

DATE

CAUSE NO. 1368232

CWP

DEPUTY

STATE OF TEXAS

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185<sup>th</sup> DISTRICT COURT

v.

HARRIS COUNTY, TEXAS

VICTORIANO TREVINO

**DEFENDANT'S OBJECTIONS TO COURT'S IMPOSITION OF PAYMENT TO  
CHARITY IN VIOLATION OF ARTICLE 42.12 OF THE TEXAS CODE OF  
CRIMINAL PROCEDURE**

TO THE HONORABLE JUDGE SUSAN BROWN:

COMES NOW the Defendant in the above entitled and numbered cause, by and through his attorney of record, Chip B. Lewis, and requests this Honorable Court withdraw its assessment of an anonymous undetermined payment to a charity of his choice<sup>1</sup> (equaling the amount the Court referred to as "the actual amount of loss that we can attribute Mr. Trevino going into his accounts") as a condition of the probation in the instant case; and in support thereof would show the Honorable Court as follows:

I.

In the instant indictment the Defendant pled guilty to and was convicted by the Court of the offense of Misapplication of Fiduciary Property under *Texas Penal Code* § 32.45. The Court assessed punishment at ten (10) years in the Texas Department of Criminal Justice probated for ten (10) years. Among other conditions in compliance with Article 42.12 of the Texas Code of Criminal Procedure, the Court announced an intended additional

<sup>1</sup> C.A.R.E. was the victim in the underlying indictment. C.A.R.E. is defunct (without any successor entities), so no restitution could be paid to that charity.

condition of an undetermined payment to a charity and asked the State to provide an appropriate number to the Court. In an email titled "Restitution Calculation" and dated November 18, 2014, the State provided this Court with the amount they believed was placed into the Defendant's personal bank account: \$30,200.00.<sup>ii</sup>

## II.

The Defendant objects to the charitable contribution condition of his probation for misappropriation of fiduciary property, because it was ordered in violation of Article 42.12 of the Texas Code of Criminal Procedure (hereafter "Code"). Such is not a permissible condition of probation either as restitution, as a substitute for the statutorily mandated payment of \$50.00 to a Crime Stoppers organization, or as any other expressly justified payment under the Code.

This Court has the authority to set the conditions of community supervision and to modify those conditions at any time during the period of community supervision. TEX.CODE CRIM. PROC. ANN. art. 42.12, § 11(a). The court "may impose any reasonable condition that is designed to protect or restore the community, protect or restore the *victim*, or punish, rehabilitate, or reform the defendant." *Id* (emphasis added). But the court may not assess monetary payments as a condition of community supervision except for "fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law." TEX.CODE CRIM.PROC.ANN. art. 42.12, § 11(b); *see also Busby v. State*, 984 S.W.2d 627, 629–30 (Tex.Crim.App.1998) ("The specific statute controls over the general. Subsection 11(b) acts

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<sup>ii</sup> Attached hereto as Exhibit A.

as a limitation on the conditions that are authorized by subsection 11(a).”).

The Court’s order of payment to a charity unrelated to the specific *victim* of the offense reads as follows, “All right, Mr. Trevino, what I am going to require of you at this point is that when we make a determination of what that number is, I’m going to assess that, and require that you pay that amount into one of the charities that the Legislature has allowed us to make donations. That donation will be through the Adult Probation Department. And that donation is paid to whatever charity you choose – because I can’t choose it for you; you’ll be given a list and you can choose which one – but it will be anonymous because there will be no dinners or plaques or thanks to you for doing that... Someone is going to benefit from the funds that you raised from your employees and members of the community.”<sup>iii</sup>

No matter what the Court labels this term/condition/aspect of the Defendant’s probation it violates the provisions of Article 42.12. That Article includes a section expressly authorizing a one time \$50.00 payment to a Crime Stoppers organization but *does not* expressly allow this Court to increase that amount by over \$30,000.00 and change the charity organization to one not authorized by that provision. See TEX.CODE CRIM.PROC.ANN. Art. 42.12, § 11(a)(21).

Further, this charitable contribution condition of probation is not authorized by any provision allowing for restitution under the Code. When calculating restitution in an offense that results in the damage or destruction of property, the court may order the defendant: (A) to *return the property to the owner of the property* or someone designated by the owner; or (B) if

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<sup>iii</sup> Attached hereto as Exhibit B.

return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of: (i) the value of the property on the date of the damage, loss, or destruction; or (ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned. TEX.CODE CRIM. PROC. ANN. Art. 42.037(b)(1) (West Supp. 2010).

