed that Devon Davis responded to the Towne Lake address with "outside" at 7:44 pm and that the two exchanged phone calls until 9 pm (4 R.R. 162).

Surveillance video showed that Davis arrived at an area near a dumpster at Timberwalk apartments at about 9:08 pm and was met by a person in dark clothing who walked out of a hallway in a Timberwalk building (4 R.R. 53). At about 9:17 pm Davis is seen running towards the Timberwalk front gate where his body was found the next morning along with a trail of blood leading from the dumpster area (4 R.R. 54-55; 3 R.R. 88).

The surveillance video was not close or clear enough to positively identify the person in dark clothing (SX 1). The one piece of evidence that connected Brandon Gregory to the Timberwalk scene was a likely match to his DNA on a burnt cigar butt of indeterminate age near the dumpster (5 R.R. 123-124; 128).[2] A likely match to Brandon's DNA and an unknown third contributor was also collected from Davis's hand (5 R.R. 139).

The jury ultimately concluded that this circumstantial evidence was enough to convince them of Brandon Gregory's guilt (6 R.R. 42).

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[2] The cigar was not identified by the crime scene investigator and was not marked in his scene photographs, the first person to see the cigar was Deputy Reinert on his "final walk through" of the scene. (3 R.R. 93; 4 R.R. 20).

During the sentencing phase of trial, Appellant's mother Nicole Donaldson testified that being accused of murder had a sobering effect on her son (8 R.R. 105). She testified that Brandon had successfully complied with pretrial supervision for four years while awaiting trial in this case and noted that Brandon had undergone several positive changes during this time (4 R.R. 107-108). She attributed some of those changes to the rules her son had to follow while on supervised release, which required him to stay away from drugs and criminal behavior (8 R.R. 106). She attributed other changes to his conversion and dedication to Islam, which she testified "has given him peace throughout this process. His calmness and his ability to be open to instruction and humbleness" (8 R.R. 106). Ms. Donaldson testified on direct that Islam is "not one of my beliefs" and "I don't know much about the day-to-day" of the practice of Islam but had noticed that her son set aside time to say his prayers (Id.).

Despite her testimony that she was not Muslim and did not know about the day-to-day practice of Islam, on cross examination, the State asked her,

> I was going to ask you a few questions about Islam. Okay? Isn't it true that retribution is not -- the recompense for those who wage violent transgressions against God and his messengers and who go forth spreading corruption in the earth is that they should be killed or crucified or that their hands and their feet should be cut off alternate sides, that they should be sent into exile, from the Quran 5:33?

(8 R.R. 126).

Appellant's counsel objected that the State's question "call[ed] for speculation by this witness," who, as mentioned above, had already denied that she had any familiarity with Islam (8 R.R. 127, 8 R.R. 106). The court initially sustained the objection, but while Appellant's counsel was requesting that the jury be instructed to disregard the question, the State asserted "We're asking if this witness knows" and the trial court reversed course and allowed the question (8 R.R. 127) With the Court's permission, the State proceeded:

> Q. (By Mr. Sanchez) Do you know if that's what the Quran says?
>
> A. No, I'm a Christian.

(Id.)

When the witness answered that she was not aware because she is a Christian, the State proceeded to cross-examine the witness on the Christian Bible's teachings on retribution as well:

> Q. And so you're saying you're a Christian. So Ms. Donaldson, you're familiar with the concept eye for an eye, right?
>
> A. I am, and I'm also familiar with mercy and grace.
>
> Q. And you understand that the Quran also believes eye for an eye, tooth for a tooth?
>
> A. Sir, I don't follow the Quran. I made that clear in the

beginning.

(Id.) The State then returned yet again to a question cross-examining the witness about her Christian beliefs of mercy and grace, confronting her with other theological concepts of punishment and retribution:

> Q. And Ms. Donaldson, in addition to mercy, you understand that the Christian faith does believe in punishment and retribution, correct?
>
> A. I do.

(8 R.R. 127).

