NO. 14-24-00929-CR

IN THE COURT OF APPEALS FOR THE

FOURTEENTH DISTRICT OF TEXAS

AT HOUSTON

NO. 22-CR-4373

IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS

122nd JUDICIAL DISTRICT

BRUCE ALAN SHEALY, **Appellant**

v.

THE STATE OF TEXAS, **Appellee**

BRIEF OF APPELLANT

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Hon. Leslie Brock Yates	Visiting Judge of the 122nd District Court Galveston County, Texas

STATEMENT REGARDING ORAL ARGUMENT

The appellant requests oral argument because of the importance of the issues concerning proof beyond a reasonable doubt and whether an abatement for a new

punishment hearing is a proper remedy.

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TO THE HONORABLE COURT OF APPEALS:

Comes now the appellant, Bruce Alan Shealy ("Shealy"), through the undersigned court-appointed counsel on appeal, and respectfully requests that this Court reverse the appellant's conviction and remand this cause for a new trial, on guilt and on punishment, for reasons set forth below.

STATEMENT OF THE CASE

An indictment filed in the 122nd District Court of Galveston County, Texas accused Shealy of Murder (CR -9). [1] A jury found Shealy guilty as charged (CR-247)..[2] At the punishment stage of trial, the jury assessed punishment at confinement for life in the Texas Department of Criminal Justice, Correctional Institutions Division, with no fine (CR-251).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final criminal judgment from a district court in Galveston County. Shealy gave timely notice of appeal on December 5, 2024 (CR- 263, 265).

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[1] The clerk's record of court documents is designated as "CR" herein.

[2] The reporter's record is designated as"RR," with Roman numerals for volume numbers.

FACTUAL BACKGROUND

A. Guilt Phase

The evidence showed that Bruce Alan Shealy was living in San Leon, Texas, an unincorporated area near the Bay in Galveston County. The location was a farm operated by Virginia Valentino, who went by the nickname "Ginger."That property had been set up as a zoo, with various animals, especially rabbits, on the grounds (RR III- 30). Shealy's wife, Amanda, and their two children, Andrew (called "AJ") and his sister Natasha, lived nearby.[3] Although the parents were separated, the children spent many Saturdays visiting their father (RR III-19).

On the night of December 9, 2022, Shealy and his wife took their children to a Christmas light show at NASA (RR III-21) After that, they returned to the home of"Ginger" Valentino. Shealy told the children to go up to Valentino's home and get some ice cream (RR III-22). Shealy's son testified that he and his little sister did that, then the children walked back to where the car was parked (RR III-24).. At first the children did not see Shealy or his wife in the car. Then they noticed their mother lying on the ground, and she was not moving (RR III-24). AJ saw Shealy himself lying nearby on the ground. Shealy told AJ to go to the bedroom in Valentino's

[3] Amanda's maiden name was Montgomery, and she is identified by that name in the indictment and a few other documents.

house, where there was a piece of paper that Shealy wanted AJ and Natasha to read (RR III-25).

When Galveston County Sheriff's Department deputies and emergency medical personnel arrived, Amanda was pronounced dead. Shealy was taken to a hospital, and as a result of that, he survived.

Valentino testified that, when the children returned from their grim discovery, young Natasha asked Valentino to hold her (RR III-38). While Natasha sat in Valentino's lap, AJ brought out a spiral notebook from a bedroom (RR III-39). Valentino recognized a letter inside the notebook which she had seen the appellant, Shealy, writing earlier (RR III-39). The letter subsequently was taken as evidence by an officer (RR III-41). Eventually the letter was introduced into evidence as an exhibit (RR VI-111). It is addressed to A J and Natasha, (or Tasha for short), and reads (with no grammatical or spelling corrections), as follows:

A J – Tasha

My Babys

I want you to know that everything will be Fine.

Take care of Tasha Hold Her Hand Tight I Love You So Much

Your The man of The House. Call your uncle Scott He will Take care of you on mom phone it under SiSter in lawton. Call Them and papa.

Be Strong Here iS Some money for you. love you Son. Your the Best.

Remember Be Strong. we will always be with you.

I was looking forward TO Tommow But That wasnt going To Happen.

Love Dad

Love you guys SO MUCH

Be Strong Buddy

give Tesha [sic] Big Hugs For me

Aunty Toni and Scotts Number

[Indecipherable phone number redacted].