Importantly, Due Process requires three restrictions on the restitution a trial court may order: (1) the amount must be just and supported by a factual basis within the record, (2) the restitution ordered must be only for the offense for which the defendant is criminally responsible, and (3) **the restitution ordered must be proper only for the victim or victims of the offense with which the offender is charged.** *Cantrell v. State*, 75 S.W.3d 503, 512 (Tex.App.-Texarkana 2002, pet. ref'd); see *Cabla v. State*, 6 S.W.3d 543, 546 (Tex.Crim.App.1999); *Miller v. State*, 343 S.W.3d 499, 502 (Tex.App.- Waco 2011, pet.ref'd).

In an identical factual situation, the San Antonio Court of Appeals found that even if a charity was the original victim of the crime, the trial court did not have the authority to order a defendant to pay restitution (donation) to a *different or unrelated charity* when the charity that was actually victimized no longer existed. *Ex parte Roberts*, 409 S.W.3d 759, 763 (Tex.App.-San Antonio 2013, no pet.)(emphasis added). The Court further found that under these facts, the ordered payment was not the kind that could be properly considered “related personally” to the Defendant’s rehabilitation either. *Id.* at 764. Simply stated, the Court is without authority to impose this term of probation and the Defendant objects to its imposition and addition to his terms of probation.

### III.

For the foregoing reasons, the Defendant objects to the assessment of an anonymous undetermined payment to a charity of his choice (equaling the amount the Court referred to as “the actual amount of loss that we can attribute Mr. Trevino going into his accounts”) as a condition of his probation. Said condition should not have been assessed and should not be added to the Defendant’s terms of probation pursuant to the Code. The Defendant only objects to this condition and does not object to any other aspect of his sentence.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court grant the Defendant's objection and withdraw this from the his conditions of probation.

Respectfully Submitted,



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**Certificate of Service**

I hereby certify that a copy of the foregoing document was served on counsel for the Harris County District Attorney’s Office via email and hand delivery on this 24<sup>th</sup> day of November, 2014:



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Chip B. Lewis

CAUSE NO. 1368232

STATE OF TEXAS

v.

VICTORIANO TREVINO

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185<sup>th</sup> DISTRICT COURT

HARRIS COUNTY, TEXAS

**ORDER**

BE IT REMEMBERED that on the \_\_\_\_\_ day of \_\_\_\_\_, 2014 came on to be

heard the above Motion and the same is GRANTED

\_\_\_\_\_  
JUDGE PRESIDING

# EXHIBIT A

# Trevino Restitution Summary

#	Date	Clk#	Type	Check Amount	Restitution Amount
1	12/15/2008	1593	Gambling Trip - Cashed CARE Check	\$ 1,850.00	\$ 1,850.00
2	12/15/2008	1586	Gambling Trip - Cashed CARE Check	\$ 360.00	\$ 360.00
3	12/16/2008	1596	Gambling Trip - Cashed CARE Check	\$ 2,600.00	\$ 2,600.00
4	2/20/2009	1608	Gambling Trip - Cashed CARE Check	\$ 1,150.00	\$ 1,150.00
5	3/13/2009	1955	Cashed Check - Personal Deposit	\$ 1,395.00	\$ 1,000.00
6	3/20/2009	1958	Gambling Trip - Cashed CARE Check	\$ 950.00	\$ 950.00
7	4/9/2009	1969	Cashed Check - Personal Deposit	\$ 850.00	\$ 425.00
8	4/24/2009	1979	Cashed Check - Personal Deposit	\$ 405.00	\$ 300.00
9	10/29/2009	2030	Gambling Trip - Cashed CARE Check	\$ 850.00	\$ 850.00
10	2/12/2010	2125	Gambling Trip - Cashed CARE Check	\$ 975.00	\$ 975.00
11	2/19/2010	2135	Cashed Check - Personal Deposit	\$ 595.00	\$ 500.00
12	2/24/2010	2138	Cashed Check - Personal Deposit	\$ 950.00	\$ 500.00
13	3/17/2010	2148	Cashed Check - Personal Deposit	\$ 475.00	\$ 225.00
14	9/10/2010	2178	Sunrise Check	\$ 575.00	\$ 575.00
15	9/24/2010	2185	Gambling Trip - Cashed CARE Check	\$ 1,550.00	\$ 1,550.00
16	10/22/2010	2196	Gambling Trip - Cashed CARE Check	\$ 1,750.00	\$ 1,750.00
17	11/09/2010	2219	Sunrise Check	\$ 475.00	\$ 475.00
18	11/18/2010	Cash	El Guero Cash	\$ 2,000.00	\$ 2,000.00
19	11/22/2010	2222	Sunrise Check	\$ 875.00	\$ 875.00
20	12/02/2010	2245	Sunrise Check	\$ 585.00	\$ 585.00
21	12/6/2010	2254	Cashed Check - Personal Deposit	\$ 1,360.00	\$ 700.00
22	12/14/2010	2278	Sunrise Check	\$ 1,400.00	\$ 1,400.00
23	2/16/2011	Cash	Cash from Golden Gloves	\$ 2,300.00	\$ 2,300.00
24	3/14/2011	2296	Sunrise Check	\$ 1,375.00	\$ 1,375.00
25	3/18/2011	2302	Sunrise Check	\$ 985.00	\$ 985.00
26	5/09/2011	2304	Sunrise Check	\$ 895.00	\$ 895.00
27	5/16/2011	2305	Sunrise Check	\$ 1,250.00	\$ 1,250.00
28	6/15/2011	2313	Sunrise Check	\$ 1,800.00	\$ 1,800.00
<b>TOTAL RESTITUTION</b>					<b>\$ 30,200</b>