Finally, the State returned to the theme of divine retribution yet again in their closing argument in punishment: after suggesting that Mr. Gregory had "gotten closer in Islam because he's asking for that forgiveness later," the State went further, suggesting that Mr. Gregory should be judged by the rules of his religion, "In Islam, it says an eye for an eye, a life for a life, he knows that" (9 R.R. 17).

The jury sentenced Mr. Gregory to 35 years in prison (8 R.R. 150).

SUMMARY OF THE ARGUMENT

Throughout the sentencing phase of Appellant's trial, the State made repeated references to passages from the Quran and the Bible demanding divine retribution for violent crimes. The State used these passages to cross examine and impeach Appellant's mother when she testified as a punishment witness,

and again in closing argument. The trial court overruled Appellant's objection to the State's first citation to the Quran, and trial counsel failed to object to the State's continued citations to both the Bible and the Quran during the rest of sentencing. As a result, the State's repeated suggestion that the jury consider laws of divine retribution as a factor in deciding Appellant's sentence went unopposed and unmitigated. The prejudice and impact on Appellant's sentence cannot be disregarded.

Point of Error 1:

The trial court's decision to allow the State's question about the Quran was an abuse of discretion. A witness can only testify to matters within their personal knowledge, and the question in this case improperly asked Ms. Donaldson, who had no knowledge of Islamic beliefs, to speculate about religious scripture. This violated rules prohibiting the introduction of speculative or inadmissible evidence, as it allowed the State to use the form of a lengthy leading question as a subterfuge to interject otherwise impermissible evidence of religious laws regarding divine retribution.

Introducing religious law into the trial, particularly laws regarding punishment and retribution, risks inflaming the jury and violating constitutional protections against religious discrimination in sentencing. Texas law prohibits using religious

beliefs to judge a defendant's credibility or to influence sentencing decisions. The State's question, which was clearly aimed at suggesting divine retribution, violated these protections.

Given the prejudice caused by the improper question, which was not cured by a limiting instruction, and its potential influence on the jury's decision, the trial court's error was harmful and warrants a remand to conduct a new sentencing hearing.

Point of Error 2:

Trial counsel rendered ineffective assistance by failing to object when the prosecution repeatedly invoked scripture during cross-examination and closing argument to suggest that Appellant should be judged according to his religious beliefs. While counsel initially objected to one improper question, they failed to object further as the State continued to use Biblical references—particularly "an eye for an eye"—to inflame the jury and argue for harsh punishment based on divine retribution. Such arguments fall outside the bounds of permissible summation and are considered highly prejudicial. Under *Strickland v. Washington*, this failure constitutes deficient performance, as no reasonable strategy justifies allowing the jury to be influenced by improper religious appeals. The Fifth Circuit has found similar conduct to warrant

reversal. Given the likely impact on Appellant's sentence, this deficiency also merits a remand for a new sentencing hearing.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

THE COURT ERRED BY ALLOWING THE STATE TO CROSS-EXAMINE A WITNESS ABOUT THE QURAN OVER APPELLANT'S OBJECTION.

1) Standard of Review

Courts review a trial court's ruling admitting evidence under an abuse of discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). "A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement." *Id.*

2) Relevant Law and Analysis

a) It is improper to ask a witness a question about a subject outside of the witness's personal knowledge

As a threshold requirement, witnesses must only testify to matters that are within the witness's personal knowledge. Tex R. Evid. 602. A question that asks a witness to speculate about a matter outside their personal knowledge is improper and should be excluded, See *Ivie v. State*, 407 S.W.3d 305, 317 (Tex. App.—Eastland 2013, pet. ref'd).

This rule exists in part to prevent the introduction of improper or otherwise inadmissible evidence under the subterfuge of a leading question on

cross-examination; counsel cannot be permitted to disclose information in the form of a leading question when it has not been established that information is actually within the witness's personal knowledge. *See Duncan v. State,* 95 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)("prohibiting this kind of interjection of prejudicial hearsay as fact, in front of the jury, is the purpose of the objections" to a witness's lack of personal knowledge), citing *Ramirez v. State*, 815 S.W. 32d 636 (Tex. Crim. App. 1991, reh'g denied)(finding reversible error when the State's question injected the results of an otherwise-inadmissible study into the record and was allowed over objection).

