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## STATEMENT OF THE CASE

On September xx, 19xx, John Smith, a dedicated Marine and former police officer, was indicted for aggravated assault on a public servant in the 500th Judicial District Court for Acme County, Texas, in cause number x-xx-xxxx-x. (CR: 9).<sup>1</sup> Mr. Smith was accused of striking Officer Jeff Jones (“the complainant”) in the face with his hand after the officer entered Mr. Smith’s backyard, unannounced, in the middle of the night. (CR: 9).

A jury trial commenced on March 20, 2000. (RR2). At the conclusion of all evidence, the court charged the jury on aggravated assault on a public servant and the lesser-included offense of aggravated assault. (CR 96). The court refused the defense request that the jury also be charged on the lesser-included offense of assault. (RR5: 5-7). On March xx, 20xx, the jury found Mr. Smith guilty of aggravated assault on a public servant, as alleged in the indictment. (CR: 100; RR5: 51). On March xx, 20xx, the jury assessed punishment at five years’ confinement in the TDCJ-ID, but recommended that the court grant Mr. Smith’s application for probation. (CR: 92-93, 106; RR6: 33). The court granted probation during the sentencing hearing on April 6, 2000. The Judgment was entered on April x, 20xx. (CR: 114-118). Mr. Smith filed a motion for new trial on April xx, 20xx. (CR: 124-129). He timely filed a notice of appeal on July x, 20xx. (CR: 131).

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<sup>1</sup>The Reporter’s Record will be designated by (RR) and the appropriate volume number. The Clerk’s Record will be designated as (CR).

## ISSUES PRESENTED

1. Should John Smith's conviction for aggravated assault on a public servant be reversed and an acquittal entered because the evidence of the complainant's facial injuries caused by a single punch to the face is legally insufficient to support a finding of serious bodily injury, a necessary element of aggravated assault on a public servant?
2. Should John Smith's conviction for aggravated assault on a public servant be reversed and this case remanded for new trial because the evidence of the complainant's facial injuries caused by a single punch to the face is factually insufficient to support a finding of serious bodily injury, a necessary element of aggravated assault on a public servant?
3. Should John Smith's conviction for aggravated assault on a public servant be reversed because the trial court refused the defense request that it instruct the jury on the lesser-included offense of assault?

All of these questions should be answered in the affirmative.

## STATEMENT OF FACTS

Because Mr. Smith is challenging both the factual sufficiency of the evidence to support the necessary element of serious bodily injury and the court's failure to instruct the jury on the lesser-included offense of assault, a complete summary of the evidence follows:

**A. Mr. Smith and his Eldest Son, John Smith Jr., Spend the Evening in a Local Pub and Invite Numerous People to Mr. Smith's Home to Play Pool.**

John Smith and his son, John Smith Jr., spent the evening at a local pub called the ABCD Club. Before closing, they invited numerous people back to Mr. Smith's house to play pool. (RR4: 145, 216). Only Sara Jefferson and Mary Johnson accepted the invitation. (RR3: 197-198; RR4: 217).

At his home, Mr. Smith showed Sara and Mary pictures of his family and told them stories about his service as a police officer. (RR3: 123-125; 160). Mr. Smith, a pilot and managing director of flight safety for Acme Airlines, is a retired Marine with over ten years active duty in special operations. (RR4: 210-212). Mr. Smith had been in active combat in Beirut, Honduras, Grenada, and Sarajevo and was one of the most decorated Marines in his unit. (RR4: 212, 214). He also served as a police officer in Tennessee. (RR4: 212-214).

At Mary Johnson's suggestion, all four people went swimming. (RR3: 125-127, 200). Johnson testified that the pool and patio lights were on and that there was decent lighting. She did not remember the dog being in the yard, but did testify that the music was playing at a moderate level. (RR3: 127).

**B. After Mr. Smith's Youngest Son Speaks with a Neighbor About a Noise Complaint, Mr. Smith and one of the Guests Enter the House While Smith Jr. Stays Outside in the Pool with the Other Guest.**

Mr. Smith's youngest son, Michael, who was also home at the time, answered a phone call from a neighbor, complaining about "loud music." (RR4: 71). He adjusted the music and relayed the phone message to his father. (RR3: 165, 203; RR4: 71). Mr. Smith told everyone to get out of the pool and to come inside. (RR4: 221). At that point, Sara decided to get out of the pool because she was getting cold. (RR3: 202). Mary and Smith Jr. stayed in the pool, talking, while Mr. Smith gave Sara a tour of the house and showed her pictures of his wife and family. (RR3: 128, 204).

**C. A Flower Mound Police Officer Arrives at the House and Speaks with Mr. Smith About a Noise Complaint.**

Michael Smith was outside smoking a cigarette when he saw a police officer next door. (RR4: 72, 76, 78). Sara testified at trial that the youngest Smith son came in and told his father that a police officer was next door. (RR3: 204-205). Mr. Smith immediately went downstairs and out the front door to speak with the officer. (RR3: 205; RR4: 79). Michael testified that his father was not angry and that he merely wanted to take care of the situation. (RR4: 80). Mr. Smith testified that the officer asked him if he was having a pool party at his house, to which he replied "no." (RR4: 225).

Officer A. B. Jackson testified that he was dispatched to a noise disturbance and that he saw Officer Jones' patrol car when he arrived. (RR3: 250). But he did not see the officers or hear any noise when he arrived. (RR3: 262). He exited his car and was approached by

a man, without a shirt. (RR3: 251). Jackson asked the man if he had seen the other officers, and when he said “no,” Jackson left to confirm the house number. (RR3: 252-253). Jackson described the man, who he later identified as Mr. Smith, as being polite and speaking in a conversational tone of voice. (RR3: 258-259). Jackson testified that Mr. Smith did not appear to be intoxicated while he spoke with him in front of the house. (RR3: 272). Jackson returned to the house to find the man gone and almost immediately heard yelling from the back yard. (RR3: 252-253).