The letter reads like something that might be sent by a man planning a murder-suicide. The appellant did not take the stand, however, and therefore could not explain what he meant.

But that is not all of what was inside the notebook. Page after page contains numbers, associated with various first names which suggest that the book was a drug dealer's ledger. Since the evidence contained no expert testimony regarding handwriting analysis, could it be that the ledger really belonged to someone else? Perhaps a drug dealer? The evidence simply does not give a clear answer to that question.

Turning to the actual cause of Amanda's death, a medical examiner, Erin

Barnhart, testified that Amanda died from multiple gunshot wounds (RR IV-163). One entered her head (RR IV-157). Another entered her abdomen and struck internal organs, *i.e.* her pancreas, small intestine, and liver (RR IV-159). Both of those shots could be fatal. Internal organ bleeding creates a high risk of death.

As to Shealy's operation of the murder weapon, a DNA analyst who examined the trigger and trigger guard area of the handgun which was recovered showed that some of Shealy's DNA was abundant at those spots on the gun. Of course some of his DNA could be expected if he owned the gun and fired it, which in a place like San Leon could be for reasons other than intentionally killing some other person. And the DNA comparison did not include any DNA taken from the somewhat mysterious resident of another person who lived in a trailer on the property, Danny Veatch. Veatch testified that he would help out Valentino and her sister, Karen Clark, by driving them to appointments (RR IV-19). ,Veatch could have thought that Shealy was in line to inherit some of the property from Valentino and Clark, edging Veatch out of his own chance to inherit the property.Veatch hinted at that resentment in the following exchange on cross-examination:

Q. And you know that Bruce refers to Karen as mom?

A. Yes.

Q. Karen doesn't have any biological children. Correct?

A. Yeah.

Q. In fact, if something – God forbid – were to happen to Ms. Karen, she probably would have left everything to Bruce. Right?

A. Probably.

(RR IV-79). If that kind of resentment drove Veatch to hate Shealy, then Amanda may have been shot simply because she was a witness, and therefore she had to be eliminated, even though Shealy himself was the intended target.

Despite such troubling questions, Galveston Sheriff's Department detective Danny Kitchens summarized the State's theory of what happened:

> Q. Now, ultimately, what was the conclusion that you came to based on all the evidence that you had been presented, all the forensics that had come back, with Bruce's statement, what was your understanding of what happened that night?
>
> A. What I felt had happened that night is he went out to talk to his wife, sent his kids up there because he didn't want them around, and something happened at that car that caused him to shoot his wife.
>
> Q. Okay. So, ultimately, your understanding of what happened based on the evidence, your interview is that Bruce is the one that shot Amanda?
>
> A. Correct.

(RR IV- 93). The theory that Shealy shot his wife because of "something" that "happened at that car" cannot be squared with the purported murder-suicide note,

which must have been written at some point when Shealy was inside Valentino's home. Shealy never was inside Valentino's home after Shealy, Amanda, and the children returned from the Christmas light festival at NASA.

B. Punishment Phase

At the punishment phase of trial, the first thing that happened was that the defense attorneys filed a motion to withdraw as counsel (CR- 245, RR V-6). The motion itself was filed at 11:04 AM on December 5, 2024; Before the punishment testimony started, attorney Carpenter stated "We filed our motion to withdraw and order. Here's our notice to the clerk" (RR V-6). Yet the motion was not granted until after the punishment hearing was concluded. This odd timing is important to the second point of error.,

Shealy did have a prior misdemeanor conviction, but it was not even mentioned in the State's closing argument. Instead the State relied primarily on the testimony of Sharon Montgomery, the mother of Shealy's wife. Ms. Montgomery testified that her daughter Amanda grew up in Massachusetts, but they saw each other "two or three times a year" (RR V-8). Amanda earned two master's degrees, worked in the business world for a few years, and then changed careers to become a science teacher (RR V-9). She taught for several grades at the Odyssey Academy in Texas City (RR V -10). Montgomery had been staying with Amanda until Thanksgiving of 2022,

shortly before Amanda was killed (RR V-9).

Montgomery said the last visit was "chaotic because Bruce was not living with them" (RR V-11). She concluded by thanking all of the friends and relatives who "have been amazing help in healing my heart" (RR - 12). Defense counsel then stated that "we have no questions for Ms. Montgomery" (RR V -12). First among the topics which could have been asked was *why* appellant Shealy was not living with Amanda and the children. The fact that no question was asked is suggestive of one of Irving Younger's "Ten Commandments of Cross-Examination," which is that defense counsel should not ask a question unless he or she already knows what the answer would be. The record is unclear on what the defense lawyers did or did not know.