Several common objections exist for the purpose of calling the trial court's attention to such an interjection of information through an improper leading question. Courts have recognized that objections to "speculation," "assumes facts not in evidence" and "counsel testifying" are all objections that raise the impropriety of a leading question based on the witness's lack of personal knowledge to answer it, *see Berryhill v. State*, 501 S.W.2d 86, 87 (Tex. Crim. App. 1973) (finding that the State's injection of facts not in the record in the form of an "isn't it true…?" question caused reversible error when the State also returned to their previously injected speculation in closing argument.); and *Duncan v. State*, 95 S.W.3d at 673 ("Prohibiting this kind of interjection of

prejudicial hearsay as fact, in front of the jury, is the purpose of the objections 'assumes facts not in evidence' and 'counsel testifying"').

b) Allowing the State's speculative question about the Quran allowed them to interject scripture into the record without first establishing that the witness had personal knowledge of the Quran.

In this case, the State interjected an entire passage from the Quran along with chapter-and-verse citation, but cloaked the interjection in the form of a leading question beginning with "isn't it true…?" (8 R.R. 127). The question was asked to Ms. Donaldson without first establishing that she had any familiarity with the Quran. In fact, Ms. Donaldson had already testified that she was *not* familiar with the details of the practice of Islam because "it's not one of my beliefs." (8 R.R. 106).

Because the State's question interjected an entire passage of the Quran, the Court's initial ruling to sustain the objection was correct. The State's excuse that they were just "asking if this witness knows" about the lengthy quoted passage did not make the question any less improper (8 R.R. 126). Because the jury had already been exposed to the improperly interjected scripture, the bell had been rung— the prejudice caused (discussed at length below) also called for the court to give an instruction to disregard, *Brown v. State,* 692 S.W.2d 497, 501 (Tex.Crim.App.1985). Instead, the trial court reversed its initial ruling and

permitted the State's question (8 R.R. 126). This was error and an abuse of discretion.

c) A speculative question invoking religious laws of retribution is inherently improper and prejudicial.

The most prejudicial improper question is one that is "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing its impression on the jury," *Brown v. State*, 692 S.W. 2d. at 501. Allowing such questions can be reversible error regardless of whether the court gives limiting instruction or not, *Id.*

Since 1934, Texas courts have recognized that a reference to scriptures about the religious laws of retribution during the punishment phase of trial is "a direct appeal to religious prejudice and calculated to arouse the emotions" of the jury, *see Oakley v. State,* 125 Tex. Crim. 258, 263, 68 S.W.2d 204, 206–07 (1934). Decades later, the Fifth Circuit again decried the practice of invoking religious laws of retribution, pointing out that courts across the country have found the practice to be "rank misconduct," and one that causes reversible error. *Ward v. Dretke*, 420 F.3d 479, 497 (5th Cir. 2005), *citing Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444, 458 (1998) (prosecutor's invocation of "millstone passage" from the Bible held to be reversible error); *Long v. State,* 883

P.2d 167, 177 (Okla.Crim.App.1994) (prosecutor's quotation of "the millstone passage" at penalty phase was "rank misconduct").

The circumstances in this case are remarkably similar to those in Ward v. *Dretke*: the mother of the accused had testified that her son "had turned back to his Catholic faith, attended confession, and sought absolution for his sins…aimed at bolstering [her son]'s claim that he was penitent and ready for treatment," 420 F.3d at 494. The court observed that this testimony may have properly invited a response that "[her son] was not ready for treatment, or perhaps that his spiritual reawakening was opportunistic," but citation to a biblical passage about the punishment for the crime for which he had been convicted instead "suggest[ed] that [his] embrace of faith dictated that he be judged by Biblical standards of justice." *Id.* This "reached beyond the record evidence and encouraged the jury to base its sentencing determination on notions of divine retribution." *Id.*

d) The State's question in this case was clearly calculated to inflame the minds of the jury and was not permissible for any proper purpose.