**D. Another Flower Mound Police Officer, Jeff Jones , Also Responds to a Noise Complaint at Mr. Smith’s House, but Rather than Knocking at Mr. Smith’s Front Door, Enters his Backyard in the Middle of the Night Without Any Notice.**

On July xx, 19xx, Corporal Jeff Jones received a dispatch call at approximately 12:30 a.m. regarding a noise complaint at 1234 56th Street. (RR2:51). Jones , an Acme City police officer, was accompanied by a recruit in training, Officer Kevin Clinton. (RR2: 48, 50). Jones parked the marked patrol car several houses down from Mr. Smith’s house. Both officers were in uniform. (RR2: 52).

At trial, Corporal Jones testified that once he arrived at the house, he and Clinton proceeded directly to the back gate. They did not approach the front door of the house, or even knock. (RR2: 54-55). The officers could not hear any music or barking coming from the house or the backyard. Only after they reached the gate could they hear people talking in a “conversational” tone of voice from the backyard. (RR2: 54; RR3: 50-61; RR4: 52).

Although Corporal Jones conceded at trial that no offense was being committed, he and Clinton entered Mr. Smith's backyard without notifying anyone of their presence and without a warrant. (RR2: 55). Only two people were present in the backyard. (RR2: 55). A woman, later identified as Mary Johnson, and Mr. Smith's eldest son, John Smith, Jr., were getting out of the pool when the officers entered the gate. (RR2: 56). According to Corporal Jones, Smith Jr. became very hostile toward them and kept asking them why they were standing in his backyard. (RR2: 56-57; RR3: 130).

**E. Mr. Smith Enters the Backyard and Punches Officer Jones Once in the Face.**

Mr. Smith testified that he quickly walked out the back door to tell his son to come inside. (RR4: 227-228). Michael followed his father outside. (RR4: 81). The level of illumination in the backyard that night was disputed by all witnesses. (RR3: 64). Jones testified that he believed the porch light was on, but pictures taken that night by police show that it was off. (RR3: 64, 114; SX-1). Although Sara agreed with Mary that the backyard was lit, she testified that she was unable to see the entire yard. (RR3: 227-228, 230). Michael Smith testified that the pool lights were the only lights that were on at the time and that he only saw his brother and Mary standing in the yard. (RR4: 83)

Mr. Smith testified that as he walked out the back door toward his son, he was startled by a bright light shining in his face, at which he instinctively swung. (RR4: 228-229). Smith Jr. testified that the officer shined a flashlight in his father's face and that his dad said "what the hell are you doing in my yard" as he swung. (RR4: 152). Michael Smith also

testified that the flashlight did not come on until it was right next to his father's head. "Soon as the flashlight cut on, my dad went into a swing." (RR4: 87). Mary Johnson testified that the officers were shining the flashlights at both her and Smith Jr. when they entered the backyard, although she did not know if Jones had also shined the flashlight at Mr. Smith as she did not see Mr. Smith swing. (RR3: 179). At trial, Jones testified that he was trained in the tactical use of shining a flashlight in a suspect's eyes to conceal the officer's position and to disorient the person. (RR3: 73-75). Jones also admitted that he had a flashlight in his hand when he entered Mr. Smiths' backyard, although he claimed that he shielded the bright light with his hand. (RR3: 66-67). Only after the person holding the flashlight fell did Mr. Smith realize that he had hit a police officer, at which time Michael testified that his dad said "I fucked up, I fucked up, I hit a police officer, get inside, get inside." (RR4: 87).

Corporal Jones and Officer Clinton testified at trial that as Mr. Smith came out the back door, he turned to Jones and asked him "what are the police doing in my backyard?" (RR2: 59; RR4: 28-33). Mary Johnson, who admitted to drinking six or seven beers, testified in a similar manner. (RR3: 131-132). Corporal Jones claimed that he tried to explain over the din of the Smith's barking dog that Mr. Smith he needed to take his "friend" inside so they could respond to the noise complaint. (RR2: 60, 69). According to Jones, Mr. Smith responded that it was his son, and not his friend, and then punched him in the face as Jones was looking toward Smith Jr. (RR2: 69). Mr. Smiths' fist struck Jones in the eye,

nose, and jaw, and Jones fell backwards. Mr. Smith testified that he would never have swung if he had known it was a cop. (RR4: 231).

**F. After Striking Officer Jones , Mr. Smith Puts Up No Resistance and is Immediately Arrested.**

Mr. Smith testified at trial that he immediately put his hands up to show the officers that it was a mistake. (RR4: 230). Officer Clinton testified that Mr. Smith got on the ground after Clinton told him he was under arrest. (RR4: 36). By the time Jones stood up, Officer Clinton already had Mr. Smith on his stomach and handcuffed. (RR2: 70-72). Jones planted his foot in Mr. Smith's back and stood over him while other officers arrived on the scene. (RR2: 73). While this was happening, Mary Johnson ran into the house where she found Sara changing in a downstairs bathroom. After Melissa told Sara that the cops were in the back yard, with guns drawn, they left the scene, only later contacting the police to give statements. (RR3: 206, 208-210, 217).

In the backyard, more police arrived on the scene. Mr. Smith testified that he was repeatedly kicked in the ribs until he told the officers that he only had one kidney. (RR4: 234-235). Mr. Smith testified that an officer then planted his foot on the back of his head, mashing his face into the concrete. (RR4: 236). The officer told him to turn his head and then began blowing his nose, spraying blood onto Mr. Smith's face. (RR4: 236-238).