# EXHIBIT B

1                    *THE COURT:* Please stand, Mr. Trevino.

2                    Mr. Trevino, based on your plea of guilty to  
3 the offense of misapplication of fiduciary duty and having  
4 reviewed the testimony, not only from today but also from  
5 the trial that was admitted before you made the decision to  
6 withdraw your plea of not guilty from the jury and enter a  
7 plea of guilty, and based on all the evidence that was  
8 presented at this time, the Court is going to find you  
9 guilty and assess your punishment at 10 years probation and  
10 a \$1,000 fine.

11                    Mr. Trevino, I'm also -- and is there -- let  
12 me ask this. I have that the loss to CARE was approximately  
13 \$124,000.

14                    *MS. WELTIN:* 170 --

15                    *THE COURT:* I wrote 124. I could be wrong.

16                    *MS. WELTIN:* Is that right? I think what we  
17 had was a risk of loss and I'll have to give you that number  
18 from George Jordan.

19                    *THE COURT:* Okay. I guess what I'm really  
20 interested in at this point is the actual amount of loss  
21 that we can attribute to Mr. Trevino going into his  
22 accounts. I'm very interested in that number.

23                    *MR. MOORE:* Okay.

24                    *THE COURT:* Is that a number that you can  
25 provide for me?

1                   MR. MOORE: Yes, Your Honor.

2                   THE COURT: Okay. All right, Mr. Trevino.  
3                   What I'm going to require of you at this point is that when  
4                   we make a determination of what that number is, I'm going to  
5                   assess that and require that you pay that amount into one of  
6                   the charities that the Legislature has allowed us to make  
7                   donations. That donation will be through the adult  
8                   probation department. And as that donation is paid to  
9                   whichever charity you choose -- because I can't choose it  
10                  for you; you'll be given a list and you can choose which  
11                  one -- but it will be anonymous because there will be no  
12                  dinners or plaques or thanks to you for doing that. It will  
13                  be completely anonymous, that you will make the payment to  
14                  the adult probation department and they will then pass that  
15                  on to one of the approved charities that is set out by the  
16                  Legislature. Someone is going to benefit from the funds  
17                  that you raised from your employees and from members of the  
18                  community.

19                  I'm also going to require, sir, that you  
20                  complete 150 hours of community service. I imagine that is  
21                  something I probably do not need to order but I think that  
22                  you will need to do that. Basically what that allows you to  
23                  do is community service where whoever it is has to take you,  
24                  they can't turn you down because you're on felony probation.  
25                  You can choose which of those folks that you want to work

1 for because I'm quite certain that whether it be the Diocese  
2 of Galveston-Houston, whether it be your own parish, that  
3 they are more than welcome to take you back as a volunteer  
4 and I bet that if you walked to Blessed Sacrament right this  
5 moment, they would have work for you.

6 So with that, sir, if you'll see the court  
7 probation officer, she's going to go over your conditions  
8 with you. Please ask her any questions that you have. And  
9 we're in recess.

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