After the State rested, the defense called Karen Clark, who said that she got to know the appellant after"Amanda came over with her son when he was two and a half to get a rabbit for him" (RR V-13). Clark said the appellant was "very helpful" to Clark and her husband, who ran a small farm where they raised rabbits and deer (RR V-13). She said the appellant also lived with her for "maybe three weeks, maybe a month, after he got out of – I forgot the name of — yeah" (RR V-14).[4]

The questioning continued:

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[4] This was potentially a very damaging answer. It sounded as if Ms. Clark was going to say Shealy had been in jail or a mental hospital.

Q. So, let me ask you this. In all the years that you've known Mr. Shealy, have you ever witnessed any violent behavior?

A. No.

Q. Do you know anything about how Mr. Shealy grew up?

A. A little. It was pretty traumatic.

Q. How -- what makes you say "traumatic"?

A. Well, I mean, his father and mother, you know, had problems and was reflecting how he was raised.

(RR V - 14). There was no specific explanation of how Shealy's experience while growing up was "traumatic." But the witness' choice of words, "traumatic," and the comment that "his father and mother ... had problems" suggested that Shealy had witnessed domestic violence between his parents.

In short, there was some potentially mitigating evidence, but it did not get developed. Why that shortcoming was the situation is the reasons why Point of Error Two seeks an abatement and potentially a new punishment hearing.

This was only lightly addressed in the punishment-stage argument to the jury, where the defense argued that the facts did not support a life sentence:

> A life sentence, folks, is for someone who continuously throws away morals, makes conscious decisions time after time to break the law, to do harm to others. That's the type of person that you put in prison for life, not someone who snapped once. Amanda did not deserve to die. I get that. But you're talking about a gentleman who, before that night, never exhibited any form of hostility, anger, or violence towards anyone.

(RR V-23). The defense argument also pointed out Shealy's age, and with that in mind, urged the jury to assess punishment at twenty years (RR V-24).

The prosecutor, in reply, argued that, despite the absence of a history of violence by Shealy, "I also know that you can do one thing so heinous, one thing so evil that you completely forfeit your right to life in free society" (RR V-25). She scoffed at a 20-year sentence as bei "insanity" (RR V-26). The prosecutor continued: "This man has earned himself every single day of a life sentence, and that's where I want you to start your consideration. ... The only way that we serve a just verdict in this case, the only way that we keep the community safe is to send him to prison for life" (RR V--26).

SUMMARY OF THE ARGUMENT

Shealy first contends that the trial court erred by not giving the definition of proof beyond a reasonable doubt which was adopted in *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991). That definition is virtually the same as the definition given to juries for all trials conducted in the federal courts within the territorial jurisdiction of the United States Court of Appeals for the Fifth Circuit, and in federal district courts in several other circuits. That definition then was abandoned in *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000), which gutted *Geesa* by allowing an instruction on proof beyond a reasonable doubt only if the prosecutor

does not object. Prosecutors never fail to object. Making matters worse, however, is that prosecutors (and in this instance, the visiting judge) used voir dire to suggest that proof beyond a reasonable doubt requires nothing more than "common sense," which actually is a nebulous concept.

This situation now creates a problem with obtaining a unanimous verdict. Ever since *Ramos v. Louisiana*, 590 U.S.__ (2020), a unanimous verdict is required by the federal constitution in state criminal cases. Such was not the case when Paulson left jurors to their own devices in deciding whether the correct standard of proof was applied. With no guarantee that all twelve jurors were applying the same standard, there is no assurance that they all actually agreed on what the evidence showed.

The State may argue that Shealy waived this point of error by not requesting a *Geesa*-type instruction. For jury instructions, however, whether or not an instruction is requested only determines the degree of harm which must be shown. Shealy contends that the error was egregiously harmful and that a new trial should be granted on the issue of guilt..

The second point of error arises from the odd situation in which the defense attorneys announced their intention to withdraw from representation of Shealy before they had participated in the punishment phase of trial. Being retained, rather than court-appointed, does not excuse attorneys from the obligation to see a case through

to completion. As this cause illustrates, a retained attorney who precipitously withdraws leaves his client without the guiding hand of counsel at a critical stage in the proceedings has failed to complete his or her obligation to the client.