Officer Jackson testified at trial that, when he entered the backyard, he saw Jones standing over Mr. Smith, dripping blood onto his face. (RR3: 268). Clinton testified that Jones stood over Mr. Smith, yelling at him. (RR4: 38). Sharon Adams, Mr. Smith's next

door neighbor, who was awakened by the yelling, also watched from her bedroom window as Jones stepped on Mr. Smith and dripped blood on his face. (RR4: 193).

Jones claimed at trial that he could not remember what he said to Mr. Smith while he stood over him, but that he may have used profanity. (RR3: 96). Jones also agreed that he was angry and that he may have intentionally dripped blood onto Mr. Smith's face as he lay on the ground. (RR3: 97). Jones denied hearing Mr. Smith state after the fact that he did not know that Jones was a "cop." (RR3: 98). After other officers came on the scene, Jones was transported by ambulance to the emergency room. (RR2: 80).

At trial, Officer Jackson described Mr. Smith as looking remorseful after striking Officer Jones. (RR3: 273). Jackson, as well as several other witnesses, testified that Mr. Smith told his sons that he had "messed up" and that his sons should never hit a cop. (RR3: 258; RR4: 10, 39). Officer Madison, another officer on the scene, testified that he believed by this statement that Mr. Smith did not realize that he had hit an officer until afterwards. (RR3: 16). Jackson also heard Mr. Smith ask Jones to back up and to stop dripping blood onto his face. (RR3: 273-274). Smith Jr. testified that Jones kept screaming "why did you hit me" at his father, to which his father would reply "because you scared me." (RR4: 156). Next-door neighbor Sharon Adams also testified that she heard Mr. Smith tell Jones that he hit the officer because he was startled. (RR4: 191-192).

**G. Smith Jr. is Also Arrested, and the Youngest Smith Son is Forced from the Family Home While the Police Conduct an Extensive Warrantless Search of the Smith Residence.**

After running from the front yard into the backyard to assist, Jackson handcuffed the older son, Smith Jr., as he would not be quiet as ordered. (RR3: 256). Officer Madison testified that the Smith sons were not disrespectful, but that they would not stop yelling and talking. (RR3: 14). Both Michael and John Smith Jr. testified that they saw blood on their father's face and kept pleading with the police not to hurt their father. (RR4: 91, 157). Smith Jr. also testified that he was protesting the fact that Jones had planted his feet on the back of his father's head. (RR4: 153). The police arrested Smith Jr. and charged him with interfering with a public servant. (RR4: 159). Michael testified that the police told him to sit down after he threatened to get a video camera. (RR4: 92).

Michael testified that after his brother and father were arrested and taken away, the police told him that he could not remain in the house, even though he was 18 years old at the time. (RR4: 94). While the police were searching the Smith house, Mr. Smith telephoned from jail and gave Michael several names that he could contact. But the call was terminated by police. (RR4: 240). The police officers made Michael call his step-mother in Tennessee. (RR4: 95-96). The officers told his mother that Mr. Smith had women in the house and that he had been arrested. They would not let Michael speak with his step-mother. (RR4: 97). When Michael left two hours later with his girlfriend's mother, the police were still inside the Smith house. (RR4: 98).

**H. At the Police Station, Mr. Smith is Subjected to an Involuntary Interrogation, Which is Videotaped Without his Permission.**

Officer Paul Harrison transported Mr. Smith to the police station. (RR3: 294). While in transit, Mr. Smith told Officer Harrison that he had made a mistake, but the officer was unsure if he meant that it was an intentional or accidental mistake. (RR3: 294, 301). Harrison testified that Mr. Smith did not have slurred speech, nor was he staggering. (RR3: 303). Harrison also testified that Mr. Smith had blood on his face and shoulder. (RR3: 295; SX 4-6). When Mr. Smith tried to clean the blood from his face, Officer Harrison re-cuffed him. (RR4: 241). That night, police officers kept opening his cell door and asking him if he wanted to fight. (RR4: 242).

The next morning, Mr. Smith was interrogated for over 90 minutes. (RR4: 243). At the time, Mr. Smith was unaware that the police were videotaping the interrogation. (RR4: 243). Mr. Smith did not learn of the existence of a videotape of the interrogation until the week before trial. (RR4: 243). At trial, the prosecutor questioned Mr. Smith, over defense objection, about the contents of this inadmissible interrogation, specifically whether he told Officer Jones, a non-testifying witness, that he walked five or two feet out the door prior to striking the officer. (RR4: 245-248).

**I. Corporal Jones Files a Civil Suit Against Mr. Smith Prior to the Instant Case.**

Prior to Mr. Smith's criminal trial, Jones filed a civil case against Mr. Smith. (RR3: 4). In a related protective order filed in the civil suit, Jones stated that Mr. Smith's actions were negligent. (RR3: 7). But at trial, Jones contended that Mr. Smith's actions were intentional, rather than negligent. (RR3: 8). Jones admitted at trial that the outcome of the criminal case would impact his civil case against Mr. Smith. (RR3: 113).

**J. At Trial, Jones and his Doctor Testify that He Suffered a Broken Nose, a Fractured Eye Orbit, and a Hair-Line Fracture to the Jaw.**

Jones testified briefly about the medical attention he received. The night of the assault, a specialist from Acme City straightened and set his nose. Jones testified at trial that his nose now felt "fine." (RR2: 82-84). Jones did testify that his nose was "crooked," although he admitted that he did not derive any income from his appearance by modeling. (RR2: 12-13). It is unclear from the record to what extent Jones' nose was bent, whether it was permanent, or whether Jones' nose was straight prior to being struck by Mr. Smith.

