

**Appeal No. 14-24-00421-CR
Appeal No. 14-24-00422-CR**

FILED IN
14th COURT OF APPEALS
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In the Fourteenth Court of Appeals

STEPHEN ANDRE GAY, Appellant

Vs.

THE STATE OF TEXAS, Appellee.

**On Appeal from the 434th Judicial District Court
of Fort Bend County,
Cause No. 22-DCR-098135A and 23-DCR-102538.**

**BRIEF FOR APPELLANT,
STEPHEN ANDRE GAY**

ORAL ARGUMENT NOT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), appellant certifies that the following is a complete list of the parties to the final judgment and the names and addresses of counsel in the trial court and on appeal:

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Judge Presiding

J. Christian Becerra

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STATEMENT OF THE CASES

Appeal 14-24-00421-CR, cause number 22-DCR-098135A17 in the trial court, is an appeal from the plea of guilty, in the 434th Judicial District Court of Fort Bend County. On October 27, 2023, appellant entered a plea of guilty, before the court, to the February 1, 2015, and June 22, 2019, offense of aggravated sexual assault of a child. Texas Penal Code §22.021(a)(2)(B). Appellant was convicted and the trial court formally sentenced him to imprisonment for forty (40) years and no fine. (3 RR at 75). Appellant did not file his motion for new trial. On June 10, 2024, Appellant filed his notice of appeal. (1 CR at 71).

Appeal 14-24-00422-CR, cause number 23-DCR-102538 in the trial court, is an appeal from the plea of guilty, in the 434th Judicial District Court of Fort Bend County. On October 27, 2023, appellant entered a plea of guilty, before the court, to the February 1, 2015, offense of aggravated sexual assault of a child. Texas Penal Code §22.021(a)(2)(B). Appellant was convicted and the trial court formally sentenced him to imprisonment for forty (40) years and no fine. (3 RR at 67). Appellant did not file his motion for new trial. On June 10, 2024, Appellant filed his notice of appeal. (1 CR at 70).

ISSUES PRESENTED

THE TRIAL COURT ERRED BY ASSESSING A PUNISHMENT WHICH IS GROSSLY DISPROPORTIONATE TO THE CRIMES COMMITTED.

**Appeal No. 14-24-00421-CR
Appeal No. 14-24-00422-CR**

In the Fourteenth Court of Appeals

STEPHEN ANDRE GAY, Appellant

Vs.

THE STATE OF TEXAS, Appellee.

**On Appeal from the 434th Judicial District Court
of Fort Bend County,
Cause No. 22-DCR-098135A and 23-DCR-102538.**

**BRIEF FOR APPELLANT,
STEPHEN ANDRE GAY**

To the Honorable Justices of the Fourteenth Court of Appeals:

Comes now appellant, Stephen Andre Gay, by and through his attorney of record, Cary M. Faden, and files this his brief in the above-styled and numbered cause; and would respectfully show the Court:

STATEMENT OF FACTS

On January 23, 2023, appellant was indicted in Cause No. 22-DCR-098135A, in the 434th District Court of the February 1, 2015 and June 22, 2019, offense of sex abuse of a child continuous of a child under 14; reduced to aggravated sex assault of a child upon plea. In that indictment, it was alleged that appellant did:

STEPHEN ANDRE GAY, hereafter styled the Defendant, did then and there, heretofore between the dates of on or about February 1, 2015 and June 22, 2019, during' period that was 30 days or amore in duration, commit two or more acts of sexual abuse against NATASHA HAROLD **(pseudonym)**, said acts of sexual abuse having been Violations of one or more of the following penal laws, namely:

Indecency with Child by engaging in sexual contact, if committed in manner other than by touching the breast of the child, and at the time of the commission of each of the acts of sexual abuse, the defendant was 17 years of age or older and the complainant, NATASHA HAROLD **(pseudonym)**, was child younger than 14 years of age. (1 CR at 5).

On February 9, 2023, appellant was indicted in Cause No. 23-DCR-102538, in the 434th District Court of the February 1, 2015, offense of aggravated sexual assault of a child. In that indictment, it was alleged that appellant did:

STEPHEN ANDRE GAY, hereafter styled the Defendant, heretofore on or about February 01, 2015, did then and there intentionally or knowingly cause the penetration of the female sexual organ of NATASHA HAROLD **(pseudonym)**, a child who was then and there younger

than 14 years of age and not the spouse of the defendant, by the defendant's finger. (1 CR at 5).