This is not an "ineffective assistance of counsel" issue, such as is better reserved for a postconviction writ application. Instead Texas case law calls for the appeal to be abated and a hearing to be conducted in the trial court to explore why the lawyers who were representing Shealy chose to withdraw before the punishment hearing. They presented only a scant amount of mitigating evidence, although a thorough investigation of Shealy's mental health might have uncovered evidence whcih would call for a significantly less harsh punishment. With what will be shown on abatement, a new trial should be granted on punishment.

ARGUMENT AND AUTHORITIES

POINT OF ERROR ONE

A. Standard of Review

The burden of proof is a legal issue, so review is *de novo*.

B. The Meaning of Proof Beyond a Reasonable Doubt

The first point of error concerns a *controversy* which now is over thirty years old in Texas law, but has a much longer history in Anglo-American jurisprudence.

In criminal cases, unlike civil cases, the State, which is in the same position as the plaintiff in a civil case, has a burden of proving its allegations beyond a reasonable doubt. The core question is whether that standard should be defined in a jury charge.

Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991) started as a debate in the Court of Criminal Appeals about circumstantial evidence in narcotics cases. That debate mushroomed in the 1980's with the spread of cocaine use. *Geesa* adopted a pattern jury instruction used in every federal criminal case tried to a jury within the jurisdiction of the Fifth Circuit Court of Appeals. That pattern instruction, as published in the 2019 Edition of the federal Pattern Instructions, reads:

1.05

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF,

REASONABLE DOUBT

> The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The defendant begins with a clean slate. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify].[5]
>
> The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond

[5] The bracketed words are deleted from the pattern instruction if a defendant testifies.

> all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.
>
> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.

The current Fifth Circuit pattern instruction includes a sentence stating "The defendant begins with a clean slate," but that is just a figure of speech which adds no unique guidance. The vital concept is the "hesitate to act" guidance which had been approved in federal cases before any "clean slate" language was added.

Nine years later, along came *Paulson v. State*, *supra*. *Paulson* purported to dissect the reasoning in *Geesa*, but it is the reasoning in *Paulson* which is questionable. *Paulson*, drawing upon a concurring opinion in another case which had criticized *Geesa*, stated:

> If a conscientious juror reads the *Geesa* charge and follows it literally, he or she will never convict anyone. Considerations utterly foreign to reasonable doubt might make a person hesitate to act.

That straw-man analysis in *Paulson* ignored the fact that a jury always is told to base its decision *on the evidence presented*. "Utterly foreign" factors, such as racial bias or political beliefs against a particular statute, have to pass through at least two filters which will expose and neutralize them. Those filters are voir dire and the

requirement that jurors deliberate together. Venire members with any pre-existing bias as to guilt can and should be weeded out in voir dire, using challenges for cause. In this cause, for example, the judge and the attorneys for both sides went row-by-row to discuss challenges for cause. Once twelve jurors who are not governed by pre-existing bias have heard the evidence and sit down to deliberate, any "foreign" considerations will be sifted out during deliberations. Then, if any particular juror hesitates to return a guilty verdict, that juror's particular concerns can be addressed by others who may have recalled the testimony differently. Legitimate disagreements about the evidence can be addressed by a note requesting a read-back of particular testimony. *That is how jury deliberations are supposed to work.*

Paulson mustered no empirical evidence, such as a comparison of pre-*Geesa* and post-*Geesa* conviction rates, to support the fear of juries "never convict[ing] anyone." The Court of Criminal Appeals , and the lower appellate courts, are very busy, and they have no policy research division comparable to the federal Sentencing Commission. As far as Shealy's counsel knows, there also was no published research by partisan attorney groups on either side in the 1990's to compare pre-*Geesa* and post-*Geesa* conviction rates. But when a new majority on the Court of Criminal Appeals voted to overrule *Geesa*, it should have backed up the assertion made in Paulson with some data. Otherwise, it would be preposterous to think that federal

conviction rates are materially lower than in Texas state courts, let alone there being a situation where "nobody" is convicted.

C. The Importance of Assuring Unanimity

It also has become particularly important, in state criminal cases, to protect the defendant's right to a unanimous verdict. Without an explanation providing a definite standard, the various jurors could each have a different idea of what the State's burden really is. Since the various jurors could be applying different yardsticks to determine whether there is proof beyond a reasonable doubt, there is no assurance that a jury's verdict is really unanimous. Not all of the jurors are even asking themselves the same question as to the strength of the State's evidence.