Dr. Tyler, an oral and maxillofacial surgeon, examined Jones in August after the injury occurred. (RR3: 26-29). He testified that Jones sustained three injuries: a fracture of the orbit, nose, and jaw. (RR3: 30). At no time did Dr. Tyler ever testify that Jones sustained serious bodily injury. (RR3: 27-36). Instead, Dr. Tyler testified that if Jones' fractured nose and eye orbit had not been treated that he could have "possibly" suffered

some type of visual problem, airway obstruction, or nasal drainage problem. (RR3: 35).

Jones has also seen a dentist and an orthodontist, but the State did not call them to testify. (RR2: 85). Jones testified that his jaw still hurts and that he grinds his teeth. (RR2: 84). Jones stated at trial that Dr. Tyler told him that it was “possible” that he could develop TMJ as a result of his jaw fracture. (RR3: 11). But, Dr. Tyler testified that there would be no long-term problem with Jones’ jaw and that his bite, which was characterized as “off,” could be managed with orthodontics. (RR3: 35).

**K. The Court Refuses the Defense Request that It Instruct the Jury on the Lesser-Included Offense of Assault, and Mr. Smith is Subsequently Convicted of Aggravated Assault on a Public Servant and Sentenced to Five Years’ Probation.**

Prior to submission of the jury charge, the defense asked the trial court to instruct the jury on the lesser-included offense of assault. (RR5: 5). The trial court denied the request, refused to grant a continuance for briefing on the issue, and instructed the jury only on the offenses of aggravated assault on a public servant and aggravated assault. (RR5: 6-7; CR: 96). Deprived of the option of finding Mr. Smith guilty of assault or assault on a public servant, the jury convicted him of aggravated assault on a public servant. (RR5: 51). The jury sentenced him to five years’ confinement, which the trial court probated for five years upon the jury’s recommendation. (RR6: 33; RR7: 7). Mr. Smith filed a motion for new trial, specifically challenging the State’s impeachment of Mr. Smith with inadmissible statements made to Detective Jones, a non-testifying witness, during a videotaped, involuntary

interrogation. (RR8; CR: 124-129). Upon denial of his motion for new trial, Mr. Smith filed a timely notice of appeal. (RR8: 30; CR: 131).

### **SUMMARY OF THE ARGUMENTS**

Mr. Smith challenges the legal and factual sufficiency of the evidence, as well as the trial court's refusal to instruct the jury on the lesser-included offense of assault. All three points concern the extent and permanency of the facial injuries that the complainant, Officer Jones, sustained after a single punch to the face. It is the State's burden to prove serious bodily injury, an element necessary for aggravated assault or aggravated assault on a police officer. Serious bodily injury is injury which carries a substantial risk of death, protracted loss or impairment of a bodily member or function, or serious permanent disfigurement. The State failed to prove any of the three forms of serious bodily injury and the evidence is legally, or in the alternative factually, insufficient as a result. The State's only medical expert, Dr. Tyler, never testified that the complainant suffered serious bodily injury. (RR3: 27-36). To the contrary, Dr. Tyler testified that the complainant suffered a fractured nose, eye orbit, and hairline fracture of the jaw, all of which healed. The State never offered any evidence that the complainant's injuries created a substantial risk of death, nor was there any evidence that the complainant suffered any protracted loss or impairment of the function of any body member or organ. The only evidence of lasting effects of the complainant's injuries was that his bite was slightly "off," which was so minor as to be corrected by orthodontics. (RR3: 35). No evidence was presented that this interfered with the function of

any bodily organ, such as chewing. As for evidence of alleged “serious permanent disfigurement,” the complainant testified that his nose was “crooked,” but no evidence was offered regarding the permanency or seriousness of the condition, or even if the complainant’s nose had been straight prior to being struck by Mr. Smith. Accordingly, the evidence is legally, or in the alternative factually, insufficient to support the jury’s finding of serious bodily injury necessary to sustain a conviction for aggravated assault on a public servant.

The sufficiency of the evidence aside, the lower court committed reversible error in refusing the defense request that it instruct the jury on the lesser-included offense of assault. It is well-settled law in Texas that a court should instruct the jury on all lesser-included offenses raised by the evidence. Here, the evidence presented at trial raises a triable issue of fact regarding the permanency and extent of the complainant’s injuries. Accordingly, the issue should have been submitted to the jury to determine whether the complainant’s injuries constituted “bodily injury,” or “serious bodily injury.” Failure to so instruct the jury resulted in reversible error because it deprived the jury of the option of convicting Mr. Smith of assault, which carries a lesser punishment as well. As a result, Mr. Smith’s conviction should be reversed and his case remanded for a new trial.

## ARGUMENT

### I. **MR. SMITH'S CONVICTION FOR AGGRAVATED ASSAULT ON A PUBLIC SERVANT SHOULD BE REVERSED BECAUSE THE EVIDENCE REGARDING INJURIES CAUSED BY A SINGLE PUNCH TO THE COMPLAINANT'S FACE IS LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF SERIOUS BODILY INJURY.**

Mr. Smith's conviction for aggravated assault on a public servant should be reversed because the evidence is legally insufficient to support the jury's finding of serious bodily injury. After the close of the evidence, Mr. Smith's counsel moved for instructed verdict due to the State's failure to prove each element of the offense beyond a reasonable doubt. (RR4:62, 298). In reviewing the legal sufficiency of the evidence to support a jury finding, this Court must determine, after viewing the evidence in the light most favorable to the verdict, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Serious bodily injury is a necessary element of aggravated assault on a public servant. Tex. Penal Code 22.02 (Vernons 1994). Serious bodily injury is "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code § 1.07(a)(46) (Vernons 1994). "[I]t is the burden of the State to prove that such an act created a substantial risk of death, or caused death, a serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily member or organ." *Moore v. State*, 739 S.W.2d 347, 352 (Tex. Crim. App. 1987), citing *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim.