On January 23, 2023, appellant was indicted in Cause No. 22-DCR-098135A, appellant filed and executed a verified document entitled "defendant's plea of guilty or nolo contendere - written admonishments, waiver of statutory and constitutional rights, and written stipulation and judicial confession, (1 CR at 18-28). That document is divided into three parts: (1) the court's written admonishments, (2) the waiver of statutory and constitutional rights, and (3) the written stipulation and judicial confession. (1 CR at 18-28).

In the “court's written admonishments,” appellant acknowledged an understanding of admonitions: (1) that he was charged with the offense of aggravated sexual assault and that the range of punishment for that offense is imprisonment for five (5) to ninety-nine years or life and a fine not to exceed \$10,000.00; (2) that any plea bargain agreement constituted no more than a recommendation from the state and was not binding upon the court; that the court would inquire into the existence of such a plea bargain; and that, if the court should reject such a bargain, appellant would be permitted to withdraw his plea; (3) that, if the punishment assessed by the court did not exceed the agreed recommendation, his right of appeal would be limited to matters permitted by the court or ruled upon in response to a pretrial motion; (4)

that, if he was not a United States citizen, his plea might result in deportation or denial of United States admission or naturalization; and (5) that a deferred adjudication has certain dire consequences. (1 CR at 18-28).

In the “waiver of statutory and constitutional rights,” appellant waived (1) the right to the reading of the indictment; (2) the right to trial by jury; (3) the right to remain silent and the privilege against self-incrimination; (4) the rights of appearance, confrontation and cross-examination of witnesses; (5) any right to additional time to prepare for trial; and (6) the right to have a court reporter record the proceedings. (1 CR at 19).

In the “written stipulation and judicial confession,” appellant (1) judicially confessed that, he committed the acts alleged in the indictment and constituting the offense of aggravated sexual assault of a child; (2) acknowledged that there was no agreed recommendation as to punishment; (3) asserted that he was competent to stand trial; (4) acknowledged his understanding of the admonishments and the consequences of his plea; (5) asserted that he voluntarily entered his plea of guilty; and (6) asserted that he had consulted fully with his attorney before entering his plea. (1 CR at 20).

Appellant entered a plea of guilty before the judge. The trial court accepted appellant's plea and entered judgment; deferring sentencing for a sentencing hearing

subsequent to the preparation of a pre-sentence investigation.

On February 9, 2023, appellant was indicted in Cause No. 23-DCR-102538, appellant filed and executed a verified document entitled "defendant's plea of guilty or nolo contendere - written admonishments, waiver of statutory and constitutional rights, and written stipulation and judicial confession, (1 CR at 18-28). That document is divided into three parts: (1) the court's written admonishments, (2) the waiver of statutory and constitutional rights, and (3) the written stipulation and judicial confession. (1 CR at 18-28).

In the “court's written admonishments,” appellant acknowledged an understanding of admonitions: (1) that he was charged with the offense of aggravated sexual assault of a child and that the range of punishment for that offense is imprisonment for five (5) to ninety-nine years or life and a fine not to exceed \$10,000.00; (2) that any plea bargain agreement constituted no more than a recommendation from the state and was not binding upon the court; that the court would inquire into the existence of such a plea bargain; and that, if the court should reject such a bargain, appellant would be permitted to withdraw his plea; (3) that, if the punishment assessed by the court did not exceed the agreed recommendation, his right of appeal would be limited to matters permitted by the court or ruled upon in response to a pretrial motion; (4) that, if he was not a United States citizen, his plea

might result in deportation or denial of United States admission or naturalization; and (5) that a deferred adjudication has certain dire consequences. (1 CR at 18-28).

In the “waiver of statutory and constitutional rights,” appellant waived (1) the right to the reading of the indictment; (2) the right to trial by jury; (3) the right to remain silent and the privilege against self-incrimination; (4) the rights of appearance, confrontation and cross-examination of witnesses; (5) any right to additional time to prepare for trial; and (6) the right to have a court reporter record the proceedings. (1 CR at 19).