The importance of jury unanimity in criminal trials was reinforced by the Supreme Court in *Ramos v. Louisiana*, 590 U.S. __ (2020). *Paulson*, decided twenty years before *Ramos*, did not take into account federal constitutional law as being applicable to state courts. That view goes back to the 1970's, when the Supreme Court had upheld state laws in Oregon and Louisiana which permitted non-unanimous verdicts in those states' courts. Ramos overruled those cases.

In light of *Ramos*, the Supreme Court's current views on unanimity have great relevance to what unanimity means in Texas courts. It also is sensible to make the standard for proof beyond a reasonable doubt the same in state court and federal

court. The word "unanimous" cannot have two different meanings, depending upon the forum.

The Court of Criminal Appeals has not addressed the continuing authority of *Paulson* since before *Ramos* was decided. It may be that this Court can do no more than note the questionable viability of *Paulson* after *Ramos*, leaving it to Shealy to carry the issue up to the Court of Criminal Appeals by an appellant's petition for discretionary review. Shealy gladly will do that. Shealy is now serving a life sentence, so one thing he has is time to carry the issue as high in the judicial system as necessary.

D. Was Error Waived?

During trial, the attorneys for Shealy did not mention *Geesa* at all. First, when an opportunity was created by misstatements of the burden of proof by the judge and by the prosecutor, there was no objection. During voir dire, the judge commented:

> And so, at the end of the trial, I will be giving you a jury charge that contains a lot of legal definitions, and it will take about the fact that the burden of proof is beyond a reasonable doubt, but it will not define that term for you. You know, the Courts and legislatures struggled for years trying to come up with a definition of what does beyond a reasonable doubt mean, and they ultimately decided that it's incapable of definition. And I think the reason for that is because its's a personal standard to you, as jurors. And so, at the end of the trial I think you'll know in your heart whether or not the evidence has convinced you beyond a reasonable doubt, even if you can't articulate exactly what that means to you. But what I will tell you is it doesn't mean beyond all doubt or beyond a shadow of a doubt. It means just what it says, is that you, as

> jurors, have to be convinced beyond a reasonable doubt by the evidence before you would be warranted in returning a verdict of guilty.

(RR II- 10-11). That was incorrect because (1) the federal courts have proven to be "capable" of defining the term, and while *Geesa* was the law, so were Texas state courts; and (2) knowing "in your heart" creates its own unanimity problem. The phrase "in your heart" calls for subjectivity, and not every member of a jury is going to understand the meaning of that phrase in the same way

The prosecutor later stated .

> So, it's not a hundred percent certainty. It's truly more of a common-sense standard. And what it takes for you to get beyond a reasonable doubt is going to be different than [sic] what it takes takes Juror No. 13 to get to beyond a reasonable doubt.

(RR II-74). "Common sense" is an imprecise standard, and what amounts to "common sense" will vary from juror to juror."

Considering how these "bird nest on the ground" chances to object were missed, was error waived? Given that attacks on *Paulson* had failed in various earlier cases, simply brushing off the watershed change made in *Ramos* would be unjust, because an objection to the jury charge would have been futile. Historically, after *Almanza v. State*, 724 S.W.2d 805 (Tex. Crim. App. 1986), charge error was not made subject to a waiver if there was no objection. Instead a more demanding harm standard, "egregious" harm, was applied.

E. The Harm

Because the right to a unanimous verdict now relies on both the Texas Constitution and the United States Constitution (by operation of U.S. Const. Amend. XIV), the failure to enforce unanimity is constitutional error, and therefore subject to Tex. R. App. P. 44.2(a). The conviction should be reversed if there was "some" harm. The state of the evidence shows nothing except circumstantial evidence as to Shealy's culpability. No one saw him fire the shot. He did not confess to shooting his wife. As far as the evidence showed, his wife had never expressed fear of him before that happened. The only evidence which would support a knowing killing of Amanda was the strange letter found within the spiral talking, and as noted earlier, that letter was so indicative of mental illness that even a knowing *mens rea* is doubtful.

The harm for Shealy can be cured by granting a new trial on guilt. Meanwhile, the Texas Legislature easily could add a definition of proof beyond a reasonable doubt to the Penal Code, or the Code of Criminal Procedure, or both.