App. 1985). What facts will be sufficient to establish serious bodily injury must be determined on an “ad hoc” basis. *Id.* Here, the State failed to prove beyond a reasonable doubt that the complainant’s facial fractures, all of which healed, resulted in substantial risk of death, protracted loss or impairment of the function of any body member or organ, or even serious permanent disfigurement. In fact, the State’s only expert witness, Dr. Tyler, never testified that the complainant suffered serious bodily injury. (RR3: 27-36).

**A. The State Failed to Offer Any Evidence that the Complainant’s Injuries Created a Substantial Risk of Death.**

The evidence is legally insufficient to sustain Mr. Smith’s conviction for aggravated assault because no evidence was offered at trial that the complainant’s injuries caused death or created a substantial risk of death. The Texas Penal Code allows three separate methods for proving serious bodily injury – the first of which is substantial risk of death or actual death. Tex. Penal Code § 1.07(a)(46). In *Webb v. State*, 801 S.W.2d 529 (Tex. Crim. App. 1990) (en banc), the Court of Criminal Appeals affirmed the reversal of an aggravated robbery conviction because the state failed to prove serious bodily injury. In *Webb*, the victim was struck by a rock during a robbery, suffered a skull fracture as a result, and underwent surgery involving an incision at his hairline and insertion of a pin to repair skull fracture. The State failed to offer any expert testimony that the victim’s injuries created a substantial risk of death. *Id.* at 533. Here, the complainant’s injuries, while unfortunate, are not as serious as those present in *Webb*. The victim in *Webb* suffered a skull fracture that required the insertion of a medical screw. Here, the complainant suffered a broken nose, a

broken eye orbit, and a hairline jaw fracture, which was not even treated. (RR3: 30). Accordingly, no evidence was offered that the complainant suffered serious bodily injuries that could have resulted in death.

**B. The State Failed to Offer Any Evidence that the Complainant Suffered Protracted Loss or Impairment of the Function of any Bodily Member or Organ.**

Mr. Smith's conviction for aggravated assault should also be reversed because the evidence is also legally insufficient to prove that the complainant suffered protracted loss or impairment of the function of any bodily member or organ – the second method for proving serious bodily injury. Tex. Penal Code § 1.07(a)(46). Any loss or impairment of the function of a body member or organ must be protracted in order to constitute serious bodily injury. See *Webb v. State*, 801 S.W.2d 529 (Tex. Crim. App. 1990) (en banc); *Villarreal v. State*, 716 S.W.2d 651 (Tex. App. – Corpus Christi 1986, no writ). In *Webb*, the Court of Criminal Appeals affirmed the Tyler Court of Appeals' reversal of defendant's aggravated robbery conviction after concluding that no evidence existed of serious bodily injury. The victim suffered temporary amnesia as a result of being struck by a rock during a robbery, but the Court concluded that temporary amnesia was not protracted loss or impairment sufficient to elevate the victim's injuries to serious bodily injury. *Webb*, 801 S.W.2d at 533. In *Villarreal*, the Corpus Christi Court of Appeals reversed an aggravated assault conviction because evidence that the victim could not raise his arms for ten days was legally insufficient to prove protracted impairment of a bodily member. *Villareal*, 716 S.W.2d at 652. Here,

the State offered testimony that the complainant suffered swelling, causing his vision and breathing to be temporarily impaired. But short-term visual and breathing problems are not protracted impairment of the function of a bodily member or organ necessary to sustain a conviction for aggravated assault.

Further, testimony that the complainant grinds his teeth and that his bite is “slightly” off is insufficient to support a finding of serious bodily injury as well. (RR2: 84; RR3: 35). In *Pitts v. State*, 742 S.W.2d 420 (Tex. App.– Dallas 1987, no pet.), the Dallas Court of Appeals affirmed a finding of serious bodily injury where the victim suffered far more serious facial injuries, including fractures of the orbital bones, nasal bones, cheekbone, and jawbone. Further, the victim in *Pitts* had protracted loss or impairment of the function of a bodily organ because his mouth was wired shut for eight weeks. *Id.* at 422. In this case, Dr. Tyler testified that the complainant’s jaw was never even treated, that there would be no long-term problems with his jaw, and that any minor bite problems could be managed with orthodontics. (RR3: 35). Finally, Dr. Tyler’s testimony regarding “possible” hypothetical complications from the complainant’s injuries, if he had never been treated, such as nasal drip, visual problems, and breathing difficulties are insufficient to elevate the complainant’s injuries to serious bodily injury. (RR3: 35). See *Moore v. State*, 739 S.W.2d 347 (Tex. Crim. App. 1987) (en banc). In *Moore*, an expert witness testified that the knife wound in the victim’s back, if untreated, carried the possibility of infection and fatal septicemia. But Court of Criminal Appeals reversed the finding of serious bodily injury, concluding that

because the wound was treated, “the hypothetical questions and the answers that were asked and given assumed facts that did not exist in this cause.” *Id.* at 353. The Court of Criminal Appeals went on to state that the Legislature separately defined “bodily injury” and “serious bodily injury” to distinguish between the degrees of severity between the injury. The Legislature did not intend “for the prosecution, in establishing its case against the accused, to be able to elevate through hypothetical questions a ‘bodily injury’ to a ‘serious bodily injury.’” *Moore*, 739 S.W.2d at 354. Likewise, in this case, the State cannot elevate a fractured nose, eye orbit, and jaw to serious bodily injury merely by posing hypothetical questions to the doctor regarding what may have “possibly” happened if the complainant had not received medical treatment. No evidence was ever presented that the complainant presently suffers from any of these problems. Further, even if the Court of Criminal Appeals had not expressly rejected the use of hypotheticals to establish serious bodily injury, the doctor in this case only testified that the complainant “possibly,” rather than “probably,” could have suffered these complications in the absence of medical treatment. Accordingly, in the absence of any evidence of protracted loss or impairment of the function of a bodily member or organ, the jury’s finding of serious bodily injury and Mr. Smith’s conviction for aggravated assault cannot stand.