In the “written stipulation and judicial confession,” appellant (1) judicially confessed that, on October 8, 2017, he committed the acts alleged in the indictment and constituting the offense of aggravated sexual assault of a child; (2) acknowledged that there was no agreed recommendation as to punishment; (3) asserted that he was competent to stand trial; (4) acknowledged his understanding of the admonishments and the consequences of his plea; (5) asserted that he voluntarily entered his plea of guilty; and (6) asserted that he had consulted fully with his attorney before entering his plea. (1 CR at 18-28).

Appellant entered a plea of guilty before the judge. The trial court accepted appellant's plea and entered judgment; deferring sentencing for a sentencing hearing subsequent to the preparation of a pre-sentence investigation.

In all two cause numbers, the sentencing hearing, before the trial court, the parties announced ready to go forward with the sentencing hearing. (3 RR at 6).

The state called Natasha Harold, I'm 18. I turn 19 next month, actually. You turn 19 next month? Yes. I'm going to the neuro program, but I also decided I wanted to take up early childhood development. Okay. What made you add that part to it? I love kids. Will you miss your brothers and your sister when you go back to New York? Deeply, yeah. That was one of the main factors of not going at first; I was just going to miss my family a lot, and I didn't really want to go a thousand miles away. But I call them all the time, or I did, when I was up there. And I always have the summer. So it's a little more manageable now. Good. And the reason I bring up your siblings a lot is because of the statement that you provided to the Court through the PSI writer. And so are you worried about what is going to happen to them depending on what Judge Becerra decides today? And so but for your friend Jada writing and disclosing your abuse in her suicide note, would you have ever reported the sexual abuse by Stephen Gay? No. Why not? Because I don't think he's a bad person, but I think there's just things that he needs to figure out in himself. But I do think that he was a good dad and he provided. And I just don't want them to grow up without a father because he was a good father to me. Okay. And so given all of that, are you asking for Stephen to be placed on probation so that he can continue to support the

family? I am. And I know how it might sound, but I really do believe that he wouldn't do something like this again. And I just want to make sure that the aftermath of all of this results in my family still being taken care of. Because it's just not about me right now, I want to make sure. Were there some sexual acts that you disclosed to me later on in a meeting that were in addition to what you had previously stated? Yes. And so I want to talk about that. And so how old were you when the abuse started? Nine. And what grade were you in when the abuse ended? I think it was my sophomore year of high school. So over five years of abuse? So in your interview you had disclosed that Stephen had touched your vagina with his hands. What did his fingers in particular do whenever he would touch your vagina with his hands? So did his fingers go past those outer lips? Yes. What other parts of Stephen's body went past the outer lips of your sexual organ? His penis. Okay. You said penis. And how many times did his penis pass the outer lips of your sexual organ? Multiple. But I don't remember exactly. Multiple. Okay. And when his penis would pass the outer lips of your sexual organ, how would that make your sexual organ feel? It hurt. And when it would hurt, what would you tell Stephen? That it hurt. And would he stop at that point or would he still try to keep going? Eventually he would stop. But not immediately? Not always, no. So then other than his finger and his penis, was there another part of his body that made contact with your sexual organ? Yes. And what part of his body was

that? (No response.) Did his mouth make sexual contact with your sexual organ? Yes. And when I say his mouth, was it his mouth as well as his tongue? Yes. And did his tongue pass the outer lips of your sexual organ when it would make contact? Yes. Did that happen multiple times? Yes. How old were you whenever that type of sexual contact started, his mouth on your vagina? I was nine or ten. Okay. You said nine or ten. And did that continue on until your sophomore year of high school? And these various sexual acts, were they consistent or inconsistent in terms of how frequently they would occur? They were inconsistent. And why were they inconsistent? Um, it might have had something to do with like marriage problems or whatever was going on between him and my mom. But I also feel like he was -- like my age, in time, kind of made him feel a bit guilty, so he wouldn't as much. Were there times where the abuse would be infrequent? Yes. And were there times when the abuse would happen multiple times a week? Yes. In his statement to the Court, I know I talked to you about his version of events. He described this as him fondling you on one instance. Is that true? No. Did he commit repeated acts of sexual abuse against you? Yes. So the fact that he is saying this is a one-time instance of fondling, is he lying? Yes. In your statement to the Court, you state that, quote: "I could never hate him, and it makes me heavily question myself why I still love him or catch myself calling him dad." So given how you feel about Stephen Gay, do you have any reason to lie about