POINT OF ERROR TWO

The appeal should be abated to determine whether the appellant is entitled to a new punishment hearing, given that they gave notice before the punishment hearing that they were withdrawing from representation over some "contractual" problem.

A. Standard of Review

Whether or not Shealy's attorneys completed their representation of him at the punishment phase of trial is a question of law, which should be reviewed *de novo*.

B. The Duty of Retained Counsel to a Client

In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court recognized that there are "critical stages" in criminal case where the guidance of counsel is required, unless it is affirmatively waived. Normally the "critical stage" debate has concerned pretrial proceedings. *Kirby* noted:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable. [Footnote omitted.] See *Powell v. Alabama*, 287 U.S., at 671; *Massiah v. United States*, 377 U.S. 201; *Spano v. New York*, 360 U.S. 315, 324 ,(Douglas, J., concurring).

This cause, however, deals with the punishment stage. Various holdings which have

treated sentencing-related procedures as a "critical stage," requiring the guiding hand of counsel, were discussed in *Mempa v. Ray*, 389 U.S. 128 (1967) . In a Murder case, punishment may be the most "critical" stage of all, given that the range of punishment runs from five years to life. In short, counsel owes the same duty to a client at the latest stage of representation that she or he owes to the client at the beginning.

In this cause, immediately after the jury returned its guilt verdict, and just a few minutes *before the punishment hearing started*, the defense attorneys filed their Motion to Withdraw as Attorney of Record (CR-245). It stated:

> COMES NOW, JENNIFER "JL" CARPENTER and ADAM BANKS BROWN, attorneys of record in the above styled and numbered cause and moves this honorable court permit that we withdraw as attorneys of record for the above-named defendant, and in support thereof would show unto the court as follows:
>
> I.
>
> Pursuant to the request of the defendant in the above-styled and numbered cause, presently pending in this court, we were **RETAINED** to represent the defendant.
>
> II.
>
> Subsequent to our **RETAINMENT**, this matter was called to trial in which the jury found the Defendant Guilty.
>
> The contractual scope of Attorneys' work upon being hired has been completed.

> We HAVE notified the defendant of our intention to withdraw as attorney of record.
>
> WHEREFORE, premises considered, in light of the aforementioned factors, the undersigned attorney respectfully requests she be permitted to withdraw as attorney of record and be relieved of

This appears to have been a contract drafted by Carpenter, in that it refers to the lawyer as "she." But the withdrawal notice also referred to attorneys (plural), so at some point attorney Brown also must have entered into some agreement to work with Carpenter.

There should be no doubt that Carpenter and/or Brown chose to take on Shealy's case as retained counsel. The face of their Motion to Withdraw acknowledges that fact. The contract itself does not appear in the record, so it is impossible to tell from the present state of the record what the expected pay under the contract was. Nor does the record indicate how much of the agreed-upon fee actually was paid. It stands to reason, however, that the attorneys were asking for (and Shealy agreed to pay) more than the going rate for a court-appointed attorney. Otherwise, why take on the risk of nonpayment, when Galveston County is guaranteed to pay as long as a fee voucher is submitted. The Galveston fee voucher bases pay on a scaled hourly rate, so it is safe to assume that the lawyers had charged a flat fee – and a large one at that.

All that is clear at this point is that Carpenter and Brown considered that they

had completed all of the guilt-stage work they had agreed to perform. The Motion to Withdraw included the statement "The contractual scope of Attorneys' work upon being hired has been completed." Carpenter and Brown must have genuinely believed it, for their performance at the punishment stage was lackluster.

When the prosecution put Amanda's mother, Ms. Montgomery, on the stand, Carpenter said she had no questions for that witness on cross-examination. That is puzzling, because Ms. Montgomery had described the situation leading up to the shooting as "chaotic." As one example of the need for such cross-examination, the view that things were "chaotic" could have led into a line of questioning as to whether or not Ms. Montgomery believed the chaos was partly due to Shealy's mental state. The note written by Shealy was a pretty good indicator that his mental state was unstable. That arguably was a mitigating condition. In fact, if it had been explored early enough in the representation of Shealy by Carpenter and Brown, it might have been possible to mount an insanity defense at the guilt stage. Winning an insanity defense on guilt is is not an easy task, and for retained counsel,i t also could be expensive to muster the necessary professional diagnostics. But if money were not an obstacle, nimble, experienced trial attorneys like Carpenter and Brown probably could have massaged Shealy's mental state into a mitigating consideration that could have been used in an argument for lower punishment.