**C. The State Failed to Offer Any Evidence that the Complainant Suffered Serious Permanent Disfigurement.**

Not only did the State fail to offer any evidence of substantial risk of death or protracted loss or impairment, but the State also failed to prove that the complainant suffers

serious permanent disfigurement. *See Moore v. State*, 739 S.W.2d 347 (Tex. Crim. App. 1987) (en banc); *Williams v. State*, 696 S.W.2d 896 (Tex. Crim. App. 1985) (en banc); *McCoy v. State*, 932 S.W.2d 720 (Tex. App. – Fort Worth 1996, pet. ref'd). In *Moore*, the Court of Criminal Appeals, sitting *en banc*, held that knife slashes on a victim's back and nose did not constitute serious bodily injury because no evidence existed that the knife wounds caused the complainant serious permanent disfigurement. *Moore*, 739 S.W.2d at 352. In *Williams*, the victim had been shot three times in the back, thigh, and buttocks, and two bullets remained in his body. The Court of Criminal Appeals, again sitting *en banc*, held that the evidence was legally insufficient to sustain a finding of serious bodily injury because no evidence was offered that complainant suffered “substantial risk of death or a serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.” *Id.* at 897. In *McCoy*, this Court reversed a conviction for aggravated assault on a public servant because of the insufficiency of the evidence proving serious bodily injury. The officer in *McCoy* sustained a “lasting and permanent scar” on his lip after the defendant punched him in the face. *McCoy*, 932 S.W.2d at 722. This Court stated that “to be a serious bodily injury, the injury must be grave, not trivial, that is, ‘it must be such an injury as gives rise to apprehension of danger to life, health, or limb.’” *McCoy*, 932 S.W.2d at 723, citing *Hatfield v. State*, 377 S.W.2d 647, 648 (Tex. Crim. App. 1964). Thus, evidence must be presented that the complainant's disfigurement is not only permanent, but that it is serious as well.

Here, the State failed to prove serious bodily injury by serious permanent disfigurement. “There must be evidence of some significant deformity caused by the injury.” *Hernandez v. State*, 946 S.W.2d 108 (Tex. App. – El Paso 1997) (evidence that victim had a scar on abdomen was legally insufficient to sustain finding of serious bodily injury where no evidence was offered regarding the scar’s extent or permanence). It is the State’s burden to prove, rather than the defendant’s burden to disprove, the seriousness of the complainant’s injuries. *Moore v. State*, 739 S.W.2d 347, 352 (Tex. Crim. App. 1987), citing *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985). Here, no evidence was presented that the complainant’s jaw or eye orbit fractures resulted in disfigurement. And the complainant’s testimony that he has a “crooked” nose does not establish the seriousness of the disfigurement, its permanency, or even that it was the result of Mr. Smith’s single punch. (RR2: 12-13). At trial, the complainant admitted that a medical doctor straightened his nose the night he was struck and that it now felt “fine.” (RR2: 82-84). The extent of the “crooked[ness]” of the complainant’s nose is unclear from the record, and the complainant did admit that he was not employed as a model. (RR2: 12-13). Additionally, no evidence exists whether the complainant’s nose was straight prior to being struck by Mr. Smith or even whether or not the complainant had ever suffered a previous nose fracture.

It is anticipated that the State will rely heavily upon *Brown v. State*, 605 S.W.2d 572 (Tex. Crim. App. 1980), for the proposition that the complainant’s broken nose was sufficient evidence of serious permanent disfigurement and serious bodily injury. But the

panel decision in *Brown* was decided by the Court of Criminal Appeals prior to its *en banc* decision in *Moore v. State*, 739 S.W.2d 347 (Tex. Crim. App. 1987). In *Brown*, although reversing on other grounds, a panel of the Court of Criminal Appeals concluded that evidence that the victim's nose was broken and deformed on the day of the offense was sufficient to establish serious permanent disfigurement and, subsequently, serious bodily injury. *Brown*, 605 S.W.2d at 575. The panel stated that “[t]he relevant issue was the disfiguring and impairing quality of the bodily injury as it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment.” *Id.* at 575. In *Moore*, however, the Court of Criminal Appeals, sitting *en banc*, concluded in a plurality opinion that the State could not elevate an injury to a “serious bodily injury” by posing hypotheticals assuming facts not in evidence. *Moore*, 739 S.W.2d at 354. It is respectfully submitted that the holding in *Brown*, based upon the limited facts enumerated in that opinion, has effectively been overruled by the Court of Criminal Appeals’ subsequent holding in *Moore*. It is immaterial whether or not a victim’s nose is broken and deformed immediately after the incident because the definition of serious bodily injury requires “serious, permanent disfigurement.” Tex. Penal Code § 1.07 (a)(46) (emphasis added). And the holding in *Moore* establishes that a “nonextant scenario” regarding the type of deformity that would be present if the fracture had not been set, is a mere hypothetical that will not support a finding of serious bodily injury. Accordingly, the only material evidence

is whether the complainant had serious and permanent disfigurement as a result of Mr. Smith's actions.