the fact that there was repeated active sexual abuse? No. (3 RR at 10-22). Cross examination, I know you don't really want to be here; is that right? I just want to be here to do something. I just want to be able to help my family. I understand. And we'll get to that. But I don't mean you didn't want to be here to go through with this, I mean that this is just uncomfortable and it is not a normal setting, place, where you want to be doing this today, right? That's what I meant by that. Yes. I'm sorry. So when you -- when you made some statements that you are worried about if Stephen is incarcerated about how your family is going to be supported, what do you mean by that exactly? Well, in order for me to get another loan in order to make my 100 percent student aid, there needs to be a Parent Plus Loan. And I think it's student loans on my mom's end, and that is why she is not able to obtain a loan. So if Steve is not working, then she won't be able to pay the loan off without my help and I won't be able to get the loan for school. There's been some discussion about your wanting the Judge to grant probation. Has anybody ever explained to you what probation is? I don't think I have a very clear picture, but I do know that he wouldn't be serving time in prison. (3 RR at 22-32). State rested. (3 RR at 32).

Appellant called Cheryl Gay, and so Stephen is your brother? Correct. If the Court considered some type of community supervision, would there be any children living in that home or in the area? There would not be. And based upon your

understanding of the allegations, and you just heard them described briefly by Ms. Ramos, what type of consequence are you looking for in this case? I personally understand, I love that girl that was just up here. I love her like she was my own child. And I -- my heart goes out to everyone in this situation because the allegations were hard to listen to because that is not the person that I know. And I can't tell you why or how or when or what those allegations are about, but I do know that my brother worked two jobs seven days a week, working one job where he drove 45 minutes, an hour, both -- you know, one way to make sure that my nephew, his son with his wife, has insurance because he has sickle cell anemia. I'm asking for the same thing that she was asking for, which is probation, whatever that entails, whether it is very supervised, which I would be totally understand, you know, it is totally understanding that he would have to be very, very scrutinized, very heavily monitored. (3 RR at 33-39). Cross examination, and you saw her testify and you saw the emotion and how hard it was for her to give the details about the abuse, correct? Correct. And you referred to what she said multiple times as "the allegations," "the allegations were hard to listen to." But do you understand that now that she has testified that these are not allegations, these are facts? Well, I was referring to it the way that he was referring to it so that we could keep it consistent in what we are speaking about. Okay. So you would agree with me that what she testified to are facts, correct? If that

is what you are presenting, then yes. So your brother you now know did perform oral sex on your niece, correct? Correct. Your brother, based on what Natasha said, attempted to have sexual intercourse with her on multiple occasions, correct? Correct. And that there were a number of egregious acts of sexual abuse for over five years based on her testimony? Based on her testimony, correct. Okay. And you would agree with me that the reason that you are asking for leniency for your brother is not necessarily based on the facts of the case but because you want to see him continue to support his family, correct? That's part of it. (3 RR at 39-48).

Selam Kebede was called, I'm employed with Fort Bend County Behavioral Services. And based upon -- based upon your meeting with him, you generated a report, a psychological evaluation, that was ordered by the Court and provided to the Court; is that correct? That's correct. You also, on Page 3 of your report, you identify a label as: Abuse and Trauma. When you say "abuse and trauma," are you asking Mr. Gay regarding abuse and trauma that he may have -- some abuse and trauma to him as a child or adult or as he is growing up? Yes. What does that mean exactly? That means trauma or abuse he experienced both as a child and as an adult. And did he disclose any issues to you regarding that? Yes, he did. Did you identify any -- based upon your education, training, and experience and your testing, did you come to the conclusion that there was any medical or psychiatric problems going on with Mr.

Gay? Yes, I have. And that's when the diagnosis was offered. And what is -- what was your diagnosis? Adjustment disorder with mixed anxiety and depression. An adjustment disorder and depression; is that what you said? That's what I said, yes. There were three psychological testing that was done. One of them was a BDI depression scale and the other one is a anxiety scale and the last one is a personality assessment testing. And what were your conclusions based upon that testing? The test results indicate that there is some level of depression and anxiety, as well as trauma related symptoms that were observed and concluded. And with regards to the DSM-5 diagnosis, again, what was your diagnosis with regards to that? Adjustment disorder with mixed depression and anxiety. (3 RR at 48-57). Cross examination, so in regards to the diagnosis of adjustment disorder with mixed anxiety and depressed mood, did I get that correct? You did. A long, long name for that. Does that diagnosis in any way justify Stephen Gay penetrating the sexual organ of his stepdaughter with his fingers, his penis, and his tongue? No, it doesn't. (3 RR at 57-59).