Another example came when it was the defense turn to present punishment stage evidence. When the defense witness, Karen Clark, was asked whether she knew about "how Mr. Shealy grew up," she replied that it was "pretty traumatic." Asked to clarify what she meant by "traumatic," she said that Shealy's father and mother "had problems" that reflected "how he was raised." (RR V-14). What did Ms. Clark specifically mean? To show the jury what the witness meant, defense counsel could have built a chain of several dozen questions, covering who did what to whom, did Shealy personally see abusive treatment (or personally experience it himself), what specific reactions did Shealy have, was an account of Shealy's reactions) reported to child welfare officials, was an official diagnosis rendered by a qualified professional, and what was that diagnosis. Just guessing, the undersigned counsel would guess Shealy was affected by PTSD, *i.e.* post-traumatic stress disorder.

But there should have been no need to guess. Rather, defense counsel could have, and should have, prepared a long, well-organized presentation for the punishment stage ... and should have done that well before trial. The absence of such a presentation is strongly suggestive that there was no preparation in advance to present such mitigating evidence in the hope of reducing Shealy's eventual sentence.

The lack of investigation into mitigating factors is by now a well-known consideration in detemining whether defense counsel was effective at the punishment

stage of trial. Nevertheless, this is not a claim of ineffective assistance of counsel *per se.* If it were, the topic would better be reserved for a postconviction writ application under Tex. Code Crim. Proc. Art. 11.07. In this cause, this Court should follow a little-used path, but actually a better one for the situation at hand.

C. The Need for Abatement

The Court of Criminal Appeals has recognized that the particular problem of abandonment of a client can be addressed on direct appeal, using the process of abatement. *Steel v. State,* 453 S.W.2d 486 (Tex. Crim. App. 1970). In Steel, as inthis cause, the issue was simply whether or not counsel had effectively abandoned the client. *Steel* pointed out that the abatement process was appropriate for simply clarifying facts for the record, without passing appellate judgment until all the necessary information was presented to the appellate court.

That is precisely the kind of procedure which should be used here. At this point, the uncertainties include:

- The terms of the contract regarding the services Carpenter and Brown were expected to provide;
- Whether Shealy or some third-party ben•efactor made the arrangements;
- What price was quoted for the services;

- How much Shealy or a benefactor actually paid;
- What the remaining balance under the contract was at the time the case was called to trial;
- Whether fees had been paid to defense experts, and if there were remaining balances, what was owed to whom;
- Whether any experts were not summoned to trial due to lack of payment for their services;
- What any unpaid expert would have to say;
- Whether Carpenter and Brown sought a court appointment to close the gap on unpaid fees or costs with partial public funding;
- Whether Shealy was competent to read and understand the lawyer's employment contract, or whether Shealy was illiterate to the degree suggested by the letter he wrote to his son;
- Whether Carpenter and/or Brown had received a mental health evaluation concerning Shealy, and what any such evaluation indicated;this C
- Whether Carpenter and/or Brown believed that requesting a continuance would have given adequate time to complete the funding, evaluation, and delivery to them of any expert's report;

- Whether Carpenter and/or Brown had clashed with Sheahy over any of the foregoing topics to the extent that either Carpenter or Brown no longer wanted to just "get it over with" instead of giving it their best efforts.

Answers to any of the foregoing questions also could lead to other relevant questions. A live hearing on these questions is appropriate.

The *Steel* opinion also pointed out that the passage of time can be the enemy of getting accurate answers to such inquiries. It is better, Steel pointed out, to gather the information while memories are fresh and any records that may be necessary are still intact and accessible.

What if the *Steel*-type abatement leads to answers which call the adequacy of representation into question? Since it appears that the work done by the lawyers at the guilt stage was adequate, there would be no need to start the whole process over again. A new trial on punishment would be an adequate remedy for this point of error.

PRAYER FOR RELIEF

Wherefore the appellant prays that the appeal first be abated, and that after the abatement process produces answers to the questions posed pages 27 and 28, this Court grant relief appropriate to whichever point of error is sustained.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel, certify that the foregoing brief was prepared with WordPerfect, using 14-point font for text and 12-point font for footnotes. Omitting those portions of the brief whish are not to be counted in the word count, the brief contains 6324 words.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief is being electronically served on counsel for the State, on this the 18th day of June,2025 at the following address:

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