**II. IN THE ALTERNATIVE, MR. SMITH'S CONVICTION FOR AGGRAVATED ASSAULT ON A PUBLIC SERVANT SHOULD BE REVERSED BECAUSE THE EVIDENCE REGARDING INJURIES CAUSED BY A SINGLE PUNCH TO THE COMPLAINANT'S FACE IS FACTUALLY INSUFFICIENT TO SUPPORT A FINDING OF SERIOUS BODILY INJURY.**

In the alternative, the evidence in this case is factually insufficient to sustain the element of serious bodily injury necessary to a conviction for aggravated assault. Tex. Penal Code § 22.02. "In assessing factual sufficiency, we view all the evidence without the prism of 'in the light most favorable to the prosecution.'" *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App.1996); *see Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App.1997). Recently, the Court of Criminal Appeals expanded this Court's review of the factual sufficiency of the evidence in criminal cases, to adopt both prongs of the factual sufficiency analysis utilized in civil cases. *See Johnson v. State*, 23 S.W.3d 1 (2000). Under this standard, "[e]vidence is factually insufficient if it is so weak that it would be clearly wrong and manifestly unjust to allow the verdict to stand, or the adverse finding is against the great weight and preponderance of the available evidence." *Donoho v. State*, 39 S.W.3d 324, 238 (Tex. App. – Fort Worth 2001, pet. filed 5/15/01). Thus, Mr. Smith's conviction for aggravated assault should be reversed on factual insufficiency grounds if the evidence of serious bodily injury is so weak that it would be clearly wrong and manifestly unjust for the aggravated assault conviction to stand.

Upholding Mr. Smith’s conviction for aggravated assault would be clearly wrong and manifestly unjust. It is undisputed that Mr. Smith’s actions in punching Office Jones in the face caused him regrettable pain and discomfort, but this is insufficient to elevate his injuries to serious bodily injury as defined by the Legislature. “[I]t is obvious that [the Legislature’s] intent was not to make the term ‘bodily injury’ the equivalent of the term ‘serious bodily injury.’” *Moore v. State*, 739 S.W.2d 347, 354 (Tex. Crim. App. 1987) (en banc). This Court has also stated that “to be a serious bodily injury, the injury must be grave, not trivial, that is, ‘it must be such an injury as gives rise to apprehension of danger to life, health, or limb.’” *McCoy*, 932 S.W.2d at 723, citing *Hatfield v. State*, 377 S.W.2d 647, 648 (Tex. Crim. App. 1964). It is undisputed that the complainant suffered a fractured nose, a fractured eye orbit, and a hairline fracture of his jaw. It is also undisputed that these injuries never created a substantial risk of death or protracted loss or impairment of the function of any body member or organ. The only testimony regarding disfigurement was that complainant had a “crooked” nose at trial. (RR2: 12-13). No evidence was offered that the complainant had a straight nose prior to Mr. Smith’s punch or that the “crooked[ness]” was serious or permanent. (RR2: 12-13). Evidence that the complainant, a grown man, suffered facial injuries of a temporary nature after being punched once in the face, is so weak that a finding of serious bodily injury based on this evidence is clearly wrong and manifestly unjust. Accordingly, the evidence is factually insufficient, and Mr. Smith’s conviction for aggravated assault should be reversed and remanded for further proceedings.

**III. MR. SMITH'S CONVICTION FOR AGGRAVATED ASSAULT ON A PUBLIC SERVANT ALSO SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY DENIED MR. SMITH'S REQUEST FOR A JURY CHARGE ON THE LESSER-INCLUDED OFFENSE OF ASSAULT.**

Regardless of the sufficiency of the evidence, however, the trial court committed reversible error in refusing to instruct the jury on assault. A two-step analysis must be used to determine whether a charge on the lesser included offense is required: (1) the elements of the lesser offense must be included within the proof necessary to establish the offense charged; and (2) there must be evidence that if the defendant is guilty, he is guilty only of the lesser offense. *Bravo v. State*, 627 S.W.2d 152 (Tex. Crim. App. 1982) (en banc); *Royster v. State*, 622 S.W.2d 442, 446-47 (Tex. Crim. App. 1980). If more than a scintilla of the evidence from any source raises the issue that the defendant is guilty only of the lesser included offense, the instruction must be submitted. *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999). Here, more than a scintilla of proof existed that the complainant's injuries did not rise to the level of serious bodily injury, thereby justifying a jury instruction on the lesser-included offense of assault, which was requested by the defense. (RR5: 5). The trial court refused to include an instruction on assault, or to entertain briefing on the matter. (RR5: 7).

**A. Assault is a Lesser-Included Offense of Aggravated Assault and Aggravated Assault on a Public Servant.**

The trial court erred in refusing to instruct the jury on assault, a lesser- included offense of aggravated assault and aggravated assault on a police officer. An offense is a

lesser-included offense if it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission. Tex. Code Crim. Proc. 37.09 (2) (Vernons 1981). Assault is a lesser-included offense of aggravated assault because it requires a showing of bodily injury versus serious bodily injury. Tex. Penal Code §§ 22.01 & 22.02. Thus, if more than a scintilla of evidence raised the issue of bodily injury, as opposed to serious bodily injury, than the trial court should have granted Mr. Smith's request that the jury be charged on assault as well as aggravated assault and aggravated assault on a public servant.