Leslie Gay was called, and do you know this man sitting to my right? Yes. And who is he? That's my husband. Are y'all still legally married? Yes. And that your daughter has testified about what took -- not in great detail, but she has testified as to what happened to her, things of that nature? Yes. Can you tell us why that insurance is necessary for your family? My children have specific healthcare needs.

I have the sickle cell trait and Stephen also has the sickle cell trait. So we have a child that was born with sickle cell, SC disease. That means that he needs more monitoring from his hematologist and sometimes hospitalization for blood transfusions. And I'm primarily the one that goes to the hospital with them and go to doctor appointments with all of the children, and Stephen provides the insurance as well as financial well-being. And so not to go back over, but you understand that Stephen has pled guilty to these indictments; there's going to be a serious consequence to this, right? There should be. I want Stephen to be punished. But I ask for consideration for the livelihood of my children and for Natasha who we still very much depend upon his -- on the financial benefits that he provides and he has continued to provide. I can't -- I won't have a car. I don't know how I will feed my children. So I ask that first and foremost that you would give whatever judgment or take into consideration whatever judgment Natasha would want, but if you would consider me as the mother if we could not further be victimized by the loss of employment that I need to provide for the children, because I can't provide for them solely on my own. (3 RR at 59-65).

Cross examination, in fact, when you found out about Natasha's disclosure to her friend Jada, you immediately reported this to the police, correct? Yes. And you also immediately confronted your husband about what he had done, correct? Yes. And your understanding of the sexual acts involved are based on what Natasha told you

initially, correct? Yes. And those sexual acts would be sexually fondling of her genitals and him making contact between his penis and her sexual organ, correct? Yes. (3 RR at 65-68).

Both sides rested and closed. (3 RR at 68). The trial court made a finding of guilt and made the findings a final finding of guilt. (3 RR at 73). The trial court then formally imposed sentence on appellant. (3 RR at 73). The court ordered the sentences to run concurrent.

SUMMARY OF THE ARGUMENT

Appellant contends that the sentence assessed against him was excessive and grossly disproportionate to the crime committed. “If the trial court assesses a punishment within the statutorily prescribed limits, the punishment is not cruel and unusual and generally will not be disturbed on appeal.” *Buerger v. State*, 60 S.W. 3d 358, 365 (Tex. App. – Houston [1st Dist.] 2001, review ref’d). However, Appellant contends that the trial court’s punishment was disproportionate to the crime committed and did violate his constitutional right under the Eighth Amendment to the United States Constitution and Article I, Section Thirteen of the Texas Constitution.

ARGUMENT

POINT OF ERROR NO. 1

THE TRIAL COURT ERRED BY ASSESSING A PUNISHMENT WHICH IS GROSSLY DISPROPORTIONATE TO THE CRIMES COMMITTED.

Appellant contends that the sentence assessed against him was excessive and grossly disproportionate to the crime committed. “If the trial court assesses a punishment within the statutorily prescribed limits, the punishment is not cruel and unusual and generally will not be disturbed on appeal.” *Buerger v. State*, 60 S.W. 3d 358, 365 (Tex. App. – Houston [1st Dist.] 2001, review ref’d). However, Appellant contends that the trial court’s punishment was disproportionate to the crime

committed and did violate his constitutional right under the Eighth Amendment to the United States Constitution and Article I, Section Thirteen of the Texas Constitution. “Although a sentence may be within the range of permitted by statute, it may nonetheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment.” *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App. – Houston [14th Dist.] 2000, review ref’d).