Cross examining appellant's Mother with a passage from the Quran was patently improper, not only because the question referred to a long and otherwise clearly inadmissible quotation from scripture, but because Ms. Donaldson had already testified that Islam was "not one of [her] beliefs" and

that she did not know about the day-to-day practice of her son's faith (8 R.R. 106). The question, regardless of whether it was phrased as "isn't it true" or "do you know," called on Ms. Donaldson to speculate about a scriptural law on punishment and retribution.

Because Ms. Donaldson's testimony made it clear to the court and to the State that she did not know the answer to the question before it was ever asked, the context makes it clear that the question was not intended to probe Ms. Donaldson's actual knowledge of the existence of scripture in the Quran, but rather to inject the religious punishment laws into the record through an improperly speculative question, and infer that Appellant should be punished according to the rules of his faith.

The record also does not support the introduction of scripture for any proper purpose. The state did not cross examine Ms. Donaldson about her about her son's calmness, openness to instruction, or humility, but instead confronted and impeached her with quotations from religious texts outlining divine commands for retribution.

Even if the State missed or misheard her testimony about not believing in Islam herself, Texas law is very clear that no witness may have their credibility tested by a challenge to their religious beliefs, Tex. R. Evid. 610 ("Evidence of a witness's religious beliefs or opinions is not admissible to attack or support

the witness's credibility."); Texas Constitution Article 1 Sec 4, ("No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief"); Tex. Code Crim. Pro. Ann. art. 1.17 ("No person shall be disqualified to give evidence in any court of this State on account of his religious opinions").

After the court allowed the State's first Quran question, the State cross-examined Ms. Donaldson not only about the beliefs of her son's religion but did in fact cross-examine her about her own personal religious beliefs and whether those beliefs conformed to the State's assertions about what "the Christian faith does believe" (8 R.R. 127). When Ms. Donaldson testified that she was a Christian and that she believed in mercy and grace, the state attempted to impeach her with the fact that Christian scripture also demands divine retribution, "an eye for an eye" (Id).

The State's dogged insistence on discussing divine commands about retribution from both Islamic and Christian scriptures reveals the State's intent in interjecting scripture from the Quran in their initial question to Ms. Donaldson. The continuing pattern all the way through closing argument also enhanced the prejudice caused by the trial court's error in overruling Appellant's initial objection and implicitly refusing to give a limiting instruction.

3) Appellant was harmed when the trial court overruled his objection to the State's speculative and prejudicial question.

On appellate review, a nonconstitutional error must be disregarded unless it affects the defendant's substantial rights. Tex. R. App. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing to *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). "Put another way, if the reviewing court has a grave doubt that the result was free from the substantial influence of the error, then it must treat the error as if it did. Grave doubt means that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error. Thus, in case of grave doubt as to harmlessness the [appellant] must win." *Burnett v. State*, 88 S.W.3d 633, 638-639 (Tex. Crim. App. 2002) (internal quotations omitted).

When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). "In determining whether the error was harmless, the test is not whether a conviction could have been had without the improperly admitted evidence, but, rather, whether there is a reasonable possibility that the evidence might have

contributed to the conviction or affected the punishment." *Battles v. State*, No. 11-05-00166-CR, 2006 Tex. App. LEXIS 3117 at *12 (Tex. App.—Eastland 2006, no pet.) (mem. op., not designated for publication), citing *Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987). "Thus, if there is a reasonable possibility that the evidence might have contributed to either the conviction or punishment assessed, then the error in admission is not harmless error." *Id.*

A question that is "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing its impression on the jury," causes harm to the substantial rights of the accused. *Brown v. State*, 692 S.W. 2d. at 501. As discussed above, the State's improper question was inherently prejudicial because it suggested that the jury should consider divine retribution when determining Mr. Gregory's sentence. Because the State was allowed to question Ms. Donaldson about a specific passage from the Quran, because that passage dealt specifically with retribution, and because this interjection of scripture was not cured with a limiting instruction, it cannot be said that the impression on the jury did not contribute to the punishment they assessed, *cf. Lucero v. State*, 246 S.W. 3d 86, 95 (Tex. Crim. App. 2008)(bible passage that did *not* concern eye for an eye or retribution was "essentially an admonishment to follow man's law" and thus did not affect the jury's verdict).