**B. The Trial Court Erred in Refusing to Charge the Jury on Assault, because the Evidence Raised the Issue of Whether the Complainant's Facial Injuries Constituted Bodily Injury, Rather than Serious Bodily Injury.**

The trial court should have instructed the jury on assault, in addition to aggravated assault and aggravated assault on a public servant, because it was possible for the jury to conclude from the evidence that Mr. Smith was only guilty of assault. *See generally Yeager v. State*, 737 S.W.2d 948, 951 (Tex. App. – Fort Worth 1987, no writ). In determining whether a lesser-included offense is raised by the evidence, the Court is to consider all the evidence presented at trial. *Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984). Whenever evidence from any source raises an issue that a lesser-included offense may have been committed, the charge must be given on request. *Moore v. State*, 574 S.W.2d 122, 124 (Tex. Crim. App. [Panel Op.] 1978). “[I]t is well recognized that a defendant is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the

defendant, and whether it be strong, weak, unimpeached or contradicted.” *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App.1985). As the Court of Criminal Appeals stated in *Bell*, “it is then the jury’s duty, under the proper instructions, to determine whether the evidence is credible and supports the lesser included offense.” *Id*; accord *Yeager*, 737 S.W.2d at 952. Here, Mr. Smith’s counsel requested that the court also charge the jury on the lesser-included offense of assault. (RR5: 5-7). Accordingly, the trial court should have instructed the jury on the lesser-included offense because the evidence also raised the issue of whether the complainant’s injuries constituted bodily injury, rather than serious bodily injury.

The trial court erred in refusing to instruct the jury on the lesser-included offense of assault because the jury could have concluded from the evidence that the complainant only suffered bodily injury and that Mr. Smith was, therefore, only guilty of assault or assault on a public servant. *See Ferrel v. State*, 16 S.W.3d 861 (Tex. App.-Houston [14th Dist.] 2000, pet. granted); *Jordan v. State*, 1 S.W.3d 153 (Tex. App.-Waco 1999, pet. ref’d). In *Ferrel*, the victim died after the defendant struck him in the head with a beer bottle. Although the court admitted evidence that the decedent died as a result of being struck with the bottle, more than a scintilla of evidence existed that being struck by a bottle could not have led to death and that the decedent’s fall to the floor and extreme intoxication were the causes of his death. Accordingly, the appellate court reversed, concluding that the trial court erred in not instructing the jury on the lesser-included offense of misdemeanor assault. *Ferrel*, 16 S.W.3d at 864. In *Jordan*, the Waco Court of Appeals concluded that the trial court’s

refusal to charge the jury on the lesser-included charge of assault required reversal of the defendant's conviction for burglary of a habitation while committing or attempting to commit an aggravated assault. Although evidence existed that the victim suffered serious bodily injury, the doctor, as in this case, never testified that the victim's injuries created "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Jordan*, 1 S.W.3d at 157. In this case, as in *Ferrel* and *Jordan*, reversal is also warranted by the lower court's refusal to instruct the jury on the lesser-included offense of assault. It is undisputed that the State failed to offer any evidence that the complainant suffered injuries that resulted in substantial risk of death or the protracted loss or impairment of the function of any bodily member or organ. Moreover, it is debatable whether the complainant's testimony that his nose was "crooked" is sufficient to prove serious permanent disfigurement. The State did not offer any evidence regarding whether his nose had ever been previously broken or was crooked prior to the events at issue. In any event, the record does not reflect the extent or permanency of the complainant's alleged disfigurement. When questioned, the complainant admitted that he nose felt "fine" and that he had never been a model prior to the incident. (RR2: 12-13, 82-84). Ultimately, whether or not complainant's fractured nose resulted in serious permanent disfigurement necessary for a finding of serious bodily injury was an issue of fact that should have been submitted to the jury.

**C. The Court’s Failure to Instruct the Jury on the Lesser-Included Offense of Assault Requires Reversal of Mr. Smith’s Conviction for the Greater Offense of Aggravated Assault of a Public Servant.**

The lower court’s failure to instruct the jury accordingly on the lesser-included offense of assault is reversible error. It is well-settled that any harm, regardless of degree, is sufficient to require reversal where a party has timely objected to a jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996), citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). Moreover, reversal is also warranted under the recently enacted Rules of Appellate Procedure. Rule 44.2 provides that errors of constitutional magnitude will be disregarded unless they contributed to the verdict and that all other errors will be disregarded unless they affect substantial rights. Tex. R. App. P. 44.2. Here, the court’s refusal to properly instruct the jury on the lesser-included offense of assault both contributed to the verdict and affected Mr. Smith’s substantial rights. *See Ferrel v. State*, 16 S.W.3d 861 (Tex. App.-Houston [14th Dist.] 2000, pet. granted) (holding that court’s refusal to give jury instruction on the lesser-included offense of assault resulted in reversible error under both the *Almanza* standard and the subsequent Rule 44.2 standard). If the jury had been charged on assault, the jury could have found that the complainant sustained bodily injury, rather than serious bodily injury, and convicted Mr. Smith of the lesser-included offense of assault on a public servant – a third-degree felony. *See* Tex. Penal Code § 22.01(b)(1). Instead, the jury was deprived of the full range of punishment, including a third-degree felony as well as the second and first-degree felony charges, i.e. aggravated

assault and aggravated assault on a public servant, which were submitted. *See* Tex. Penal Code § 22.02(b)(2) & (3). Thus, failure to properly instruct the jury on assault harmed Mr. Smith and requires reversal.

**PRAYER**

Because the evidence is legally and factually insufficient to support the jury finding of serious bodily injury, a necessary element of aggravated assault on a public servant, and because the court erred in refusing to charge the jury on the lesser included offense of assault, John Smith respectfully prays that this Court reverse his conviction for aggravated assault on a public servant, either acquit or remand as necessary, and grant him such other and further relief to which he may be justly entitled.

Respectfully submitted,

by: \_\_\_\_\_  
Jane Doe