In deciding whether the punishment is disproportionate to the crime committed, “[w]e first make a threshold comparison of the offense against the severity of the sentence, judging the gravity of the offense in light of the harm caused or threatened to the victim or society and the culpability of the offender.” *Culton v. State*, 95 S.W.3d 401,403 (Tex. App. – Houston [1st Dist.] 2002, review ref’d). “Only if we infer that the sentence is grossly disproportionate to the offense, will we then consider the remaining factors of the *Solem* test and compare the sentence received to (1) sentences for similar crimes in the same jurisdiction, and (2) sentences for the same crime in other jurisdictions. *Baldrige v. State*, 77 S.W.3d 890, 893 (Tex. App. – Houston [14th Dist.] 2002, review ref’d). Appellant acknowledges that the trial court’s sentence falls within the range of punishment which is prescribed by statute for the offenses of aggravated sexual assault of a child which is 5 years to 99 years or life in prison. However, Appellant contends that the trial court’s decision to

sentence him to two 40 year prison sentences and run them all concurrent, is grossly disproportionate to the crime for 4 reasons. First, Appellant has no felony criminal history.

Second, no one was seriously injured, in fact no one was injured. Third, Appellant spent some time in jail awaiting the resolution of his felony charges. Fourth, Appellant pleaded guilty to the felony charges and accepted responsibility for his actions while asking the court to grant him community supervision or at the minimum sentence. While Appellant admits that he should receive punishment, he contends that his listed four reasons demonstrate that the trial court rendered a grossly disproportionate sentence for the crime committed for a first-time offender. The trial court could easily have granted Appellant community supervision or a lower prison sentence. By assessing two 40-year TDC sentences to run concurrent, the trial court administered an excessive and grossly disproportionate sentence for the crime Appellant committed. In addition, Appellant contends that a sentence for the crime of aggravated sexual assault of a child in Fort Bend County and other Texas counties would have been significantly lower than the two 40-year sentences for a first-time offender who did not injure anyone.

Courts have held the record does not show that appellant raised his Eighth Amendment complaint in the trial court. Thus, appellant has not preserved error. *See*

Tex. R. App. P. 33.1. Appellant argued, that the sentence assessed against him was excessive and grossly disproportionate to the crime committed. “If the trial court assesses a punishment within the statutorily prescribed limits, the punishment is not cruel and unusual and generally will not be disturbed on appeal.” *Buerger v. State*, 60 S.W. 3d 358, 365 (Tex. App. – Houston [1st Dist.] 2001, review ref’d). However, Appellant contends that the trial court’s punishment was disproportionate to the crime committed and did violate his constitutional right under the Eighth Amendment to the United States Constitution and Article I, Section Thirteen of the Texas Constitution. “Although a sentence may be within the range of permitted by statute, it may nonetheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment.” *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App. – Houston [14th Dist.] 2000, review ref’d).

Courts are requiring an objection, “A sentencing issue may be preserved by objecting at the punishment hearing, or when the sentence is pronounced,” and sometimes by a motion for new trial. *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013). In assessing harm, reviewing courts “consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record.” *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); see also *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App.

2016) (setting out these factors in issue regarding error from omission of accomplice-witness instruction); *Ratliff v. State*, No. 03-18-00569-CR, 2020, 604 S.W.3d 65, 85–86, 86–87(Tex. App.—Austin Feb. 14, 2020, no pet. h.) (applying these factors to issue of whether jury-charge error constituted “an impermissible comment on the weight of the evidence”).

However, Appellant was harmed, this is constitutional error, an objection should not be required in this instance to preserve constitutional error. Harm analysis or lack of complete harm analysis does not create waiver. As a reminder, you don’t have to argue harm. There’s no constitutional or statutory right to be free from harm. “No burden to show harm should be placed on the defendant who appeals.” *Johnson v. State*, 43 S.W.3d 1, 8-9 (Tex. Crim. App. 2001). “We hold that it is the responsibility of the appellate court to asses harm . . . and that the burden to demonstrate whether the appellant was harmed by a trial court error does not rest on the appellant or the State.” *Id* at 9. See also, *Ovalle v. State*, 13 S.W.3d 774 (Tex. Crim. App. 2000). “[N]o party should have the burden to prove harm from an error, and there ordinarily is no way to prove actual harm.” *Id* at 787.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, appellant, Stephen Andre Gay, for the reasons stated, prays the Court to reverse and acquit or in the alternative to

reverse and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE, T.R.A.P., RULE 9.4(3)

_____ In accordance with TEX. R. APP. P. 9.4(3), I Cary M. Faden, certify that this is a computer generated document and I state that the number of words in this document is 5,721 words. I am relying on the word count of the computer program used to prepare this document.

/S/CARY M. FADEN

Cary M. Faden

CERTIFICATE OF SERVICE

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