a. *Allowing a speculative question about a patently impermissible subject can cause substantial harm to the rights of the accused.*

Allowing the reading and questioning about a passage from the Quran also infringed on Mr. Gregory's constitutional rights and may merit an even more rigorous harm review under Texas Rule of Appellate Procedure 44.2(a). Under Rule 44.2(a), a constitutional error requires reversal unless the appellate court "determines beyond a doubt that the error did not contribute to the conviction." Tex. R. App. P. 44.2(a).

The accused have a fundamental expectation, protected by the United States and Texas Constitutions, that they will not be sentenced according to the laws or tenants of any religion or penalized due to their own religious beliefs U.S. Const. Amend. 1 ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."); Tex. Const. Art. 1 Sec. 6 ("No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.") Texas law demands that sentencing be based on "any matter the court deems relevant to sentencing" C. Cr. P. 37.07 sec 3(a), but the United States Supreme Court has specifically stated that "race, religion, or political affiliation of the defendant" are "factors that are constitutionally impermissible or totally irrelevant to the

sentencing process." *Zant v. Stevens*, 462 U.S. 862, 885, 103 S.Ct 2733, 77 L.Ed.2d 235 (1983).

Because the State invoked religious law regarding retribution and suggested both in questioning and later in argument that the jury should look to religious law in determining Mr. Gregory's sentence, this fundamental expectation not to be penalized for your exercise of religion was violated. The trial court's failure to limit this questioning the moment it began caused harm to Appellant's fundamental constitutional rights.

The trial court erred in overruling Appellant's objection to the State's improper leading question. As a result, Appellant was harmed by the introduction of the concept divine retribution as a factor to be considered by the jury in determining his sentence. Accordingly, Appellant respectfully requests that this court reverse the judgment entered below and remand his case to the trial court for a new sentencing hearing, *see* Tex. Code. Crim. Proc. Art. 44.29.

POINT OF ERROR NUMBER TWO

COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE STATE'S CONTINUED CROSS-EXAMINATION OF APPELLANT'S MOTHER ABOUT SCRIPTURE AND BY FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT SUGGESTING THAT MR. GREGORY BE SENTENCED ACCORDING TO THE LAWS OF HIS FAITH.

1) Standard of Review

The guarantee of effective assistance of counsel does not belong solely to the innocent, nor does it attach only to matters affecting the determination of actual guilt. *See Lafler v. Cooper*, 566 U.S. 156, 169 (2012), citing *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). Counsel's performance is measured against "an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the Court provided a two-prong analysis for claims of ineffective assistance of counsel. To show ineffective assistance of counsel, a defendant must demonstrate both that his trial counsel's performance was deficient, and that there is a reasonable probability that the results of the trial would have been different but for counsel's unprofessional errors, *Id.* at 681, 687. However, "[t]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for [the] error things would have been different " *United States v. Dominguez Benitez,* 542 U.S. 74, 83 n.9 (2004); see also *Strickland*, 466 U.S. at 694-696 ("the result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.")

When "there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision," trial counsel is not

afforded the court's ordinarily strong presumption that their conduct fell within the wide range of reasonable professional assistance. *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008). Even in the absence of a record setting forth counsel's reasons for the challenged conduct, a single egregious error of omission or commission by counsel may constitute ineffective assistance. *McKinny v. State*, 76 S.W.3d 463, 470-71 (Tex. App. – Houston [1st Dist.] 2002, no pet.). When no reasonable trial strategy could justify trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects trial counsel's subjective reasons for acting as he did. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

2) Relevant Law and Analysis

a) Failing to object to the State's argument calculated to incite the jury to factor divine retribution into its sentencing decision is deficient performance under Strickland.

The Fifth Circuit, considering a federal habeas writ on a state conviction, held that the proper application of *Strickland* and of Texas Law on improper argument would require the trial court to find deficient performance in failing to object to the State's invocation of religious law in punishment closing argument:

> We conclude that the state habeas court unreasonably applied *Strickland* with respect to Ward's claim that Lowe should have challenged the prosecutor's recitation of the millstone passage. . .

> suggesting that Ward's embrace of faith dictated that he be judged by Biblical standards of justice was improper, and an objection to this suggestion was necessary in order to mitigate its highly prejudicial effect.

Ward v. Dretke, 420 F.3d at 497.

Trial counsel has a duty to contain argument to the four general areas of proper summation: "(1) summary of the evidence; (2) reasonable deductions from the evidence; (3) response to opposing counsel's argument; or (4) plea for law enforcement." *Brown v. State*, 220 S.W.3d 564, 570 (Tex. Crim. App. 1994). Reversible error exists when facts not supported by the record are interjected in an extreme or manifestly improper argument. *Id.*

The Fifth Circuit observed that invocation of scripture to advocate for punishment according to the faith of the accused was patently improper, and that it was "a statement calculated to incite the jury to factor into its sentencing determination considerations of divine retribution." *Ward*, 420 F.3d at 499. The court specifically observed that an argument that the turn to religion might have been opportunistic could be a proper response to the mother's testimony about her son's faith, but that "suggesting that Ward's embrace of faith dictated that he be judged by Biblical standards" did not fall within the categories of proper argument, "and an objection to this suggestion was necessary in order to mitigate its highly prejudicial effect." Id. at 497; *cf. Sandoval v State*, 665 S.W.3d

496 (Tex. Crim. App. 2022)(holding that failing to object to a witness's spontaneous citation to "eye for an eye" could have been an acceptable strategy when defense counsel's later used the quotation to make a plea for mercy and grace.) Insofar as Texas courts had found the failure to object to such an argument from the State to be justifiable or even strategic, the Fifth Circuit ruled that this was a misapplication of *Strickland, Ward* at 497.

b) Counsel rendered constitutionally deficient representation when he failed to object to each of the State's subsequent references to scripture in cross examination and during the State's closing argument.

In this case, trial counsel only objected to the State's first use of scripture when the state posed a question to Appellant's mother that was clearly outside of her personal knowledge as a subterfuge to introduce and discuss the laws of retribution under her son's chosen religion. When the State continued this improper line of questioning to question the witness about her *own* faith, it was incumbent on trial counsel to continue to object to a topic clearly intended to inflame the jury.

c) Counsel's failure to object cause the State's patently improper and inflammatory statements to stand unchallenged and their extreme prejudice to go unmitigated.

The State's improper closing argument worked in concert with the improper cross examination of Mr. Gregory's mother discussed above in Point of Error 1. Looking at the record as a whole, the State's repeated focus on scriptural calls for taking "an eye for an eye" or a "life for a life" was extremely prejudicial—

that prejudice demanded an objection and a curative instruction to prevent interference with the jury's decision-making.

While defense counsel called the issue to the court's attention the first time and the court should have excluded the first question and instructed the jury to disregard it, it nevertheless fell to defense counsel to continue to object as the improper questioning, then improper argument, continued throughout the sentencing phase of trial.

Failing to object to the continued questions about scripture and to the state's invocation of scripture in closing argument constituted deficient performance. Because Mr. Gregory was prejudiced when the references were not cured by a proper objection and instruction to disregard, Mr. Gregory respectfully requests that this court remand his case to the trial court for a new sentencing hearing, *see* Tex. Code. Crim. Proc. Art. 44.29.

CONCLUSION AND PRAYER

For the reasons stated above, Brandon Gregory prays that this Honorable Court sustain his points of error, reverse the sentence entered below, and remand for a new sentencing hearing.

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/ Amanda Koons
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Amanda Koons

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 5166 words printed in a proportionally spaced typeface.

/s/ Amanda Koons
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